REPORTS

OF

CASES DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

JANUARY TERM, 1860, AND APRIL TERM, 1860.

BY E. PECK,
COUNSELOR AT LAW.

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JUDGES OF THE SUPREME COURT.

CHIEF JUSTICE,

JOHN D. CATON.

ASSOCIATE JUSTICES,

SIDNEY BREESE.

PINKNEY H. WALKER.

TABLE OF CASES.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

JANUARY TERM, 1860, AT SPRINGFIELD.

JACOB GREGG *et al.*, Plaintiffs in Error, *v.* HIRAM SANFORD, Defendant in Error.

ERROR TO EDGAR.

Property to be acquired after the execution of a mortgage, is subject to the mortgage lien, if the deed is properly executed, acknowledged and recorded, and possession is taken of the property before any other lien has attached.

A mortgage of personal property cannot hold the thing mortgaged as against a judgment creditor, unless his mortgage is recorded in accordance with the statute. Such a mortgage is an executory contract, and possession must be taken by the mortgagee in order to hold the property.

THIS is a bill in chancery, filed by Hiram Sanford in the Edgar Circuit Court, against William Snyder, Jacob Gregg and others, on which an injunction was obtained, restraining the defendant, Wm. Snyder, who is the sheriff of Edgar county, from proceeding to sell one hundred and fifty head of hogs, upon which he had levied an execution, issued by the clerk of the Circuit Court, upon a judgment obtained in said court by the defendant, Jacob Gregg, against one M. S. Edmiston and David Edmiston. The hogs were levied upon as the property of David Edmiston. The bill sets out that the defendant, David Edmiston, was largely indebted to the complainant for interest due on a note for $11,000, given for the purchase money on a tract of land, and in divers smaller sums for other things set out; and among others, for $1,758.24, money advanced by said complainant to said David Edmiston, to purchase hogs, and that the com-

plainant was under obligation to advance to the said Edmiston, further sums for that purpose, making in all the sum of $5,000. Also, that the complainant was the security of said Edmiston, on a contract with Messrs. Powell, McEwing & Co., of Madison, Indiana, to deliver to them one thousand corn-fatted hogs, by the 20th day of December next; to fill which contract the money advanced and furnished by the complainant was to be used for the purchase of hogs, and corn and pasture to feed and fat the same; and that in order to secure the payment of said sums of money so advanced, and said indebtedness of the said Edmiston, as well as to indemnify him as the security on said hog contract, (which is filed as an exhibit with the bill,) the said David Edmiston made and executed to the complainant a mortgage, which is made an exhibit, and filed with the bill of complaint. The mortgage, as the consideration on which it is based, sets out the aforesaid indebtedness for the money advanced by the complainant to purchase hogs to fill the contract, and his liability as security upon said contract. The mortgaged property includes some real estate, a large amount of chattel property, and among other things the corn and hogs which the said Edmiston may purchase with the money advanced; and is conditioned, that if the said Edmiston shall refund or pay the five thousand dollars so advanced, with ten per cent. interest thereon, and save the complainant harmless as his security on said hog contract, by delivering the hogs in accordance with the terms of the contract, and also apply all the profits, or enough of them, arising from the hog contract, to the payment of the interest due on the note for $11,000, then the mortgage is to be void. It also stipulates that Edmiston may retain the possession of the hogs purchased until the time for their delivery, and of the other property until the 1st of March, 1860; and if default is made, then the complainant may take possession and sell the property by advertising for ten days, as in constables' sales, and pay the aforesaid indebtedness, and shall refund the surplus to the said Edmiston, if there is any. No memorandum of the property was made by the justice of the peace taking the acknowledgment.

The bill further alleges that the hogs levied upon, which were in the possession of David Edmiston, were hogs purchased with the money advanced by the complainant under said mortgage contract, and that by virtue of said mortgage and contract, he has an equitable lien upon them, and that his rights will be prejudiced by their sale; and prays that the defendants be perpetually enjoined from selling or interfering with said hogs under said execution and levy.

To this bill of complaint, the defendant, Gregg, craves oyer of the mortgage referred to in the bill as an exhibit, and demurs; alleging as a ground of demurrer, that, from the complainant's own showing, he has no equity in his bill, and no legal or equitable title to the property levied upon under said mortgage, as appears from his said bill of complaint and exhibits. The court overruled the demurrer, and the defendant having elected to stand by his demurrer, and answering no further, the court ordered that the injunction be made perpetual, and the defendant forever enjoined from all further proceedings.

To which judgment of the court, in overruling said demurrer and perpetuating said injunction, the defendant at the time excepted, and prosecutes this writ of error.

The errors assigned are, that the court erred in overruling the defendant's demurrer, and perpetuating the injunction.

A. Green, for Plaintiffs in Error.

Lincoln & Herndon, for Defendant in Error.

Breese, J. There can be no just pretense of a partnership in this case, for the complainant positively disclaims it in his bill of complaint. The case must stand on other grounds. There would be little difficulty about it, had the mortgage set up in the bill been acknowledged before a district justice of the peace, and recorded in the clerk's office, as the chattel mortgage act requires.

We have examined, with great care, all the cases to which reference has been made on both sides, and we are by no means satisfied that a party cannot mortgage property to be acquired after the execution of the mortgage, provided the mortgage deed is properly executed, acknowledged and recorded, or possession taken of the property before any lien has attached; and that a court of equity will protect the mortgagee where the transaction is fair and honest. The case of *Langton* v. *Horton*, 1 Hare, (23 Eng. Ch. R. 550,) is a strong case in support of the latter position. This was the mortgage of a ship at sea, with her tackle and appurtenances, and all oil, head matter, and other cargo, which might be caught or brought home in such ship. The ship was on her voyage at the time of the assignment; the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees immediately after her return from the voyage. The Vice Chancellor, Sir James Wigram, held, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of

the mortgagor, who afterwards sued out a *fi. fa.*, and proceeded to take the ship and cargo in execution. The Vice Chancellor uses this strong language in giving his opinion: "It is impossible to doubt, for some purposes at least, that by contract, an interest in a thing not in existence at the time of the contract, may, in equity, become the property of a purchaser for value. A tenant, for example, contracts that particular things which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. And so of contracts relating to mines. He refers to the case of the ship *Wane*, 8 Price, 269, and *Curtis* v. *Auber*, 1 Jacob and Walker, 526, decided by Lord Eldon, as establishing the proposition, that non-existing property may be the subject of a valid assignment. There is reason and good sense in this; and Mr. Justice Story relies with much confidence upon this case, in deciding the case of *Mitchell* v. *Winslow et al.*, 2 Story, 630, in which he reviews all the authorities. He says: "It seems to me a clear result of all the authorities, that wherever the parties by their contract intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in *esse* or not, it attaches in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy."

In *Forman* v. *Proctor*, and *Wood, etc.*, v. *Proctor*, 9 B. Monroe, 124, it was held that the interest of a party, in property which he may perfect by the performance of an executory contract, may, in chancery, be the subject of a mortgage or attachment, and if that be in relation to live stock, its natural increase and produce become subject to the mortgage.

The cases from Massachusetts, especially that of *Moody* v. *Wright*, 13 Metcalf, 32, seem to militate against these, but the doctrine of these cases seems a reasonable doctrine, and fit to be recognized by this court. We see nothing in it in conflict with any of the provisions of our chattel mortgage act, or with its spirit and object.

Unfortunately for the complainant, however, his case does not come within their principles—his mortgage was not recorded, and he cannot, therefore, hold the property against the execution. A stipulation that future-acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character that the creditor with whom it is made, may, under it, take the property into his possession

when it comes into existence, and hold it for his security, and is a proper subject of transfer by his debtor; and whenever he does so take it into his possession, before any attachment or other lien has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but until such an act done by him, he has no title to the same; and that such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. Per Dewey, J., delivering the opinion in the case of *Moody* v. *Wright*, 13 Pick. 32.

The case of *Frost* v. *Willand*, 9 Barbour, 449, to which complainant's counsel has specially referred us, is a strong case, to show that even at law a mortgage of articles to be thereafter manufactured, will be upheld, and the mortgagee protected. The public good requires that contracts of this kind should be supported. When a manufacturer is unable to prosecute his business without aid from others, the industry of the country may be materially promoted by allowing him to pledge his future earnings to those who will make advances to him.

In this case, however, the plaintiffs obtained the actual possession of the barrels as they were manufactured. The defect in the case at bar is, that the mortgage was not recorded, nor was possession taken of the hogs. The demurrer to the bill having been to the merits, and in bar, the decree overruling it, is reversed, and the bill must necessarily be dismissed.

Separate opinion by WALKER, J. While I fully concur in the decision in this case, I am clearly of the opinion that this mortgage contravenes both the letter and spirit of the chattel mortgage law. That in equity no lien could attach as against third persons, until the property had been acquired by the mortgagors, and had also been reduced to possession by the mortgagee, and that a levy of an execution, intervening the purchase by mortgagors, and the acquisition of its possession by the mortgagee, should hold it free from the mortgage, it being fraudulent as against creditors, and the statute not having been complied with in its execution.

CATON, C. J. I concur in the above views.

Bill dismissed.

Canfield S. Hamilton, Appellant, *v.* The President and Trustees of Carthage, Appellees.

APPEAL FROM HANCOCK.

A town organized under the general law, may recover a penalty before a justice of the peace, exceeding five dollars, for an offense against an ordinance to prevent selling ardent spirits without a license.

In a proceeding to collect a fine by a municipal corporation, its existence cannot be collaterally attacked. Evidence that the corporation has acted as such, is sufficient.

This was an action brought by the President and Trustees of Carthage against Hamilton, for a penalty of twenty dollars, for a violation of an ordinance of said town prohibiting the sale of spirituous liquors, before a justice of the peace of the county of Hancock, and appealed to the Circuit Court. The parties waived a jury, and submitted to the court, Sibley, Judge. The court found the issues for the plaintiff, and rendered judgment against the defendant, who appealed to this court.

Grimshaw & Edmunds, for Appellant.

M. Hay, for Appellees.

Walker, J. This was an action instituted by appellee against appellant, for the recovery of a penalty claimed to have been incurred by the sale of spirituous liquor without a license, and in violation of an ordinance of the town. The trial before the justice of the peace resulted in a judgment against the appellant for $40 and costs, from which he prosecuted an appeal to the Circuit Court. The cause was there tried by the court, without the intervention of a jury, by consent of the parties, when the court found appellant guilty, and rendered a judgment against him for twenty dollars and costs of suit. From which he appeals to this court.

The first question which we propose to consider, is, whether the statute has conferred jurisdiction upon a justice of the peace, in actions for the recovery of penalties of this description. The latter clause of the 8th section of the division entitled "Towns and Cities," (Scates' Comp. 197,) expressly provides, that the president and trustees of such towns may impose fines for a breach of their ordinances, and that such fines may be recovered before any justice of the peace, by action of debt, in the name of the president and trustees, and collected by execution. It would be difficult to imagine what language could have been adopted, by which the jurisdiction could have been more clearly

conferred upon that officer. There is no known rule of construction by which a court can hold that this enactment does not confer it, fully and completely. It is true that this section limits the amount of the penalty to five dollars for each offense. But by a subsequent enactment, (Scates' Comp., p. 200, sec. 4,) it is provided that all towns incorporated under chapter twenty-five, R. S. 1845, shall have all the power to pass ordinances and by-laws, and shall possess all the powers authorized under the laws and amendatory acts of the cities of Springfield and Quincy. The 34th section of the 5th article of the Springfield charter, (Laws Spec. Sess. 1840, p. 10,) confers upon the city authorities the power to impose fines, penalties and forfeitures, for the breach of any ordinance, without any limit as to the amount. The 10th section of the 10th article of the constitution has, however, prohibited justices of the peace from trying any cause in which the fine exceeds one hundred dollars. This would, of course, limit the power of such a corporation in providing that justices of the peace should have jurisdiction to try causes for the recovery of such fines, to that sum, and the act has conferred the power alone on justices of the peace. We have not been referred to any law which has withdrawn the jurisdiction from a justice of the peace, and none such is believed to exist. We therefore have no hesitation in saying that the justice of the peace had jurisdiction to try this cause.

It is also urged, that the plaintiffs below, on the trial in that court, failed to show that they were legally incorporated. The bill of exceptions shows that they read in evidence, from their record book, a recital that on the 16th day of June, 1849, an election was held at which a board of trustees was elected, and that they were qualified as such before a justice of the peace of the town; also his certificate, together with the evidence of Williams, who testified that he was the clerk of the board of trustees of the town, and had been since its organization in 1849. Until the existence of this corporation was denied, they were not bound to adduce any proof of their corporate existence. And when that is put in issue, they are only required to show that the body has been acting as, and exercising the powers of, such a corporation. Unless it be in a direct proceeding by *quo warranto*, or otherwise, they are not bound to show the manner in which they were organized under their charter, or that they have complied with all of its requirements. The evidence here abundantly shows, that they were acting as a corporation, and that is *prima facie* sufficient. *Town of Mendota* v. *Thompson*, 20 Ill. R. 197.

If this were not the case, the legislature has recognized its existence as an incorporation, by acts amending the charter of this town, first, in February, 1854, and afterwards in February,

1855, which gives fines and forfeitures to the town. Even if irregularities had occurred in the organization, it was cured by these enactments. Even if that were not the case, these municipal incorporations, being created for the better police and government of communities, after long-continued acquiescence, on the part of the public, in the exercise of their corporate powers, the law would indulge presumptions of their lega organization, in a collateral proceeding, until it is rebutted. *Jameson* v. *The People*, 16 Ill. R. 257. We are therefore of the opinion, that in a collateral proceeding, as this is, the corporate existence of the appellee was amply proven.

The ordinance was proved to have been regularly adopted, recorded and published, in compliance with the law. The book in which it was recorded was also proved to be the record of their proceedings and ordinances. The ordinance prohibited the sale of such liquor in a less quantity than one gallon. This was fully within the scope of their authority. Appellant admitted the sale of the liquor in violation of the ordinance, within the corporate limits of the town, and did not pretend that he had a license. Under this evidence the court could not have done otherwise than find for the appellee.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Thomas C. Morrison *et al.*, Appellants, *v.* Hugh Stewart *et al.*, Appellees.

APPEAL FROM ALTON CITY COURT.

The sworn answer of a defendant in a proceeding to enforce a mechanics' lien, is not equal to two witnesses; but is to be overcome by two witnesses, or by one, and strong corroborating circumstances.

A new trial is not to be granted because accumulative evidence can be furnished.

This is an appeal from the Alton City Court, from the judgment of said court, upon a petition filed by the appellants, to perfect a mechanics' lien upon a lot in Alton, upon which the appellants have built a dwelling-house and other improvements.

The jury found a verdict for the defendant. The petitioners moved for a new trial, which was denied, Billings, Judge, presiding; and judgment was rendered against the appellants.

F. S. Rutherford, and S. T. Sawyer, for Appellants.

L. Davis, for Appellees.

Breese, J. There was evidence offered to the jury tending to show that a paper, marked "specifications for a dwelling-house," was a part of the contract between the parties—it was proved, or admitted to be in the hand-writing of one of the complainants, and corroborates the defendant's sworn answer. The proof was not positive by any means, but was sufficient for the purpose intended.

The instruction marked "2," asked by the complainant, was properly amended by the proviso added by the court, and so of the fourth instruction. Without the proviso, the instruction would require the jury to find for the complainants, if they found the contract set out in the petition, whether that was the real contract of the parties or not.

The instructions given on behalf of the defendants, and excepted to, were as follows:

"The court is requested to instruct the jury, that the plaintiffs in this case are bound to recover upon the contract, as laid in their petition. That they cannot abandon that contract and recover under an implied contract what the work is worth.

"That the answer in this case is evidence, as to the payment of money by Stewart, equal to two witnesses, or to one witness and strong corroborating circumstances.

"The court is requested to instruct the jury, that if they believe, from the evidence, that the work done and materials furnished in this cause, were done under a special contract, that such special contract must govern in this case.

"That if by such contract the house was to be constructed for a certain price, and in a particular manner, then no more than the price agreed upon can be recovered, no matter what the value of such work or materials may be proved to be."

We see no valid objection to any of these instructions, except the second. They affirm well-established principles, applicable to the case under consideration. As to the second, the lien law provides, § 7, that the answer to the bill or petition shall be under the oath of the defendant, and the plaintiff shall except or reply to the answer as though the proceeding was in chancery. A replication was put in, and the cause heard on the bill, answer and replication, as in a chancery proceeding. In such proceedings, the rule is, the answer is evidence for the defendant, and can only be overcome by two witnesses, or one witness and strong corroborating circumstances. It is not, as in the language of the instruction, equal to two witnesses, and it was erroneous so to charge. If it was equal to two witnesses, then it would require three witnesses to prevail against it—two against the answer, and one to establish the contract; which is not the law.

The motion for a new trial on the affidavit filed, was properly denied, because it shows nothing but such matter as was contested on the trial, and the evidence, if had, would be merely cumulative.

For this error in the second instruction, the judgment is reversed, and the cause remanded.

Decree reversed.

Joseph Mohler, Appellant, *v.* The People of the State of Illinois, Appellees.

APPEAL FROM MADISON.

This indictment is indorsed "A true bill, George S. Rice, Foreman," while the record shows that another person was appointed foreman of the grand jury. In the absence of anything on the record to negative the supposition, this court will intend that the first foreman was discharged, and Mr. Rice appointed in his place.

A criminal case cannot be brought to this court, except by writ of error.

A count in an indictment, which charges an offense in the terms and language of the code, is sufficient.

This was an indictment tried in the Madison Circuit Court, before Snyder, Judge. The facts are sufficiently stated in the opinion.

F. S. Rutherford, and J. H. Sloss, for Appellant.

W. B. White, for Appellees.

Breese, J. We do not find any one of the errors assigned, to exist in the record. In the *placita*, is this statement: "This day came the grand jury into court, and return as true, a bill of indictment in the following cases, to wit:" Among these cases is a bill entitled, "*The People* v. *Joseph Mohler*—Indictment for keeping a disorderly house." The record then contains a copy of this indictment, indorsed on the back, "A true bill, George S. Rice, Foreman," with the names of the witnesses, on whose testimony it was found.

The court quashed the second count, and a trial was had on the first count, for keeping a disorderly house, and though the evidence was slight, it tended to prove the guilt of the defendant. We cannot say it was not sufficient to satisfy the jury.

There are no reasons urged for arresting the judgment, other than those on the motion to quash, and as they were applied to

the insufficiency of the first count, we think the court properly disposed of the motion, as that count is in the very terms and language of the code, and describes the offense so that it could be understood by the jury.

The fact that the indictment is indorsed by George S. Rice, foreman, whilst the record of the impanneling the grand jury shows the appointment of another person as foreman, cannot avail. The whole record of the court is not set out, and we will intend, that the first appointee was discharged by the court, and Mr. Rice appointed.

We would remark here, that this case comes here by appeal—a mode not allowed by our statute. A criminal case cannot be got into this court, except by writ of error. There is no other mode recognized, but as the State's attorney has made no objection, we have considered the case on the merits, and affirm the judgment.

Judgment affirmed.

Elisha Mathews, Plaintiff in Error, *v.* John Shores, Defendant in Error.

ERROR TO HANCOCK.

In giving a construction to the Post Office laws, this court will feel justified in adopting the construction acted upon by the Post Office Department.

This was an action of assumpsit, by plaintiff in error against defendant in error.

There were originally two counts in the declaration. On trial, plaintiff entered a *nolle prosequi* to first count.

The second count alleges that defendant, on —— day of June, 1854, in the county of Hancock, in consideration that the plaintiff had bid the sum of $1,598 per year, at which sum per year he would transport the United States mail, on route No. 13,372, from Quincy by Ursa, etc., to Keokuk and back, daily, except Sundays, in two-horse coaches, for the term of four years, commencing on the 1st of July, 1854, and ending on the 30th of June, 1858, which bid was accepted by the United States; and that plaintiff had, at request of defendant, assigned and transferred said bid, so accepted by the United States, to defendant, defendant promised plaintiff to pay him, plaintiff, the sum of one hundred dollars on request, and take said bid off the hands of plaintiff, and to execute contracts with the United States, with sureties, for transportation of the mail upon said

route, in the place of plaintiff, and to perform all service required by law, and the rules and regulations of the Post Office Department, etc., on said route, for the term aforesaid, and if defendant failed or neglected to perform any of the above promises, then defendant would pay plaintiff the full amount of all liabibity he might incur, and all damages, losses, injuries, trouble and expense he might sustain and be put to, by reason of such neglect and failure, on part of defendant, to perform said promises.

Alleges that plaintiff did assign and transfer his bid to defendant, and that defendant has not paid him said sum of $100, except $50; that he did not take said bid off the hands of plaintiff, and execute contracts with the United States, with sureties, etc., for transportation of mails on said route in place of plaintiff, and did not perform service on said route as required by law and regulations of Post Office Department, etc., but wholly failed so to do; whereby plaintiff's bid became forfeited and lost on the 1st July, 1854, and the United States, upon neglect and failure of defendant to perform his said promises, employed another person for seventy days, at twenty dollars per day, until contract for transportation of said mail upon said route could be re-let, to carry said mail in the meantime, and paid such person $1,400 therefor, and charged the same to plaintiff, and the United States collected, of said $1,400, the sum of $1,000 from plaintiff; that defendant has not paid said sums of money, although often requested.

The defendant filed the general issue to said declaration.

At the March term, 1858, before Sibley, Judge, a jury was impanneled to try the issue on said declaration, and on trial, defendant moved the court to instruct the jury to disregard said second count as faulty, which motion the court sustained, and the jury being instructed to disregard said count, found a verdict against plaintiff, upon which the court rendered a judgment for costs.

Plaintiff took a bill of exceptions to the decision of the court in instructing the jury to disregard said second count, at the time of said decision.

Errors assigned are: the sustaining defendant's motion, and instructing the jury to disregard said second count as faulty.

Williams, Grimshaw & Williams, and Geo. Edmunds, Jr., for Plaintiff in Error.

CATON, C. J. The only question in this case is, whether Shores could have been substituted for Mathews in the contract with the Post Office Department, upon the accepted bid of Mathews. If it was competent for the department to make such a substitution, then it was the duty of Shores to procure it to be done by the department, and to execute a contract with the government in place of Mathews. Upon the most careful examination of the Post Office laws, we did not feel satisfied as to whether they permitted such a substitution as the contract set forth in the second count of the declaration contemplated, and thought it safer to rely upon, and be governed by the rules and practice of the department. Hence we applied to the Post Master General for information on the subject, and learn that the Post Office laws are so constructed as to permit the department to accept a substitute in place of the party whose bid was accepted, and to execute the contract with the substitute instead of the bidder, and that such is the constant practice of the department; and we are furnished with blanks to be filled up and executed by the parties, upon which the department acts in accepting the substitute and executing the final contract with him. However we might be inclined to construe these statutes, were it an entirely new question, we cannot doubt as to the propriety of our adopting this construction, so acted upon by the department. Even if the department has adopted a wrong construction, yet it shows that it was practicable for the defendant to have fulfilled his agreement with the plaintiff, by getting himself substituted for him in the contract. And we are not prepared to say that it would have been unlawful to have done so. If the contract was lawful, then the count was good.

We think the court erred in instructing the jury to disregard the second count, and the judgment must be reversed, and the cause remanded.

Judgment reversed.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

APRIL TERM, 1860, AT OTTAWA.

THE GALENA AND CHICAGO UNION RAILROAD COMPANY, Appellant, *v.* PERRY M. WELCH, Appellee.

APPEAL FROM BOONE.

In an action against a railroad company for damages resulting from the washing away of a culvert, the engineer who planned and superintended the erection of the culvert, is not a competent witness for the company until he has been released by it.

THE cause was heard before I. G. WILSON, Judge, and a jury, at September term, 1859, of the Boone county Circuit Court, on a change of venue from Winnebago county.

The action was trespass on the case, commenced against the Galena and Chicago Union Railroad Company, to recover damages for injuries done to the defendant's premises on the night of the 3rd of June, 1858, by reason of the giving way of a culvert near Roscoe, over the south branch of the Kennekinnick creek, which was swept away by a flood of water during a storm of rain.

The defendant in error was a wagon-maker, and resided upon a lot directly abutting upon the creek, and his house within six or eight feet of the bank of the stream. The storm which caused the damage, commenced about three o'clock in the morning of the 3rd of June; the culvert was swept away about eleven o'clock in the evening, and the water rushing down, car-

ried away Welch's house and wagon-shop, sweeping away his furniture, and doing damage to his premises.

There was a verdict and judgment for plaintiff below, for eleven hundred dollars and costs. The defendant below moved for a new trial, which was overruled.

The instructions given for plaintiff, and refused for defendant, were as follows:

Plaintiff's instructions, given by the court and excepted to by defendant:

The defendants, in constructing their railroad, were obliged by law to leave a sufficient opening through the embankment for the free passage of the water, so that the same should not accumulate unreasonably above the road, and if they failed to do so, and the embankment burst in consequence thereof, they are liable to the plaintiff for all the damage he sustained, if any, in consequence of such failure.

If the defendant failed to provide a passage way of sufficient capacity to convey the water freely through the embankment, so as to prevent its unreasonable accumulation above the road, it would have been no excuse for them if the passage way they did provide was well constructed.

If the culvert which the defendants provided for the passage of the water through their embankment was not properly constructed, and in consequence of the bad or insufficient construction thereof, the same gave way by the force of the water, the defendants are liable for all the damages sustained by the plaintiff, if any, in consequence of such giving way of the culvert.

The defendants were under obligations to keep the culvert through their embankment in repair, and if they neglected to keep the same in repair, and in consequence thereof the culvert gave way, the defendants are liable for all the damages which resulted to the plaintiff, if any, from such giving way of the culvert.

The defendants were bound to know the extent of country drained by the water course in question, and to ascertain the floods to which it was subject, and to provide a passage way under their railroad, reasonably sufficient for their free and safe passage.

The defendants were bound to provide a sufficient and safe passage under their railroad, not only for ordinary floods, but for extraordinary floods also.

Fourth, seventh and eighth instructions prayed for by defendant, and refused by the court:

4th. If the jury believe, from the evidence, that the culvert and water way, at the time of the disaster of the 3rd of June, were out of repair, yet, if they also believe, from the evidence,

that such want of repair was the necessary result of floods prior to that time, and that between such floods and the time of the disaster, the defendants were prevented by high water, from ascertaining the injury and repairing the same; and also believe, from the evidence, that the same was sufficiently and skillfully constructed, then the defendants are not liable.

7th. That under the pleadings and evidence in this case, the plaintiff is not entitled to recover damages on account of permanent injury to the real estate, even if the jury believe the defendants guilty.

8th. That the only damages which the plaintiff, under the pleadings and evidence, would be entitled to recover in respect to said real estate, are for the mere interference with his possession, and not for the damage done to the house and lot.

The motion by defendant for a new trial, and in arrest of judgment, assigned, among others, the following grounds:

Because the court excluded the testimony of John Van Nortwick, upon the ground of interest.

Because the verdict was contrary to evidence, and should have been for the defendant, no negligence being shown, but, on the contrary, proper skill, care and diligence.

Because the instructions given on the part of the plaintiff were erroneous.

Because the court refused to give the fourth and last two instructions asked by the defendant.

Because the court, on motion of defendant, should have ruled out and excluded from the consideration of the jury, all of the evidence in respect to permanent injuries to the real estate, no sufficient evidence of title having been given.

E. Anthony, for Appellant.

Leland & Leland, for Appellee.

Caton, C. J. We find no error in the instructions given or refused, or in the conduct of the trial, unless it be in the refusal of the court to admit the testimony of Mr. Van Nortwick without a release from the defendant, who called him. The alleged injury was from the giving way of a culvert, and in order to maintain the action, it was necessary to show that it was improperly constructed originally, or was negligently out of repair. The witness was the chief engineer of the road at the time the culvert was built, and it was built according to his plan and under his supervision; and he was called to prove that the plan was a judicious and proper one, and that it was properly constructed. The objection to the witness is, that he was directly

interested in establishing these facts, for if they were not true, the witness was guilty of negligence, and responsible to the company for all damages resulting from such negligence, of which the damages to be recovered in this action would form a part. This point must be resolved by a determination of the question whether, in such an action against the witness, the record in this cause could be given in evidence against him. According to general principles, it is urged, this judgment ought not to be admitted in evidence in such a case, for he is neither a party nor a privy to the record. This is no doubt the rule, when a record is to be used as concluding the matters determined by it, but there are many cases where the record of a cause between strangers to the cause on trial, may be admitted in evidence for certain purposes incidental to the main issue on trial, and the decided weight, if not the whole current of authority, recognizes this as one. In an action against the witness by the railroad company for negligence in the construction of this culvert, the record of this cause would not be evidence of that fact. Indeed it would establish no such fact even as between the parties to this record, for the plaintiff might recover for negligently allowing the culvert to get out of repair, although it were properly constructed originally, or the plaintiff might fail to maintain his action from a variety of causes, although the witness might have been negligent in its original construction. But in an action against the witness for damages, for negligence in the construction of this culvert, after the negligence had been established, and, also, that the injury, now complained of, had resulted in consequence of such negligence, it would then be competent for the company to give this judgment in evidence, for the purpose of showing what damage it had sustained in consequence of the negligence of the witness. Even then it would, by no means, be conclusive, for it would still be competent for the witness to prove that the defense of this cause was not properly conducted, and that a less judgment or no judgment should have been recovered. But the simple fact that this judgment might be used in an action against the witness, upon the question of damages, would seem to make it for his interest to defeat the present action, and that in order to remove that interest, it was necessary that the defendant should have released him.

The authorities sustain the decision of the court below, and we must affirm its judgment.

Judgment affirmed.

The County of Rock Island, Plaintiff in Error, *v.* The County of Mercer, Defendant in Error.

AGREED CASE FROM ROCK ISLAND.

Where money is deposited with a sheriff, as security for the appearance of a prisoner, who makes default, it is proper to treat the money as if it had been recovered on a recognizance.

Where the venue in a criminal case is changed, the county to which the venue is changed, is entitled to the moneys recovered, by fines and forfeitures.

This cause was submitted upon the following agreed case:

At August term of the Circuit Court of Mercer county, an indictment was presented by the grand jury, and filed, against Wallace Hatch and others, for burglary, committed in said Mercer county; on which the defendants therein were, at said term, arraigned, and severally pleaded not guilty, and at the same term entered their motion for a change of venue; which motion was allowed, and the venue changed to Rock Island county, at the same term, and the sheriff of Mercer county was ordered to remove the bodies of the defendants to Rock Island county, and deliver them to the common jailor of said Rock Island county; and also, by the proper order and indorsement upon the indictment, the amount in which the defendants were required to find bail was fixed by the court at $1,500 each.

In pursuance of the order, the papers and transcript of proceedings in said cause, were, on the 6th of November, 1856, filed in Rock Island Circuit Court, and the bodies of the defendants were delivered to the custody of T. B. Gorton, sheriff, and keeper of the common jail of Rock Island county, who detained defendant Hatch until he deposited with said sheriff $1,500, in lieu of bond and security, to be held by the said sheriff as security for the appearance of said Hatch on the first day of the next term of said Rock Island Circuit Court, at the court-house in Rock Island county, November 5th, A. D. 1856, and to be forfeited upon his default therein.

On the seventh day of the November term, 1856, of the Rock Island Circuit Court, the said cause of *The People* v. *Hatch and others*, came on for trial; and defendant Hatch, being called, came not, but made default. Thereupon the said court made and entered an order in said cause in these words: "This day came the People, by Hawley, their attorney, and the defendant, Hatch, being duly called, came not, but made default; and the sheriff represented that defendant, Hatch, had deposited with him $1,500, in lieu of giving bond and security for his

appearance at this term of the court; and the sheriff having signified his readiness to pay the same as should be directed by the court, it is therefore ordered by the court, that the sheriff pay to the clerk of this court, the said sum of $1,500, so deposited."

And the sheriff afterwards paid to the clerk of said court, the said sum of $1,500. And at the next term of the County Court of said Rock Island county, the said clerk paid over the said $1,500, which sum was received by said court, and deposited in the treasury of said last-named county; that Rock Island has paid out of said moneys, as costs in said matter, $100 for collection thereof.

Upon the above state of facts, the county of Mercer claims to recover, of the county of Rock Island, the said sum of $1,500.

It is agreed that all objections for matter of form, or for any irregularities, shall be considered as waived; that the same shall be decided upon the merits, by the Circuit Court of Rock Island county (without a jury) upon the facts above stated; and in case the court should be of the opinion that the county of Mercer, or any officer thereof, is entitled to said moneys, judgment should be entered therefor in favor of plaintiff; but in case the court should be of opinion that Rock Island county, or any officer thereof, is entitled to said moneys, judgment shall be entered in favor of defendants. And that either party may have the case certified to the Supreme Court, as an agreed case. January 18th, 1859.

At May term, 1859, of Rock Island Circuit Court, the cause was heard by the court, and damages assessed, and judgment entered in favor of the plaintiff, for $1,400, and costs; execution awarded.

R. M. Marshall, and J. B. Hawley, for Plaintiff.

Wilkinson & Pleasants, and Bassett & Brother, for Defendant.

Caton, C. J. We think the Circuit Court properly treated the money in controversy as if it had been recovered upon a recognizance taken for the appearance of the prisoner, by whom it was deposited with the sheriff, and the only important question in the case is, to which county the money thus collected belongs.

The statute imposes upon the county from which a venue is changed, in a criminal case, the expenses of the prosecution in the county where it is tried. By the law of 1847, it is pro-

vided that, in case of recognizance growing out of a change of venue, the county that, by law, is compelled to bear the expenses of the prosecution, shall be entitled to all moneys arising out of any fines, penalties or forfeitures. We have no doubt that the prosecution here referred to, is the prosecution of the criminal charge, and not the prosecution on the recognizance, as was contended for the plaintiff in error. By this law, Mercer county was entitled to this money, and the only remaining question is, whether this provision was intended to be repealed by the school law of 1855. The eighty-fifth section of that act provides that all penalties, fines and forfeitures imposed or incurred, either in Circuit Courts or before justices of the peace, shall be paid to the school fund. This statute was not designed to change the former law determining which county should pay the costs of the prosecution in cases of a change of venue, nor that which determined to which county the fines and forfeitures should be paid; but the sole object was to divert the money so collected from the county treasury, to the school fund of the same county. We have no doubt that the determination of the Circuit Court was proper, and its judgment correct, and it must be affirmed; but an order was no doubt inadvertently entered, directing an execution to issue. While the judgment is affirmed, this order for an execution must be set aside.

Judgment affirmed.

Walter Covill *v.* Adam Phy.

MOTION TO CONTINUE CAUSE.

An attorney who tried a cause in the court below, is not authorized to appear in the Supreme Court without a new retainer.

The defendant in error moves to continue this cause, after joinder in error, upon his affidavit and that of one of his attorneys, that the counsel who had signed the joinder, had not been retained in this court. It appeared, by counter affidavits, that the attorney who signed the joinder in error had assisted on the trial of the cause in the court below.

Per Curiam.—The continuance will be allowed. We do not understand that the attorneys who tried the cause below, are authorized to appear in this court, without a new retainer for that purpose. As the defendant does not ask to have the joinder in error stricken from the record, the joinder will stand as an appearance.

Harvey McPherson *et al.*, Commissioners of Highways for the Town of Eden, Plaintiffs in Error, *v.* Asa Holdridge, Defendant in Error.

ERROR TO LA SALLE.

Where an appeal from an order locating a road, and assessing damages, is taken to supervisors, they cannot act unless the parties are notified; should they do so, their action is invalid; but the appeal will stand, and may be heard by the supervisors of the same towns, upon proper notice given.

The record in this case shows that the defendant in error filed a bill of injunction in the court below, (which was allowed,) to restrain the plaintiffs in error, who were commissioners of highways, from opening the public road in controversy; also for relief; to February term, 1858, at which term the commissioners filed a demurrer, and moved to dissolve the injunction for want of equity in the bill.

At the December term, 1858, the court, Hollister, Judge, overruled the demurrer, and motion to dissolve injunction, and the commissioners abided, and the court then made a decree perpetually enjoining the commissioners from opening the road; to reverse which, this writ of error is brought.

O. C. Gray, for Plaintiffs in Error.

Glover, Cook & Campbell, for Defendant in Error.

Walker, J. There is no objection urged to the regularity of any of the proceedings in laying out and establishing this road, anterior to the prosecution of the appeal to the then supervisors. It is, however, objected that the appeal was finally had without any notice to the appellants. The record shows that an appeal was prosecuted from the order locating the road and assessing the damages, and that the supervisors of Ottawa, LaSalle and Salisbury were selected to hear and determine the same. That they fixed upon the 16th day of April, 1857, and selected a place for its hearing. That at that time and place, only one of the supervisors attended, and adjourned the hearing until some time in June; at that time, the same supervisor again attended at the place, when he ordered that the cause should stand continued until the 6th of July, at which time, none of the supervisors attended. But afterwards, on the 22nd day of July, two of the supervisors, without notice to any of the parties, met and associated with them the supervisor of Deer Park, and proceeded to hear the appeal, and affirmed the order of the commission-

ers, establishing the road, and the assessing of damages allowed to property holders affected by its location.

The ninth sec. of chap. 24 (Scates' Comp. 354,) provides that, in all cases of appeals of this character, a notice shall be served upon certain persons named, who are supposed to be parties in interest. And the object of the notice is to enable both sides of the contest to be fully heard, and the supervisors thus to be enabled to decide the case with a full knowledge of the facts. In the case of *Keech* v. *The People*, 22 Ill. R. 478, it was held that, after the appeal was perfected, and the supervisors had dismissed the appeal, they had no power to again hear the case without giving notice to the parties, and an order made without such notice, was inoperative and void. The object of the statute being that the appellants, as well as the appellees, shall have an opportunity of being heard on the trial. They must have notice of the time and place by notice, as by a regular continuance, and an order made without such a continuance, is not binding on either party, unless present and consenting to the trial. In this case, the plaintiffs in error were not notified of the time and place of the meeting of the supervisors, which took place on the 22nd of July. Nor had they, at the previous times fixed for the hearing, regularly adjourned to meet at that time and place, and they consequently were not chargeable with either actual or constructive notice. They were not before the tribunal, and are not bound by the order of affirmance. For the want of jurisdiction of all the parties required by the statute to be before them on the trial of the appeal, they had no power to render a valid judgment. The want of such jurisdiction renders the order of affirmance inoperative and void.

That order being void, the question is presented, what has become of the appeal? Was it thereby abated, and the order of the road commissioners locating the road revived, or was the whole proceeding, from the beginning, discontinued, or is the appeal still pending? The General Assembly has, in terms, made no provision for such a contingency. If we look to all the provisions on this subject, we shall perceive that it was the design of that body to provide a simple and speedy mode of locating and establishing roads of this character, and when unsatisfactory, without delay, to give a rehearing before other officers, by appeal. To hold that a failure to hear the case, without proper notice to the parties, operated to affirm the order establishing the road, would virtually deprive the party of his appeal, and to hold that the whole proceeding is thereby discontinued, would produce unnecessary delay, by rendering all the steps required by the statute to be again taken. This is not required by the act, and we think could not have been designed.

Had such been regarded necessary by them, it would, it seems to us, have been required. But this being a special tribunal, with a limited jurisdiction, owing its existence to the statute, and its mode of proceeding prescribed by it, in the absence of any provision that such a failure to try the appeal at the time and place fixed, or without notice, should operate as a dismissal of the appeal, or a discontinuance of the whole proceeding, we are inclined to hold that it is still pending.

If this be true, the appeal never having been disposed of, the parties may still have a hearing and determination of the appeal. But to do so, the same notice must be given to all parties designated by the statute, as well as the appellants, of the time and place of the meeting of the supervisors, for its hearing. This notice should be given, as though the case was for the first time before them. The act authorizes the appeal to be prosecuted to three supervisors, selected from the various towns, and not to the persons who may occupy the office. The appeal is to the officers, and not to the individuals. It is in their official, and not in their individual capacity, they are authorized to act. The supervisors, then, who now occupy the office in these towns, the same individuals, if in office, or if not, then their successors, are still authorized to cause the notice to be given, and then proceed to hear and determine the appeal.

The decree of the court below will be so modified as to restrain the parties from proceeding to open the road, until the appeal shall be determined, and then with leave to proceed in conformity with the order entered on the final hearing.

Decree modified.

Ozias Wheeler, Plaintiff in Error, *v.* William McCorristen, Defendant in Error.

ERROR TO LEE.

A party who claims property under a levy, as an officer, should set up the execution in his pleadings.

The oral or written declarations of a vendor, against a vendee, are not proper testimony.

This was an action of replevin commenced in the Lee Circuit Court by the defendant in error, against Ozias Wheeler, sheriff of Lee county, and was tried at the June term, A. D. 1858, of said court, before Eustace, Judge, and a jury, and a verdict found for defendant in error. A motion for a new trial was made, and overruled.

The declaration contained one count, alleging that the plaintiff in error, on 10th April, 1857, in Dixon, Lee county, in a certain dwelling-house there, took one parlor carpet, one dining-room carpet, one oil-cloth, eighteen chairs, one parlor stove, one sofa, and one table, of the said plaintiff, and unjustly detained the same, etc.

The defendant filed to this declaration four pleas: 1st, Non cepit; 2nd, Non detinet; 3rd, Property in defendant; and 4th, Property in Patrick M. Kilduff.

To the first and second pleas the plaintiff took issue to the country; and to the third and fourth pleas, replied, property in the plaintiff, on which defendant took issue to the country.

The cause was submitted to the jury, who returned a verdict for the plaintiff, and assessed his damages at one cent; whereupon the defendant, by his council, entered a motion for a new trial, which motion was overruled by the court, and judgment rendered upon the verdict.

CHUMASERO & ELDREDGE, for Plaintiff in Error.

T. L. DICKEY, for Defendant in Error.

BREESE, J. In this case, the defendant below did not, in his plea, justify the taking of this property under an execution, or other process, against Kilduff, or any one else. We have a right, then, to suppose he did not so take it, and all evidence of an execution was properly rejected. It follows then, if there was no execution, the defendant showed no right to disturb the plaintiff in his peaceable possession of the property. Suppose it was Kilduff's property, if the defendant had no process to seize it, the plaintiff had the right to keep the possession of it, until ousted by the true owner.

All the instructions given or refused by the court, were based on this view of the case, and we see no error in the action of the court upon it. If an execution had been pleaded, the case would have been very different.

Had a justification under a *fi. fa.* been set up, some of the instructions of the court, as given for the plaintiff were wrong, and some asked for the defendant, and refused, should have been given. We do not hesitate to say, had such a plea been pleaded, that the weight of evidence is clearly with the defendant that the property was Kilduff's. A sale to Kilduff, under the mortgage, was proved. McCorristen afterwards admitted the property to be Kilduff's, and had it shipped in his name, taking the receipt in his name, and when sworn as a witness in another case, he declared under oath that the property was Kil-

duff's. It would not be just that he should now say that on the sale under the mortgage, no money was paid by Kilduff, and that the whole of that proceeding was a mere sham. He has sworn that it was real. Assuming it to be true, that there was a sale to Kilduff, the only evidence of a resale was the bill of sale executed, as is proved, after the commencement of this suit, and therefore it could not affect the right of an execution creditor of Kilduff. It would amount to no more than a parol declaration of his, after other rights had accrued, which are not permitted to invalidate such rights. To receive the written or oral declarations of a vendor after a sale, against the vendee, would be opening a door to fraudulent combinations between vendors and vendees, which would be of the most dangerous tendency. But here were no rights established under legal process, and no authority shown to disturb the plaintiff in the peaceable enjoyment of this property. If it was Kilduff's, the defendant showed no right to meddle with it or seize it. The judgment must be affirmed.

Judgment affirmed.

Ozias Wheeler, Plaintiff in Error, *v.* Margaret McCorristen, who sues by her next friend, etc., Defendant in Error.

ERROR TO LEE.

An officer who defends in replevin, should set up that he took the property by execution.

This was an action of replevin, commenced in the Lee Circuit Court, by the defendant in error, against Ozias Wheeler, sheriff of Lee county, and was tried at the June term, A. D. 1858, of said court, before Eustace, Judge, and a jury, and a verdict found for defendant in error, and damages assessed at ten dollars. A motion for a new trial was made and overruled, and a bill of exceptions was signed and sealed by the judge, and made part of the record.

The declaration consists of one count, alleging that the plaintiff in error, on the 10th day of April, 1857, in Dixon, in Lee county, in a certain dwelling-house there, took a certain pianoforte of said plaintiff, and unjustly detained the same, etc.

The defendant filed to this declaration four pleas, viz.: 1st, Non cepit; 2nd, Non detinet; 3rd, Property in defendant; 4th, Property in Patrick M. Kilduff.

To the first and second pleas, the plaintiff took issue to the country.

To the third and fourth pleas, the plaintiff replied, property in the plaintiff, and tendered an issue to the country. To which defendant added a similiter.

CHUMASERO & ELDREDGE, for Plaintiff in Error.

T. L. DICKEY, for Defendant in Error.

BREESE, J. There was no execution set up in this case as a justification for taking the property. The jury weighed the evidence as to plaintiff's right to the property, and if they believed the witness, they could find as they did.

There is nothing in the action of the court on the instructions, to justify our interference. The case of *Wheeler* v. *Mc Corristen*, *ante*, decides this case.

The judgment must be affirmed.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, *v.* AARON PALMER, Defendant in Error.

ERROR TO LEE.

Where the body of a bill of exceptions shows that the exceptions were taken at the proper time, although the bill itself was not signed and sealed until some days after the trial, it is sufficient.

THIS was a suit commenced by Palmer against the company, in trover, for one patent self-raking reaper, value $200, and one other reaping machine, value $175.

Plea: general issue.

Trial, and verdict for plaintiff for $150.

On the trial, plaintiff called *Elijah Austin*, who testified that he was acting as agent for the plaintiff in selling reapers, in 1857. Plaintiff shipped reapers to witness at Sublette, sometime before the commencement of this suit. He called on the agent of defendant at Sublette station, at defendant's freight house, for one of Palmer's reaping machines, which machine was consigned and shipped to witness at Sublette, by plaintiff. Witness demanded of the freight agent to know the amount of freight due on said reaper; that the agent claimed a charge for other freight which had been previously shipped on defendant's road, and which was also at the freight house, and refused to

state the amount of charges on this reaper only. Witness tendered to the agent $15, which was more than the regular freight charged by the company for similar shipments made by same parties. Witness, as the agent of plaintiff, demanded the reaper. The reaper was marked "Aaron Palmer, Sublette." It was plaintiff's reaper; the firm sold them at $150. The defendant's agent refused to deliver the reaper unless witness paid the whole bill, which included charges on parts of reapers shipped by same parties, but were not plaintiff's property.

On cross-examination, witness stated that he had no personal knowledge of who owned the reaper, except as plaintiff had told him; never saw plaintiff in possession of it, and was never present when plaintiff purchased or made any bargain for it. The reaper was manufactured by John Palmer & Co., and shipped by John Palmer to Sublette. John Palmer and plaintiff are brothers; witness, when he demanded the reaper, did so upon the written order of John Palmer.

Witness had an arrangement with the plaintiff to sell reapers for him at Sublette, which reapers plaintiff shipped to witness as his agent; that this reaper was sent to him under the same arrangements and in the same manner that other reapers were by the plaintiff, which witness was in the habit of selling.

The court, EUSTACE, Judge, presiding, at the request of plaintiff, instructed the jury as follows:

1st. Under the pleadings in this case, the defendant admits the plaintiff's property and right of possession to the extent required to maintain the action of trover.

2nd. If the jury believe, from the evidence, that the defendant refused to deliver the property to plaintiff, or his agent, and did not claim at the time of the refusal to retain it for the charges thereon, that he is now estopped from setting up that claim as a reason for not delivering the property.

3rd. That a common carrier has no lien upon or right to detain goods or merchandise shipped from one place, and at one time, for charges on other goods shipped at another place and at another time.

4th. That it is not necessary to make a formal tender of money for the charges of transportation, when the party declined stating the amount claimed for charges, and refused to receive the money, provided there is a readiness to pay whatever is proved by the evidence. To the giving of these instructions, the defendant excepted.

The defendant asked the court to instruct the jury as follows:

1st. The statements of the plaintiff, or John Palmer, in this case, not coupled with any acts, are not evidence going to show the plaintiff's title.

2nd. That the plaintiff in this action must prove that he was *prima facie* the owner of the property claimed, or he cannot recover.

3rd. That the fact, if proved, that the property was demanded under an order from John Palmer, by witness, is evidence tending to show that the property was the property of John Palmer.

4th. That the plaintiff must prove, first, that the property was the property of the plaintiff; second, that if the defendants were common carriers, they are entitled to retain the property until their charges are paid, and the plaintiff must prove a tender of the charges.

Which instructions the court refused to give.

Defendant moved for a new trial. The court sustained the motion, upon the terms that the defendant should pay all the costs made by either party. To the refusal of the court to grant a new trial except upon the condition aforesaid, defendant excepted. Costs not being paid, judgment was rendered upon the verdict.

Errors assigned: The court erred in giving each of the instructions asked by plaintiff; in refusing to give the instructions asked by defendant severally; in refusing to grant a new trial unconditionally; and in rendering the judgment in manner and form aforesaid.

B. C. Cook, for Plaintiff in Error.

J. K. Edsall, for Defendant in Error.

Caton, C. J. It is conceded that the court erred in giving one instruction for the defendant in error, and in refusing to give one instruction asked by the plaintiff in error, but the objection is made that no exceptions were taken to these decisions upon the trial. The exceptions noted in the bill of exceptions are stated in the present tense, and the bill of exceptions was actually sealed and filed some days after the trial. This would show that the exceptions were not taken till that time, were it not shown in the body of the bill of exceptions that the exceptions were actually taken on the trial. The bill gives a chronological history of the trial, showing the decisions, and then the exceptions taken, and that after that, the verdict was rendered, and then a motion was made for a new trial, and overruled. That must end all controversy as to when these exceptions were taken. They were taken at the proper time, and the plaintiff in error is entitled to the benefit of them.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Elliott A. Tarbell, Plaintiff in Error, *v.* Amos Page *et al.*, Defendants in Error.

ERROR TO COOK.

A stockholder who becomes a member of a corporation organized under the act to authorize the formation of corporations for manufacturing purposes, etc., approved February 10, 1849, is not liable as such, unless suit has been brought against the corporation within one year from the time within which it became due; and this fact should be averred in the declaration.

The necessity for such an averment is not changed because the company has become insolvent.

The omission to file the certificate of organization with the Secretary of State, does not fix the liability. That matter must be inquired into by the proper process.

The dissolution of a corporation does not change the relation of the stockholders to the creditors of the company.

This was an action commenced by Tarbell, against individuals, members of the Crystal Lake Ice Company; averring that he had been employed by such company as a superintendent, at a salary of twelve hundred dollars per annum, and that after a service of some months, the company refused or failed to furnish him employment as he requested, and he brought his action for a balance of salary due him. The counts in the declaration were framed on the individual liability clause of the general manufacturing law, of 1849.

The cause was submitted to the court, Manniere, Judge, presiding, who found the issues for the defendants.

A motion for a new trial was denied.

T. L. King, for Plaintiff in Error.

W. T. Burgess, for Defendants in Error.

Walker, J. The first error assigned in this case questions the correctness of the decision of the court below, in sustaining the defendants' demurrer to the last three counts of the declaration. The 23rd section of the act of February 10, 1849, (Sess. Laws, p. 92,) provides that no stockholder shall be personally liable for the payment of any debt contracted by any company organized under that act, which is not paid within one year from the time it becomes due, unless suit for its collection be brought against the corporation within one year from the time it becomes due. This section is general in its provisions, and embraces all suits instituted against a stockholder, for the recovery of the indebtedness of the company; and whether the action is founded upon the tenth, the eighteenth, or the twenty-

second sections of the act, a recovery is not authorized, unless a suit shall be brought against the company within one year after the indebtedness has fallen due. And as this is a material fact, and essential to a recovery, it must be averred in the declaration, or it will be obnoxious to a demurrer. These counts contain no such averment, and are therefore insufficient, and the demurrer was properly sustained.

But it is urged that the company had become insolvent, and that a suit could not have been available against the company. The statute has given the remedy, and limited the terms upon which it may be maintained, and a party, to avail himself of its benefits, must be held to a compliance with its provisions. It has prescribed the condition upon which the creditor of the company may hold the shareholders individually liable, and he cannot substitute other or different conditions. If insolvency of the company gives a right to recover of the individual stockholders, the insolvency must be established by the institution of a suit. That mode is alone recognized or authorized by the statute. The insolvency of the company did not dispense with a suit instituted against them, within one year after the indebtedness became due, and the averment should have been made and proved, to authorize a recovery.

It is also urged, that the incorporation was dissolved by a decree of the Cook Circuit Court, and that, by that means, the individual members became liable to pay the debts contracted in the name of the company. If the decree of the court had the effect to dissolve and terminate the existence of the corporation, which we deem unnecessary to now determine, it could not have the effect of converting the stockholders into mere partners. The dissolution of a corporation does not change the relation of the stockholders to the creditors of the company. When it ceases to exist, the property and the assets of the corporation remain liable to discharge its debts, but to accomplish that purpose, a resort must be had to a court of chancery, as the fund is treated as trust property, for the benefit of all the creditors, and if insufficient, subject to a *pro rata* distribution. But we are aware of no decision which holds, on the dissolution of a corporation, that any of its members become liable for its debts beyond the value of its assets he may have in his possession. And we perceive no reason why the shareholders of a company, organized under this act, should be held liable beyond that imposed, by the act of the General Assembly, upon its dissolution. Whether a company has been dissolved or not, does not change the liability of the stockholders beyond that imposed by the statute.

It was urged that the defendants had failed to comply with

the law, by not filing the requisite certificate in the office of the Secretary of State, in compliance with the statute, and that they thereby failed to become incorporated, and were liable as partners. Whilst it may be true that a failure to file this certificate in the Secretary of State's office, may be such a non-compliance with the law as would authorize the People to sustain a writ of *quo warranto* or *scire facias*, and to oust the corporators from the exercise of their franchises, it does not necessarily follow that it is not as to third persons, a corporation. This court has held that the regularity of the organization of an incorporation cannot be questioned in a collateral proceeding. *Price* v. *The Rock Island and Alton Railroad*, 21 Ill. R. 93. This was *prima facie* an incorporated company, and was acting as such, and had at least taken some of the steps to become incorporated, and had entered upon the exercise of the franchises pertaining to such a body, and was treated as such by plaintiff when he made his contract with them, and he should not now be heard to say, that by reason of some informality in its organization, he will hold them liable in any other capacity. He no doubt looked to their liability as a corporation, with the right of ultimately looking to the liability of its individual members, in the mode prescribed by the statute, when he entered into his engagement to render the service, and to avail himself of the right to recover from the stockholders, he must pursue the requirement of the statute.

The plaintiff has not entitled himself to recover under the common counts, if for no other reason, because he has failed to prove that he instituted a suit against the company within one year after his action accrued. Having failed to comply with this prerequisite of the statute, he must fail to recover.

On this record, we perceive no error for which this judgment should be reversed, and it is therefore affirmed.

Judgment affirmed.

Garson Bloom, Plaintiff in Error, *v.* James L. Crane *et al.*, Defendants in Error.

ERROR TO SUPERIOR COURT OF CHICAGO.

The court will not disturb a verdict where there is a conflict of evidence, although it would have been better satisfied with a different verdict.

This was an action of trespass for taking and carrying certain chattels.

There was a trial before the Superior Court, and a jury. The jury found a verdict for the defendants in the court below.

L. H. Hyatt, for Plaintiff in Error.

S. Cameron, for Defendants in Error.

Caton, C. J. After a careful consideration of the evidence in this record, we are inclined to the opinion that we should have been better satisfied with a verdict for the plaintiff; but it is not so destitute of evidence to support it, as to warrant us in reversing the judgment of the court below, which refused to set aside the verdict. Here is a fair conflict of evidence in a case peculiarly appropriate for the determination of a jury. Upon a trial without exception, the jury found their verdict which met the sanction of the court before which the cause was tried, and we do not feel at liberty to disturb that verdict.

The judgment must be affirmed.

Judgment affirmed.

James Boyle *et al.*, Appellants, *v.* Elijah Carter, Appellee.

APPEAL FROM ROCK ISLAND.

Filing the note on which a suit is brought, counting upon it, and adding the common counts, with a general demand, is a compliance with the Practice Act.

The correctness of the description of a note, is a question of fact for the hearing; and is not a ground for a continuance.

A promissory note will authorize a recovery under the money counts.

Where there is *data* before the court, to show an error in the computation of interest, the judgment may be reformed in the Supreme Court; and costs will be awarded accordingly.

On the 7th of August, A. D. 1859, appellee sued out of the office of the clerk of Rock Island Circuit Court his writ of summons in assumpsit against the appellants, returnable to the September term, 1859, of said court; damages, one thousand dollars.

The appellee filed his declaration, containing two counts. The first on a promissory note, as follows, to wit: "For that the defendants, on the 11th day of February, in the year of our Lord one thousand eight hundred and fifty-eight, at Rock Island, to wit, at the county and State aforesaid, by their promissory note of that date, for value received, promised to pay Elijah Carter, or order, six months from the date of said

note, five hundred dollars, which said time hath long since elapsed."

By reason whereof, etc.

Also, the ordinary common counts for goods sold; work done and materials provided; money received by defendants for use of plaintiff; money due on account stated; damages, one thousand dollars.

At the return term, the defendants below filed their motion for a continuance, in writing, specifying causes as shown hereafter.

At September term, 1859, defendants were called, and defaulted, and a judgment for the plaintiff and against the defendants for want of a plea, for $613.20 and costs, was rendered.

Defendants prayed an appeal.

The plaintiff filed with his declaration a promissory note in these words and figures:

$560.00. *Rock Island, Feb.* 11, 1858.

For value received of Elijah Carter, we jointly and severally promise to pay him, or order, in six months from date, five hundred and sixty dollars.

D. BARNES.
JAMES BOYLE.

Also, with his declaration, plaintiff caused to be filed his account in these words and figures, to wit:

DAVID BARNES and JAMES BOYLE,

1859. *To* ELIJAH CARTER, *Dr.*

Aug. 1.

To price of goods sold you.....$1,000
To work and labor done for you, and materials furnished..... 1,000
To money had by you to my use.... 1,000
To money due on account stated..... 1,000

The motion for a continuance assigned these reasons:

1st. That the said plaintiff hath not as yet filed with his declaration any copy of the promissory note counted upon.

2nd. That the account of goods sold and work done, and materials for the same provided, and money due, filed with the declaration, and sought to be recovered upon under the common counts thereof, is so general and indefinite that the defendants cannot therefrom ascertain for what goods, work and material and money, or any of them, the plaintiff seeks to recover.

On the argument of this motion, plaintiff's attorneys produced and showed to the court, together with his declaration, the aforementioned promissory note and account attached to said declaration; it was admitted that the said note and account were the only note and account filed with said declaration; and

this was the only evidence produced or offered upon the hearing of said motion.

The court, DRURY, Judge, overruled the said motion.

When the cause was called for the assessment of the plaintiff's damages by the court, the plaintiff, by his attorneys, produced and offered to read in evidence under first count of declaration, the promissory note already set out, to the reading of which, defendants objected, and the court refused to permit said promissory note to be read in evidence under the said first count of said declaration. Thereupon said plaintiff offered to read in evidence the same promissory note under the common counts of said declaration, to which also the said defendants objected. But the court overruled the objection, and permitted the note to be read in evidence under the common counts of said declaration. This was all the evidence produced.

HAWLEY & WELLS, for Appellants.

BEARDSLEY & SMITH, for Appellee.

BREESE, J. We think, filing the note on which the suit was brought, counting upon it, and adding the common counts, is a compliance with the eighth section of the Practice Act. (Scates' Comp. 253.) It fully notifies the party what he is called upon to defend against.

Whether the note is correctly described or not, is a question of fact to be brought out on the trial, and can have nothing to do with a motion to continue the cause.

It is an established rule of practice and of law, that a promissory note may be given in evidence under the money counts, as in this case, and a recovery had.

The court erred, however, in calculating interest upon the note from its date, when it should have been calculated from its maturity, it being made payable six months after date. For this error the judgment must be reversed. As we have the data before us, on which to make up a correct judgment, we will not remand the cause, but enter judgment here for the amount really due, which we find to be, to this date, six hundred and thirty-one dollars and forty-nine cents. The appellants will recover the costs.

Judgment affirmed.

The City of Chicago, Plaintiff in Error, *v.* John Evans *et al.*, Defendants in Error.

ERROR TO COOK.

The act of twelfth February, 1855, entitled, "An act to enable railroad corporations to enter into operative contracts, and to borrow money," extends to horse railways.

One company using the road of another, must conform to the charter of the road used while doing so. If a lease is passed, it will be governed by the charter of the road leased.

The passage of ordinances by the common council of a city, which do not confer rights or authority, are harmless, until steps are taken to make them available. And it would seem that a common council cannot be enjoined from passing such ordinances.

This bill alleges, that on the tenth day of January, 1860, and long before, Clark street, in the city of Chicago, was a street running north and south, and crossing the Chicago river by a bridge. That a large number of teams, carts, wagons, etc., were passing along that street for business purposes. That the streets near the river, crossing Clark street east and west, were also greatly used by teams, etc., for business purposes. That said Clark street, from Randolph street to the river, about a distance of 975 feet, is a principal thoroughfare and greatly thronged. That the bridge across the Chicago river is a draw bridge. That when the bridge is drawn, passage along Clark street is delayed and impeded, and sometimes blocked up, to the inconvenience of the people and the property holders along the street. That horse railroad companies were chartered and organized, one for the north, one for the south and west divisions of the city of Chicago. That the complainants are interested in that part of Clark street which lies in the south division of the city. That the common council of the city, at the instance of the North Chicago City Railway Company, were about to pass the following ordinance:

"An ordinance authorizing the connection of the tracks of the North Chicago City Railway Company, and the Chicago City Railway Company.

"Section 1. Be it ordained by the Common Council of the city of Chicago, that the North Chicago City Railway Company is hereby authorized to extend its road across the Chicago river at such points and in such ways as that they shall make connections with the tracks of the Chicago City Railway Company, (by arrangement with said company,) at or near Randolph street, thereby making continuous lines of horse railroads between the different divisions of the city—and for this purpose the last named company is authorized to lay such tracks and extensions as will furnish all proper facilities for a convenient

and useful connection of said tracks. The said North Chicago Railway Company, in consideration of the privileges hereby granted, agree to pay annually into the city treasury, the sum of one hundred dollars for each bridge that they may cross, for the purpose of keeping such bridge or bridges in repair; provided, further, that nothing herein contained shall authorize the cars of said companies to stand on South Clark street at any other place than along the east side of the public square as near the curb stone as possible, without interfering with the side-walk.

"SECTION 2. The construction and operation of any road or roads, that may be built under this ordinance, shall be subject to all the rules and limitations and restrictions that are prescribed in the ordinance heretofore passed by the Common Council."

That the said North Chicago City Railway Company has no right or authority to operate a road in the south division, nor has the common council a right to grant such power. That the Chicago City Railway Company has a track along Randolph street, crossing Clark street. That the North Chicago City Railway Company has a track on North Clark street which approaches near the river, which is the only track by which the latter company can connect its track with those of the former company. That the common council intend to pass the aforesaid ordinance, to authorize the north side company to cross the bridge and run along South Clark street, passing Randolph street, and that tracks will be laid, under color of the ordinance. That complainants own property on South Clark street, where said road will run, to the value of $400,000, and are, by themselves or tenants, in possession. That only the north side company applied for the ordinance, and that the south side company has no interest in the passage of the ordinance, and that it is to authorize the operation of the north side company contrary to its charter. That the extension of the tracks of the north side company by such permission will not benefit the public, because the cars will be detained by the frequent opening of the bridge, and that if authorized to lay the track on South Clark street and operate it, the obstruction will constitute a public nuisance, and complainants will be irreparably and permanently injured, in the use and enjoyment of their property on the street, for which, damages which might be recovered at law would afford no adequate remedy, and that complainants and their tenants by being deprived of the use of the street in conducting their necessary affairs between Randolph street and the river, by the additional hindrance of the passage of teams, etc., will be greatly damaged, and the street will become impassable.

The bill then prays for an answer, and for an injunction to restrain the common council from passing any ordinance or giving any power whereby the North Chicago City Railway Company should or might, directly or indirectly, or by arrangement with any other company, corporation or person, construct or operate a railway across Clark street bridge, or on Clark street between Randolph street and the river, and from passing the ordinance hereinbefore copied, or any other ordinance with similar powers and provisions.

The order for an injunction was granted, and the writ of injunction accordingly issued.

On the third of February, 1859, the City appeared, and moved to dissolve the injunction:

1. Because there is no equity in said bill.
2. Because the injunction improperly issued, there being no sufficient reason assigned in said bill for an injunction.
3. Because the complainants are attempting illegally to interfere with said defendant, in a matter peculiarly within the authority and discretion of the common council.
4. Because the said bill shows no cause whatever for an injunction; it neither shows fraud, nor that its common council was attempting to do anything contrary to law, or what it had not a right to do.
5. Because said injunction illegally issued.

On the 27th of February, 1859, the motion to dissolve the injunction and dismiss the bill, was overruled. The City of Chicago then filed a demurrer to the bill, which was overruled, and the injunction was made perpetual, and judgment for costs was rendered against the City.

The defendant below brings the case to this court by writ of error, and assigns for error—

1. That the court below erred in overruling said plaintiff's motion to dissolve said injunction and dismiss said defendants' bill.
2. That the court below erred in overruling said plaintiff's demurrer to the bill of complaint of the said John Evans and others.
3. That the court below erred in making said injunction perpetual.
4. That the judgment and decree in the court below should have been for the plaintiff in error, and not for the defendants in error.

The defendants in error have appeared and joined in error.

C. Beckwith, and Hosmer & Peck, for Plaintiff in Error.

Van Buren & Geary, for Defendants in Error.

WALKER, J. This record presents the question, whether under the act of 12th February, 1855, (Special Laws, 304,) horse railways in this State may unite their roads, and make running arrangements with each other. That act, in terms, applies to all railroads organized or incorporated under, or which may be incorporated or organized under, the authority of the laws of this State, and it provides that they shall have the power to make such contracts and arrangements with each other for leasing or running their roads, or any part thereof, also the right of connecting with each other on such terms as shall be mutually agreed upon by the companies interested. This language is manifestly sufficiently comprehensive to embrace horse railways as well as railroads whose cars are propelled by steam or other power, as well roads authorized to transport passengers only, as roads authorized to transport passengers and freight by other power. The language of the enactment embraces all roads then organized, as well as those which might afterwards become so, and the act makes no distinction, or reservation, as to the character of the railroad. The members of the General Assembly were fully aware that these various roads existed, and if any roads, answering either description, were not designed to be embraced, they would, it appears to us, have limited the operation of the act so as to have excluded them. Horse city railways unquestionably fall within the description of the class of subjects of which they were legislating. They are, in every sense of the term, railroads, they are incorporated under laws of the State, and are embraced within the language of the statute, and we have no doubt within its spirit.

Whilst a road chartered for the transportation of persons only, by the use of horse power, could not connect with a road authorized to employ steam power, so as to convert a horse railroad into one using steam, or a road only authorized to transport persons, into a road to transport passengers and freight, yet roads employing the same propelling power, and created for the same purposes, may so connect, under this act, as to use each other's roads, with their several cars, etc., or may lease from each other all or any portion of their several tracks, and use them for the purposes authorized by their charters. But when two roads connect with each other under this act, they acquire no new or greater powers and privileges than are conferred by their several charters, and each of such roads, while using the road of the other company, must, in all things, conform to the provisions of the charter of the company whose road is being thus used. And when one company leases its road to another, the lessee must, in operating it, be governed by the charter of the lessor. The lessee cannot use its franchise

and charter privileges on the road of another company, but for the time being must be governed by the charter of the road they are operating. Any other construction would lead to inextricable confusion, and the legislature could never have intended to permit each company, when running, or using their rolling stock upon another road, to carry with them their own charter and privileges wherever their cars and employees might go. We have no doubt that these two horse railways, created for the same purpose, and operated by the same description of propelling power, have the power to connect with each other, make running arrangements, or lease their tracks to each other, according to this act of the General Assembly.

We are unable to perceive any injury that could result to any person by passing the proposed ordinance of the common council. Such an ordinance could confer upon the companies no power, and it may be the act is useless; but, for aught that appears, the common council and the companies differed as to their charter privileges and power to so extend their roads as to connect with each other, without the assent of the common council, and if so, the dispute would be ended by the adoption of the ordinance, and its passage may have been desired for no other purpose. These companies must look to their charters for power, and if it is not thus conferred, it cannot be supplied by any action of the common council, but alone by the General Assembly. It may have been a question whether these companies had the power to extend their roads so as to connect, and the only object in procuring the adoption of the ordinance to obtain the consent of the city preparatory to an application for authority to thus unite their roads, without the design of proceeding to connect them, previous to procuring legislative authority for that purpose. And if so, no possible injury would result by the passage of the ordinance.

If the charter of these companies authorizes them to extend their roads on the streets in which they are located, until thereby their roads were connected, they may continue them within their several territorial limits until they intersect on the boundary, without any assent on the part of the city. If their charters confer no such power, the common council are unable to confer it. They could not extend their roads beyond the line of the territorial district to which their charters limit them. And if they were to attempt to continue their roads beyond, or to construct a road outside of those limits, under the city ordinance alone, they may undoubtedly be prevented by an appropriate remedy. But until they attempt to act outside of the authority conferred by the General Assembly, there can be no reason why the courts should interpose. The procuring the

adoption of this ordinance is not such an illegal and unwarranted act as can produce injury, and until they attempt to act under it as their only warrant, no reason is perceived why they should be stayed in their action. The passage of ordinances which confer no rights or authority, are harmless, until steps are taken to make them available.

For these reasons the decree of the court below is reversed, and the bill dismissed.

Decree reversed.

William B. Ogden *et al.*, Appellants, *v.* Carlos Haven *et al.*, Appellees.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

Facts and circumstances, which are sufficient to put a prudent man, who was about to purchase land, on inquiry as to the title, will be notice against a purchaser at sheriff's sale.

The defendants in error filed their bill against the plaintiffs in error, to redeem the undivided half of the south half of section three and of section ten, town 39 north, range 12 east of the third principal meridian, from a mortgage executed by Jeremiah Tooley, in 1838, to Simon Z. Haven, for $290, and which was assigned by said Haven to said Ogden, on the 22nd of September, 1841.

The plaintiffs in error deny the right of the defendants in error to make such redemption on two grounds:

1st. Because the plaintiff, Ogden, as they allege, has acquired an absolute title to the land under certain proceedings, in an attachment suit, commenced by Ogden in the name of Butler, on the 11th of Oct., 1839, against Simon Z. Haven; and

2nd. Because said Ogden bought said land at tax sale for the taxes of 1841, and procured tax deeds for the same, which they allege constituted claim and color of title made in good faith, under which they say Ogden paid all the taxes assessed for more than seven years.

The writ of attachment was issued Oct. 18, 1839, and was levied on the land, Oct. 30, 1839. It does not appear that the sheriff filed any certificate of his levy in the recorder's office. Judgment was entered in the attachment suit, May 7, 1841, and execution issued June 28, 1841, under which the sheriff sold the land to Henry Smith, who purchased for Ogden, July 22, 1841, and the sheriff, in pursuance of said sale, conveyed

the land, Feb. 17, 1845, to Ogden, and the deed was recorded June 17, 1845. Haven conveyed the land to said Tooley, Dec. 16, 1836.

A decree was made on the 3rd day of April, 1858, which is as follows:

That the complainants be permitted to redeem the premises in controversy, from the mortgage of Jeremiah Tooley to Simon Z. Haven, and assigned by him to said Ogden, and that it be referred to a master in chancery of Cook county, to take an account of what is due to defendants on said mortgage for principal and interest, and for taxes paid on said premises since the assignment of the said mortgage, by Simon Z. Haven to William B. Ogden, and interest on the same from the times of payment thereof till the time such an account shall be taken by said master in chancery; and what shall be certified by said master to be due to said defendants, for principal and interest and taxes and interest, it is ordered that the complainants pay to the defendant, Ogden, within six months after the said master shall have made his report, and the same shall have been confirmed; and that upon such payment, the defendants do convey and surrender the said mortgaged premises unto the complainants, or unto such other person as they shall direct, free and clear of all incumbrances done by them, or any person or persons claiming by, through or under them. But, in default of such payment, ordered, that complainants stand dismissed from court with costs.

The report of the master in chancery, dated June 1, 1859, was filed June 15, 1859.

By this report it appears that the amount due from complainants to defendants, upon said mortgage, principal and interest, for taxes paid and interest thereon, is $1,328.55, which sum is made up as follows:

Principal sum of mortgage debt	$290 00
Interest thereon for 20 years and 4 months, at 7 per cent	412.76
Taxes paid on the land in question, from 1842 to 1857 inclusive, with interest on the same to Feb. 1, 1859	613.55
Interest on last item, from Feb. 1 to June 1, 1859	12.24
	$1,328.55

The master was of opinion that an order should be entered, directing the payment, by the complainants to the defendants, of the above sum of $1,328.55, with interest from June 1, 1859, until paid in full, for the redemption of said mortgaged premises, as against the mortgage debt and interest thereon, and all taxes and disbursements on account of said premises, and interest thereon up to said 1st day of June, 1859.

The final decree, confirming in all things the report of the master, was made on the 23rd day of July, 1859.

From this decree the defendants prayed an appeal, which was granted.

CATON, C. J. The only question in this case which it will be necessary to investigate, is that of notice. Had the 25th section of the 57th chapter, R. S., been in force at the time of the levy of this attachment, the want of leaving a copy of the levy with the recorder till after Ogden was confessedly notified of the conveyance from Haven to Tooley, would have given that conveyance a priority over the attachment; but that section was not incorporated into our attachment law till 1841, and can have no influence upon this case.

But we think Ogden is chargeable with actual notice of this conveyance by Tooley at the time he sued out the attachment. A little over two years before that time, and while Haven was owing this very debt, Tooley called on Ogden at his office in Chicago, and informed him that he had purchased this land of Haven, on Haven's representation alone, and informed him of the price he had paid for it, and inquired of the quality and location of the land, and asked his opinion of the bargain. Ogden said he was well acquainted with the land, and thought the purchase a safe one. When about to commence the attachment suit, Ogden examined the records for the purpose of seeing what lands had been conveyed to Haven and what he had conveyed away, with the purpose of attaching all, the title of which was apparently in him. At that time the mortgage from Tooley to Haven of these same lands was on record. We think the presumption of fact as well as of law, is that Ogden, at that time, saw the record of that mortgage. Finding the title in fee in Haven, and subsequently a mortgage to him from a third person, was well calculated to excite suspicion that Haven must have conveyed the land to Tooley by some conveyance not recorded. Would any prudent man, about to purchase this land of Haven, finding this mortgage to him, refrain from asking an explanation of this circumstance? Were not these facts sufficient to awaken inquiry in the mind of a reasonably cautious man about to purchase, and who would lose the purchase money if it should turn out that Haven had sold the land by some unrecorded deed? for this is the measure of obligation and good faith resting upon Ogden to make inquiries as to any such conveyance. But if this circumstance of itself was not sufficient to put Ogden on inquiry as to any unrecorded conveyance, it was sufficient to awaken suspicion and to bring to his remembrance the fact that this same Tooley, the mortgagor, had

but little over two years before told him of his purchase of Haven of these same lands, and consulted him in regard to that purchase. We agree that the bare fact that he had at some former time been told of this purchase by Tooley, would not be sufficient to establish the notice, unless all the circumstances would lead to the reasonable conclusion that the fact was within his remembrance at the time of the attachment. But such we think to be the reasonable and necessary inference in this case. We are of opinion that Mr. Ogden is chargeable with both actual and constructive notice.

We do not think it necessary to decide the other question arising in this case, as the conclusions already arrived at must affirm the decree.

Decree affirmed.

Robert C. Thomson, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO STEPHENSON.

A juror is qualified, although he has conversed with a witness, and believed what he heard, if he had not formed an opinion as to the guilt or innocence of the accused.

An indictment for obtaining money or property, under false pretenses, should allege who was the owner of the property.

This was an indictment for obtaining property under false pretenses. The bill was found in the Stephenson Circuit Court, and is in the words and figures following, to wit:

The grand jurors, chosen, selected and sworn in and for the said county of Stephenson, in the name and by the authority of the People of the State of Illinois, upon their oaths, present: That one Robert C. Thomson, late of said county, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and fifty-nine, in the said county of Stephenson, knowingly and designedly devising and intending by unlawful ways and means to obtain and get into his hands and possession the choses in action, money, goods, wares and effects, and other valuable things of the good people of this State, and with in tent to cheat and defraud one Levi Lucas, late of said county, the said Levi Lucas then and there being of unsound mind and memory, did then and there unlawfully, knowingly and designedly, falsely pretend and represent to the said Levi Lucas, he, the said Robert C. Thomson, then and there knowing that the

said Levi Lucas was of unsound mind and memory, that he, the said Robert C. Thomson, was then and there a person of knowledge, ability and skill in the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice; and that he, the said Robert C. Thomson, was then and there well able and qualified to teach and impart the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice, to the said Levi Lucas; and that he, the said Levi Lucas, was then and there able and competent to learn and acquire the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice; and that he, the said Robert C. Thomson, was then and there engaged in the practice of surgery, and eye and ear doctoring business, and eclectic medical practice, and was then and there doing therein a large and remunerative business, the avails of which business then and there amounted to from twenty to thirty dollars per day; and that he, the said Robert C. Thomson, then and there intended to take, and would take the said Levi Lucas into copartnership with him, the said Robert C. Thomson, in the art and practice of surgery, and eye and ear doctoring business, and eclectic medical practice; and that he, the said Robert C. Thomson, then and there intended to teach, and would teach the said Levi Lucas the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice. And the said Levi Lucas then and there believing the said false pretenses and representations, so made as aforesaid by the said Robert C. Thomson, and being of unsound mind and memory, and he, the said Robert C. Thomson, then and there well knowing that the said Levi Lucas was then and there of unsound mind and memory, and he, the said Levi Lucas, then and there relying upon said false pretenses and representations, and being deceived thereby, was then and there induced, by reason of and by means of the said false pretenses and representations, so made as aforesaid, to deliver, and did then and there deliver to the said Robert C. Thomson, a certain deed from one Jacob Mohr to the said Robert C. Thomson, and the lands therein described, of the value of eighteen hundred dollars, said deed being of the following described real estate, to wit: being part of lot number four, in block number forty-nine, in the original town (now city) of Freeport, in said county, according to a plat of said city now on record in the office of the clerk of the Circuit Court of said county; and the said land being more particularly described in a certain deed made by one Jacob Mohr to the said Robert C. Thomson, and bearing date the nineteenth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, and recorded in the office of

the clerk of the Circuit Court of said county of Stephenson, in book twenty-seven of deeds, on page three hundred and eighteen. And also, by reason of and by means of said false pretenses and representations, and then and there relying upon the said false pretenses and representations, the said Levi Lucas did then and there deliver to one Jacob Mohr, at the request of the said Robert C. Thomson, and for his sole use and benefit, as payment for the land described in the said deed above mentioned, two promissory notes, made by the said Levi Lucas to the said Jacob Mohr; one of said notes of the value of eight hundred dollars, being for the sum of eight hundred dollars, payable in one year from the date thereof, and ten per cent. interest; and the other of said notes of the value of one thousand dollars, being for the sum of one thousand dollars, payable to the order of the said Jacob Mohr, two years after the date thereof, and ten per cent. interest; and both of said notes bearing date the nineteenth day of January, in the year of our Lord one thousand eight hundred and fifty-nine. And the said Robert C. Thomson did then and there, on the said twenty-second day of January, in the year of our Lord one thousand eight hundred and fifty-nine, at the said county of Stephenson, well knowing that the said pretenses and representations were false, unlawfully, knowingly and designedly, by means of said false pretenses and representations, obtain the said deed, and the said notes of the said Levi Lucas, and with intent then and there to cheat and defraud the said Levi Lucas of the same. Whereas, in truth and in fact, the said Robert C. Thomson was not then and there a person of knowledge, ability and skill in the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice; and whereas, in truth and in fact, the said Robert C. Thomson was not then and there well able and qualified to teach and impart the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice, to the said Levi Lucas; and whereas, in truth and in fact, the said Levi Lucas was not then and there able and competent to learn and acquire the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice; and whereas, in truth and in fact, the said Robert C. Thomson was not then and there engaged in the practice of surgery, and eye and ear doctoring business, and eclectic medical practice, and was not then and there doing therein a large and remunerative business, the avails of which business then and there amounted to from twenty to thirty dollars per day; and whereas, in truth and in fact, the said Robert C. Thomson did not then and there intend to take, and would not take the said Levi Lucas into copartnership with him, the said Robert C. Thomson, in the art

and practice of surgery, and eye and ear doctoring business, and eclectic medical practice; and whereas, in truth and in fact, the said Robert C. Thomson did not then and there intend to teach, and would not teach the said Levi Lucas the art and science of surgery, and eye and ear doctoring business, and eclectic medical science and practice. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Robert C. Thomson, by means of the false pretenses and representations aforesaid, on the said twenty-second day of January, in the year of our Lord one thousand eight hundred and fifty-nine, in the said county, unlawfully, knowingly, and designedly, by means of said false representations and pretenses, did obtain from the said Levi Lucas, the said deed, lands and notes, in the manner and form aforesaid, with intent then and there to cheat and defraud the said Levi Lucas of the same; against the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

There was a second count in the indictment not materially variant from the foregoing.

Motion to quash the indictment was overruled.

And afterward, at December term, 1859, of said court, SHELDON, Judge, presiding, said cause came on for trial, and one Hiram C. Best was called as a juror in said cause, and being examined under oath, touching his qualifications as a juror, said: "I conversed with a witness in this case," and "formed an opinion as far as I heard." "I believed what I heard." "I have not formed an opinion as to the guilt or innocence of the prisoner." "I formed an opinion as far as I heard." Whereupon said juror was challenged by the defendant for cause, but the court decided that the juror was competent, and refused to allow the defendant's challenge, to which ruling of the court, the defendant excepted.

The jury found the defendant guilty, and thereupon the defendant moved the court for a new trial, and in arrest of judgment, for the following reasons, to wit:

1. Because the verdict is contrary to the evidence.
2. Because the verdict fails to do substantial justice between the parties.
3. Because there is a variance between the proof offered in evidence and the charges in the indictment.
4. Because there was no sufficient evidence that Levi Lucas was of unsound mind at the time of making the contract.
5. The court erred in admitting proof of the unsoundness of mind of Levi Lucas seventeen years previous to the time of trial.
6. The court erred in admitting any testimony of the unsound-

ness of mind of Levi Lucas at any other time than at the time of making the contract and agreements with defendant.

7. The court erred in admitting the record of the deed from Jacob Mohr to defendant, without any proof that the deed was in defendant's possession, and without sufficient and legal notice having been served on defendant to produce the deed.

8. Because the court allowed plaintiff to introduce parol testimony to vary and contradict the written contract between Lucas, the prosecuting witness, and the defendant.

9. The court erred in not confining the plaintiffs in their proofs to the written contract between prosecuting witness, Levi Lucas, and defendant, or to conversations between Lucas and defendant, subsequent to the date of said contract in relation to the same.

10. The court erred in permitting the witness, Cordelia Lucas, wife of Levi Lucas, the prosecuting witness, to testify on the trial of this cause, and her name does not appear on the back of the indictment.

11. Because the proof shows a deed of Jacob Mohr to defendant, and not from Levi Lucas, or that Levi Lucas was the owner of the property.

12. Because the evidence shows that there was no criminal intent in the contract between prosecuting witness and defendant.

13. The court erred in not allowing defendant's challenge of juror, Hiram C. Best, for cause.

And in arrest of judgment; the indictment should have been quashed, and judgment should be arrested, because—

1. Indictment does not aver and charge that Thomson knew that prosecuting witness was of unsound mind, and incapable and disqualified to learn the art and science of surgery, and eclectic medicine, and eye and ear doctoring, at the time of making the contract.

2. Because the indictment does not show fraudulent intent on the part of the defendant, and it does not appear from the indictment that the transaction was any fraud upon Levi Lucas.

3. The indictment shows upon its face a contract between the parties, on which a complete remedy can be had in a civil suit.

4. The indictment does not show whose property the notes, deed and real estate were, and does not show them to be the property of Levi Lucas.

5. The indictment shows a promise on the part of defendant to do an act in future, and no false pretense will be presumed until the time for the performance of the act has expired, and an indictment will not, in such case, be sustained.

6. The indictment shows that the prosecuting witness, Levi Lucas, has an adequate remedy in a civil action, if any fraud was practiced, and the indictment for false pretenses cannot be sustained.

7. The indictment does not charge that defendant knew that Lucas was incompetent to learn the art and science of surgery, and eye and ear doctoring, and eclectic medical science and practice.

8. The indictment avers that the choses in action, money, goods, wares and effects, and other valuable things, were the property of the People of the State of Illinois, and does not aver that they were the property of Levi Lucas at the time of obtaining the same.

9. And because the indictment is in other respects informal, uncertain, insufficient and indefinite.

Which motions were overruled by the court.

And the court thereupon rendered judgment, and imposed a fine of five hundred dollars upon said defendant, and sentenced him to six months imprisonment, and to pay the costs, and to stand committed until said fine and costs were paid.

The following errors are assigned on the record:

1. The court erred in overruling defendant's motion to quash the indictment.
2. In refusing to sustain the defendant's challenge for cause, of the juror, Hiram C. Best.
3. In permitting illegal testimony to be given to the jury.
4. In excluding from the jury legal testimony offered by the defendant.
5. In overruling defendant's motion for a new trial.
6. In overruling defendant's motion for arrest of judgment.

Turner & Ingalls, for Plaintiff in Error.

A. D. Meacham, for The People.

Breese, J. As the record in this case does not purport to contain all the evidence given on the trial, we are left to decide alone upon the sufficiency of the indictment.

Before considering the indictment, a preliminary objection, growing out of the rejection of Hiram C. Best, as a juror, will be disposed of. When examined touching his qualifications, he said he had conversed with a witness in the case, and formed an opinion as far as he heard—that he believed what he heard, but that he had not formed an opinion as to the guilt or innocence of the prisoner—that he had formed an opinion as far as he had heard.

It is not disclosed who the witness was, or on what branch of the case he talked. The juror might have formed an opinion of that matter of which he spoke with the witness, but did not, as he declares, form any opinion of the guilt or innocence of the prisoner. He was clearly a competent juror.

The indictment contains two counts substantially alike, in both of which alleging that the defendant, "intending by unlawful means to get into his possession the choses in action, money, goods, wares and effects, and other valuable things of the people of this State," etc., without any allegation it was the property of the person sought to be defrauded, which we hold essential in cases of this character. That person must be alleged to be the owner of the property out of which he was defrauded.

In the case of *Sill* v. *The Queen*, 16 Eng. L. & E. 375, the indictment alleged that R. Sill, late of, etc., unlawfully, knowingly and designedly, did falsely pretend to one H. Broome, that, (here setting out the pretenses,) by means of which said false pretenses, the said R. Sill did then and there unlawfully obtain from the said H. Broome, two bills of exchange of the value and for the payment of £120, respectively, and one bill of exchange of the value and for the payment of £240, with intent then and there to cheat and defraud him, the said Broome, of the same; whereas, in truth and in fact, etc., (negativing the truth of the pretenses alleged.)

On conviction, the judgment was reversed in Queen's Bench, on the ground of the omission to state the ownership of the property. This is necessary to exclude the fact of the defendant having obtained his own goods or money, or of their being derelict, in which case there would be no offense in getting possession of them.

Nor does the indictment allege in either count, that defendant knew the prosecuting witness was incapable of learning the art he contracted to teach him.

The evidence, as far as it appears on the record, tends rather to show a breach of contract than a criminal act—a private rather than a public wrong; but as all the evidence is not before us, we cannot say what is behind.

We think the indictment so defective that no judgment can be pronounced on the verdict, and we accordingly reverse the judgment.

Judgment reversed.

Alfred Worden *et al.*, Plaintiffs in Error, *v.* Archibald Williams, Defendant in Error.

ERROR TO WARREN.

Where A. received a title to land deduced from a deed executed in 1818, but not recorded till 1855, such title will prevail against a subsequent deed previously recorded, executed with notice to the grantee, through his agent, of the existence of the unrecorded prior deed.

Actual notice is not in all cases equivalent to recording.

Constructive notice, arising from possession under an equitable title from a fraudulent grantee—by one who occupies after the execution and before the recording of a deed—will not defeat a *bona fide* deed.

A description of land, if defective, is good if it can be cured by reference to the government records, or by the patent.

The defendant in error filed his bill in Warren Circuit Court, against Jane Searles, the widow, and Henry M. Searles, and others, the heirs of Robert Searles, deceased, Samuel Tompkins, the unknown heirs of Thomas Tompkins, the unknown heirs of William Odell, Philip Van Courtland, John H. Johnson, Stephen Bronson, Ezekiel Minor, P. D. Wilson, Darlington J. Stewart, David Thomas, James Lombard, George F. Harding, Hezekiah M. Wead, C. A. Worden, Albert Worden, John J. Worden, and Curtis Worden.

The bill states, that on the 9th of March, 1818, the United States granted to Robert Searles, his heirs and assigns, as a military bounty, the S. W. ¼ 33, 8 N., 2 W., fourth principal meridian; that on the 29th of June, 1818, Robert Searles and Jane, his wife, by deed, conveyed the said tract of land in fee to Thomas Tompkins and Samuel Tompkins, which deed was recorded in Warren county, 23rd June, 1855.

This deed describes the premises conveyed as "all that quarter section thirty-three, of township eight north, in range two west, in the tract by the acts of Congress for military bounties in the territory of Illinois, containing one hundred and sixty acres, it being land given to the said Robert Searles, for his services in the late war, by the United States."

The bill further states, that on the 1st April, 1820, the said Thomas and Samuel Tompkins, by deed, conveyed the said tract to William Odell in fee, by the description, "all the south-west quarter of section thirty-three, of township eight north, in range two west, in the Illinois Territory, containing one hundred and sixty acres," omitting, by mistake or accident, that it was of the fourth principal meridian, which deed was recorded October 20th, 1855; that on the 10th July, 1822, Odell and wife conveyed, by deed, with the description last aforesaid, to Gen. Philip Van Courtland in fee, which was recorded October 20, 1855;

that on 7th June, 1823, Van Courtland, by deed, conveyed the land in fee to John H. Johnson, by the said description, which was recorded October 20, 1855; that on the 2nd September, 1826, Johnson, by deed, conveyed to Stephen Bronson in fee, by the same description, which was recorded October 20th, 1855; that on 16th December, 1826, Bronson, by deed, conveyed to Ezekiel Minor in fee, by the same description; that on the 23rd April, 1838, Minor and wife, by deed, conveyed the land to P. D. Wilson.

The bill further alleges, that on the 18th September, 1838, the said Wilson intended to convey the land to Darlington J. Stewart, but by mistake in the deed described it as "west quarter of section thirty-three, of township eight north, in range two west, in Warren county, State of Illinois;" that on 5th June, 1854, Stewart and wife, by deed, conveyed the land in fee to David Thomas; that on 11th September, 1856, Thomas and wife conveyed the land in fee to defendant in error.

The bill further states, that each of the grantors in said deeds intended to convey the land first described in the bill, and at the time delivered the patent and proper deeds as muniments of title; that the deeds were executed in New York and Ohio, and the imperfect descriptions in the deeds resulted from a want of local information, as to the correct method of describing land in this State.

The bill states the death of Robert Searles, intestate, in 1837, leaving widow and children; that after the conveyance by Searles to Thomas and Samuel Tompkins, he never, in his lifetime, or his heirs since his death, claimed any interest in the land; that James Lombard obtained, on the 1st and 14th days of September, 1854, with full knowledge that Searles in his lifetime conveyed the land to the Tompkins, in his lifetime, two quit-claim deeds from the widow and heirs of Searles, for a nominal consideration, conveying the land to him, Lombard, and caused them to be recorded on the 12th day of October, 1854. Afterwards, and after the said deed from Searles to the Tompkins had been recorded, "to wit, on the 20th October, 1855, James Lombard conveyed the land to George F. Harding and H. M. Wead, who, at and before the time of said conveyance, or at and before the payment of the purchase money therefor, had actual notice of the said conveyance by the said Robert Searles, or if they had not such actual notice of said conveyance, yet they had by the recording thereof constructive notice."

The bill further states, that Harding and Wead conveyed the land to C. and A. Worden, 2nd December, 1855; that they conveyed the west half of the south half, to Albert Worden, 2nd February, 1856, who, on the same day, conveyed portions to

John J. Worden and Curtis Worden; that each of the said Wordens, at the time of their respective purchases, had actual notice of the conveyance from Searles to the Tompkins, or if not, they had constructive notice by the recording of the deed.

The bill states the death of the Tompkins and Odell, heirs unknown, and charges that the imperfect descriptions and the deeds to Lombard are clouds on the title.

In order that the omissions, imperfections, and mistakes in the deeds, and that the deeds to Lombard may be set aside, the defendant in error prays that all the persons aforesaid may be made parties and required to answer without oath, and that the deeds be reformed, and the deeds to Lombard be annulled, and also for general relief.

The defendant Wead answered May 26, 1858, and admits the land was granted to Robert Searles 9th March, 1818, but denies that Robert Searles deeded to the Tompkins, that it was proven or recorded as stated in the bill; denies all statements as to the conveyances from the Tompkins down to the defendant in error; avers that he has no knowledge as to the death of Searles, his heirs, or how Lombard obtained the title, or whether or not he purchased with notice.

The answer admits that James Lombard did purchase the land and obtain deeds from the widow and children of Searles, which were recorded 12th September, 1854.

The answer avers, that on the 18th day of October, 1854, the respondent and the defendant Harding, having examined the records and finding no conveyance from Robert Searles, and having no knowledge, or information of any, but believing the real title to be in James Lombard and Levi F. Stevens, and they the actual *bona fide* owners, did on that day purchase the land of them for $600, and received from them an agreement of that date to convey the same on the payment of the purchase money; that the respondent and Harding executed promissory notes for the purchase money, and paid $300 within fifteen days after the purchase, and the balance on the 18th October, 1855.

The answer denies all notice, actual or constructive, of the deed from Searles to the Tompkins, until long after the conveyance by Lombard to the respondent and Harding, and also by them to the Wordens.

The answer states, the deed from Lombard was executed October 18, 1855, and recorded October 20, 1855. That on the 31st October, 1854, the respondent and Harding sold the land to Curtis and Albert Worden for $640, payable, $305, January 1st, 1855, and the balance 1st January, 1856, and on the day of sale executed to them an agreement to convey on the payment of the purchase money, with covenants of warranty against all

patent titles; that the Wordens paid the purchase money about the times agreed; denies all notice to the Wordens of the deed to the Tompkins.

The answer states, that immediately after the purchase by the Wordens, they took actual possession, and occupied the same by making visible, open and exclusive improvements, and were in such possession at the time the deed from Searles to the Tompkins was recorded.

The contract between Wead and Harding and the Wordens, with the indorsements, is made a part of the answer, from which it appears that the first installment was paid April 6, 1855, and the second, Dec. 31, 1855, and the deed delivered on that day.

The defendants, George F. Harding, Curtis, Albert and John J. Worden, answer, and adopt the answer of Wead.

To which answers there was a replication.

The master reported as proof that he had examined the original patent, and deeds and certificates indorsed thereon, and the deeds were duly executed and recorded as stated in the bill; that the deed from P. D. Wilson to D. J. Stewart, conveying the west quarter of section thirty-three, of township eight north, in range two west, in Warren county, etc., was intended to convey the south-west quarter of said section, and that the imperfect description in said deed was the mistake of the draftsman thereof; that before and at the time of the execution of the deeds by the heirs of Searles to Lombard, the agent of Lombard, who procured the deeds, had full knowledge of the execution of the deeds from Robert Searles to Samuel Tompkins and Thomas Tompkins, and that said deed was recorded in the proper office, June 23, 1855; and that the deed from James Lombard to defendants Wead and Harding, was executed October 18, 1855; also, that the land was worth from $2,500 to $3,000, without improvements.

In April, 1859, the Circuit Court, THOMPSON, Judge, presiding, rendered a decree upon a hearing, upon the bill and exhibits, the answers, replication, master's report, and the depositions and proofs, that the deeds to James Lombard be set aside; that for the purpose of correcting the error in the description in the deed from P. D. Wilson to Darlington J. Stewart, the said Wilson convey the said tract to the complainant in fee simple, by quit-claim deed, within one month, and in default, the master convey all the right, title and interest of the said Wilson; that a complete record be made, at cost of complainant.

The cause still remaining on the docket, November 16, 1859, an agreement was entered into between the parties, as follows, to wit:

Whereas, there appears to be no decree *pro confesso* and reference now among the papers on file, and no report of the evidence on the part of the defendants; now for the purpose of supplying these omissions:

It is agreed that the complainant may take and file a decree *pro confesso*, against all the defendants sued, and who have not answered, and of reference to the master in chancery, to take and report the evidence, with his conclusions thereon, now as of and for the September term, A. D. 1858, and that no exceptions shall be taken, or error assigned, because of such taking and filing the decree *nunc pro tunc*.

And it is further agreed, that the defendants, answering upon the trial of the cause at the final hearing, proved the following facts, to wit:

1st. That the deeds from the widow and heirs of Robert Searles to James Lombard, were recorded in September, 1854, in Warren county.

2nd. That the defendants, Wead and Harding, purchased the land described in the bill, of James Lombard, on the 18th day of October, 1854, for six hundred dollars, and received from the said Lombard a written agreement to convey the land by quit-claim deed, without covenants, upon the payment of the purchase money, and Wead and Harding executed and delivered their promissory notes for $300 each, one payable within fifteen days after 18th October, 1854, and $300 on 18th October, 1855, to the said James Lombard.

3rd. That the said Wead and Harding had no actual knowledge of a conveyance by Robert Searles and wife to Thomas and Samuel Tompkins, until after 1st January, 1856, and no other notice before that time, except such notice as the law makes the filing of a deed for record.

4th. That James Lombard conveyed the land by quit-claim deed to Wead and Harding on 18th October, 1855, by deed of that date, in pursuance of the prior contract between them, and that said deed was recorded December 31, 1855.

5th. That on the 31st October, 1854, Wead and Harding sold the land to Curtis and Albert Worden, for six hundred and forty dollars, and executed a written contract of the parties, and which is attached to the answer of defendant Wead; that the payment of $305 thereon was made before 23rd June, 1855, and the remainder after that time, and before the 26th December, 1855.

6th. That Wead and Harding conveyed the land, in pursuance of their contract, to Curtis and Albert Worden, 26th December, A. D. 1855, which was recorded 31st December, 1855.

7th. That the said Wordens had actual possession of said land in the fall of 1854, when they purchased of Wead and Harding, under tax title, and retained it until after the commencement of this suit, when they sold and conveyed the land, and delivered possession thereof, to Samuel Larkins.

Which agreement was to have no other effect than was hereinbefore specified, and is not to prevent either party from availing himself or themselves, of any and all other valid objections, or assigning error upon and for any other matters, and prosecuting a writ of error from the final decree heretofore rendered, or any decree hereafter rendered.

The defendants below, Albert Worden, Curtis Worden, John J. Worden, Hezekiah M. Wead, and George F. Harding, now bring the record to this court, as plaintiffs in error.

The plaintiffs in error assign the following errors, to wit:

1st. The Circuit Court erred in rendering a decree setting aside the deed from the heirs of Searles to Lombard.

2nd. The Circuit Court erred in this, that it failed to render a decree in favor of the plaintiffs in error, or some of them, for the money paid before the filing of the deed from Robert Searles to Samuel and Thomas Tompkins, for record.

3rd. The Circuit Court ought to have dismissed the bill.

4th. The proceedings are otherwise informal and erroneous.

The plaintiffs in error, Albert Worden and Curtis Worden, assign the following separate errors:

1st. That the Circuit Court ought to have taken an account of the improvements made by them before notice, and rendered a decree therefor.

2nd. The Circuit Court ought to have rendered a decree for the payment of the purchase money paid by them for the land, either against the defendant in error, or Wead and Harding.

GOUDY & WAITE, for Plaintiffs in Error.

A. WILLIAMS, *pro se*.

CATON, C. J. Although the ground of equitable jurisdiction in this suit is the alleged defective description of the property designed to be conveyed by the deed from Wilson to Stewart, yet the consideration of the case at once leads us back to the deed from Searles and wife to the Tompkins', for upon the influence and effect of that deed depend entirely the rights of the complainant. If, at the time that deed was recorded, a complete title to the premises vested in the grantees, (assuming they had not previously conveyed the premises,) then their grantees are invested with the same right and title. Upon that

deed the complainant may safely repose, if it would now be effectual in the hands of those grantees, and he shows that he has by purchase acquired or is entitled to the interest or title thereby secured to them. If he is their representative, then he has but to show that that deed was sufficient to vest in them the title to the premises.

That deed was duly executed in 1818, but it was not recorded till the 23rd of June, 1855. Eight months before this, Searles had made another deed of the same premises to Lombard, which was immediately recorded. When this deed was made, Searles advised Lombard's agent, who made the purchase, that he had previously conveyed the premises to the said Tompkins, so that Lombard was chargeable with notice of that deed as much as if it had been previously recorded. But previous to the recording of the first deed, Lombard had sold and agreed to convey the premises to Wead and Harding, and they to the Wordens, who were at the time of the recording of the Tompkins deed in the actual possession of the premises, claiming to hold them under their purchase from Wead and Harding, and also under a tax title. The agreements to convey from Lombard to Wead and Harding, and from them to the Wordens, were not recorded, but the deeds subsequently made in pursuance of those agreements, were recorded in December, 1855, six months after the Tompkins deed was recorded. This raises the question whether the constructive notice arising from the possession held by the Wordens at the time the Tompkins deed was recorded, can affect the title of those grantees, or those claiming under them. As to the true answer to this question, no one can for a moment entertain a doubt. If at the time the deed was executed and delivered, the purchase was *bona fide*, and without notice of the conflicting patent title, no notice, actual or constructive, between that time and the recording of the deed, could affect the title. By force of the statute, the recording of the conflicting title would give that a preference. It is not always true that even actual notice is equivalent to recording. To state the case plainly and simply, is to bring it clearly within the appreciation of every legal mind. Two persons have deeds to the same premises, of different dates, from the same grantor. They simultaneously learn of the existence of each other's deeds, and the holder of the first deed beats the other in a race to the recorder's office. No one would suppose for a moment that his knowledge of the existence of the other deed, would destroy the effect of his record and postpone his deed to the one subsequently recorded. We say the simple statement of the proposition demonstrates the proper conclusion, that actual notice is not in all cases equivalent to recording. The constructive

notice arising from the possession of the Wordens, after the execution and before the recording of the Tompkins deed, could not postpone it to their equitable unrecorded title. This would seem to settle the whole controversy, were the Tompkins now in court asserting title under their deed. At the time it took full and final effect under our recording law, there was nothing with which it had to contend, but the fraudulent deed to Lombard, which could not stand before it a moment, either in a court of law or equity, by reason of the actual notice with which the grantee was chargeable at the time of the purchase.

But it is said that this Tompkins deed is itself so defective in the description of the premises conveyed, that its record could not amount to notice to any one. This is not a question of notice, but simply a question of priority under our recording laws. If the defendant's purchase had been made subsequent to the recording of the deed, and it were a simple question of notice by the record, a description so defective as not to be sufficient to put a reasonably cautious man on inquiry, the objection would merit the most serious consideration. But such is not this case. The description in this deed is not only sufficient to put a party on inquiry, but it is sufficient in law to designate the premises sufficiently to carry the legal title and to constitute a right of recovery in ejectment. This is the description: "All that quarter section thirty-three, of township eight north, in range two west, in the tract by the act of Congress for military bounties in the territories of Illinois, containing one hundred and sixty acres, it being land given to the said Robert Searles for his services in the late war, by the United States." Here the section, township and range are given in which the quarter section conveyed is situated, in such language as to leave no one in doubt as to the ideas intended to be conveyed, and then, for the purpose of designating which quarter is intended to be conveyed, a description by reference is given thus: "*It being the same land given to the said Robert Searles for his services in the late war, by the United States.*" It is not only possible to answer this descriptive reference, but we know certainly that it can be done by the government records, or by the patent issued to Searles, for we know that there are military lands, and that Searles could have derived title in no other way, and both parties admit that he had title. Even this description by reference was alone sufficient to convey the legal title when the reference is answered by extraneous proof. The deed then was sufficient to entitle the grantees and their representatives to the benefit of the record secured to them by the recording laws.

And this in fact disposes of the whole merits of this case.

It lays the defendant's title out of the case by postponing it to that conveyed to the Tompkins, and there is no dispute that the complainant is the true representative of that title, and but for the defective description of the premises in the deed from Wilson to Stewart, he would now be the undoubted holder of that paramount legal title. The proof shows, and it is admitted, that that defect originated in the mistake of the scrivener who drew the deed, and that the premises in question were in fact designed by both parties to that deed to be described in and conveyed by it. No principle is more familiar, that it is within the jurisdiction and is the duty of courts of equity to correct such mistakes.

The decree must be affirmed.

Decree affirmed.

Olof Johnson, Plaintiff in Error, *v.* The County of Stark, Defendant in Error.

ERROR TO PEORIA.

The General Assembly has the constitutional right to authorize counties and cities to become shareholders in railroad companies.

The granting of such authority does not conflict with the eighth section of article thirteen of the constitution, which declares, that no freeman shall be disseized of his freehold, etc. Nor does it conflict with the fifth section of the ninth article.

One or more bonds may be issued and exchanged by the county, and if their issuance is subsequently recognized by the action of the county, it will be held to be a ratification.

Counties, like individuals, will be held to their liabilities, and will not be permitted to avoid them because of unimportant irregularities in the action of their officers.

The fact that a *coupon* is made payable in New York, or elsewhere than at the treasury of the county issuing it, will not invalidate it; the objectionable words will be regarded as surplusage.

The holder of an unindorsed coupon is entitled to demand payment upon it.

A coupon is proper evidence under the common money counts.

This was an action of debt commenced by plaintiff against defendant, in Stark county, and moved, by change of venue, to Peoria county.

The declaration contained two counts: 1st, a special count, declaring on fifty bonds and coupons issued by defendant, to the Western Air Line Railroad Company; and, 2nd, the common money counts.

Plea of nil debet to 2nd count.

Pleas to 1st count, and to the bond described in the 1st count, as follows:

1st plea. Nil debet.

2nd plea. Non est factum.

3rd plea. That the bonds were obtained by the payees by fraud and covin, and were assigned to plaintiff with notice.

4th plea. That the bonds were obtained by the railroad company acting in concert with plaintiff.

5th plea. That the board of supervisors of Stark county, had no power or authority to issue the bonds.

6th plea. That Webster and Fuller, mentioned in the bonds, had no authority to issue the bonds.

7th plea. No such corporation as the payee mentioned in the bonds.

8th plea. That Fuller had no right or authority to attach the seal of the county to the bonds.

9th plea. That Schenck and Fenn had no authority to assign or indorse said bonds.

10th plea. Non est factum.

11th plea. That the property in the bonds is in the payees.

12th plea. That under the order made by the board of supervisors, one bond for $50,000 was issued and indorsed to plaintiff, and that no further order was passed for the issuing of the fifty bonds, mentioned in declaration.

13th plea. That the vote for the subscription was Aug. 13th, 1853, and that there was but ten per cent. assessment on the stockholders in said railroad company.

Plaintiff entered a *nolle pros.* of all causes of action, excepting such as arise upon bond No. 9, and coupon No. 3, which was attached to said bond.

On the trial of the cause, plaintiff introduced in evidence:

A certified copy of the records of the County Court of Stark county, showing that an election was ordered to be held in the several townships in said county, on the 13th day of August, 1853, at the usual places of holding elections or town meetings in said towns, for the purpose of voting for or against the subscription, by the said county of Stark, to the capital stock of the said Western Air Line Railroad Company, of the amount of fifty thousand dollars. Bonds to be issued for said sum, (in case a majority of the legal voters, as required by law, shall vote for said subscription,) running twenty years, and bearing six per cent. interest per annum, by the proper authorities, under the laws of this State; the bonds to be issued on condition that said road shall run through the central part of said county, as near as practicable.

Certified copy of record of the board of supervisors of Stark county, held September 12th, 1853, on which day was presented to said board of supervisors an abstract from the poll books of

an election held in the several townships in said county, on the 13th day of August, 1853, pursuant to above notice, for or against the subscription, by the said county, of $50,000 to the capital stock of said railroad company, under the order aforesaid, which abstract was ordered to be spread upon the records of said board, in which the votes were as follows:

For the subscription, 534 votes; against the subscription, 141 votes.

A certified copy of the records of the said board of supervisors of Stark county, at a special meeting held July 31st, 1855, where the following order was passed:

"Ordered, that the chairman of the board of supervisors be, and he is hereby authorized, to subscribe fifty thousand dollars to the capital stock of the Western Air Line Railroad, and that the clerk be authorized to issue to said company fifty thousand dollars of Stark county bonds, payable in twenty years from the date hereof, bearing interest at the rate of six per cent. per annum, payable annually, at such place as said company may designate, which said bonds may be in such sums as may be designated by said company, not less than one thousand dollars each, and shall have interest coupons attached, which said bonds and coupons shall be signed by the chairman of this board, and attested by the clerk, with the seal of the county attached thereto."

To the introduction of which evidence the defendant objected.

A certificate of the county clerk of Stark county, showing the whole number of votes cast at the general election, Nov., A. D. 1852, and at the election for subscription to the said railroad, held August 13th, 1853, as follows:

Whole number of votes cast at the general election, Nov. 2, 1852, in said county of Stark, 771 votes; that at the election held on August 13th, 1853, there were cast in favor of said subscription, 534 votes, and 141 votes were cast against said subscription, and that said 534 votes was a majority of the qualified votes of said county of Stark; taking as a standard the number of votes thrown at the last general election, held on the 2nd day of November, A. D. 1852, as hereinbefore stated, being the last general election held in said county, previous to the 13th day of August, A. D. 1853.

To the introduction of which, in evidence, the defendant objected.

The plaintiff then introduced a witness who, being examined upon his *voir dire*, testified that he had no interest in this suit; that he was a stockholder, and one of the directors of the Western Air Line Railroad Company; that he had paid up his stock subscribed to the said company, except some conditional

stock not yet required to be paid, and that the bond of Stark county in suit, was transferred, and he accepted the same upon his own responsibility, and that it was indorsed merely because the bond was payable to order and not to bearer.

Defendant then objected to the said witness on account of his interest, which objection was overruled by the court, and said witness permitted to testify.

Said witness then testified as follows: I was present when the bond and coupon now shown me were executed. William W. Webster was chairman of the board of supervisors of Stark county, and Miles A. Fuller, clerk. The signatures of said Webster and Fuller, to the said bond and coupon, are genuine; the bond and coupon are in the words and figures as follows, to wit:

No. 9. UNITED STATES OF AMERICA. $1,000.

STATE OF ILLINOIS, COUNTY OF STARK. { ISSUED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF STARK.

KNOW ALL MEN BY THESE PRESENTS, That there is due from the County of Stark, in the State of Illinois, to the Western Air Line Railroad Company, or order, one thousand dollars lawful money of the United States, with interest at the rate of six per cent. per annum, payable annually at the city of New York, on the presentation and surrender of the annexed coupon. The principal is payable at Toulon, in the County of Stark, State of Illinois, twenty years after the date hereof. For the performance of all which, the faith of the county is irrevocably pledged, as also the property, revenue, and resources of said county.

In Witness Whereof, William W. Webster, Chairman of the Board of Supervisors, and Miles A. Fuller, Clerk of said County of Stark, [L. S.] have this, the thirty-first (31st) day of July, eighteen hundred and fifty-five, hereunto set their hands, and said Clerk has affixed the seal of said county, at his office in Toulon, in said county.

W. W. WEBSTER, Chairman of the Board of Supervisors.
MILES A. FULLER, Clerk.

Indorsed: "Pay to O. Johnson, or bearer. Robt. C. Schenck, Pres. Western Air Line Railroad Co. Ira I. Fenn, Treasurer Western Air Line Railroad Co."

BOND NO. 9. ($60). COUPON NO. 3.

The County of Stark, State of Illinois, will pay sixty dollars on this coupon, on the 31st day of July, 1858, at the city of New York.

W. W. WEBSTER, Chairman.

MILES A. FULLER, Clerk.

Which coupon was then offered in evidence by the witness, to the introduction of which, the defendant objected.

This coupon was detached from the bond. This bond was delivered to me as the agent of the company, together with other bonds, fifty in all, in payment of the subscription of Stark

county to the Western Air Line Railroad Company; Robt. C. Schenck was president, and Ira I. Fenn, treasurer, of said railroad company. I was present at the time the bond was sealed and delivered. I do not recollect the date it was executed. I was acting for the railroad company; we had a conditional contract with Olof Johnson or with the Bishop Hill Colony, for grading sixteen miles of the railroad, from Wyoming to Galva, which had to be closed by the 5th of August, 1855, and under that contract we were to furnish the bonds of Stark county. The company designated that the bonds should be issued in sums of one thousand dollars each. The county had no blank bonds, and it was agreed between the chairman and clerk of the board of supervisors and myself and Judge Ramsey, who was also acting for the company, that the said chairman and clerk should issue one bond for fifty thousand dollars, which bond I was to hold until I could procure the fifty blank bonds from Chicago, or from some other place, and they were then to execute fifty bonds of one thousand dollars each, to bear the same date as the one bond for fifty thousand dollars, which was July 31st, 1855, and when the fifty bonds were filled up and executed, I was to return the one bond for fifty thousand dollars and deliver it up to the said chairman and clerk, and they were to deliver to me for the company, fifty bonds for one thousand dollars each. I was to hold the bond merely to enable the railroad company to close the contract with Mr. Johnson or with the Bishop Hill Colony. The bond for $50,000 was not the bond the railroad company designated; the company designated fifty bonds of $1,000 each; the one bond for $50,000 was to be held by me until I could procure the blanks. It was perhaps a month or six weeks I held the bond; I called upon Mr. Webster, the chairman, and Mr. Fuller, the clerk, and informed them that I had the blanks for the fifty bonds of 1,000 each, ready for them to sign, which they did. After they had signed the fifty bonds of $1,000 each, and put the seal on them, they then delivered them to me, and I delivered over to Mr. Webster, the original bond for $50,000; I also delivered to him certificates of stock for $50,000 in the Western Air Line Railroad Company, and the fifty bonds which I received from the said chairman and clerk I delivered to the railroad company, and the railroad company transferred them to plaintiff in this suit, the one bond in suit being one of them in payment in part for a contract the company had made with him or the Bishop Hill Colony for grading sixteen miles of the said railroad.

Plaintiff also offered in evidence a certified copy of the record of the board of supervisors of Stark county, at a special meeting, Feb. 25, 1856, as follows:

"Whereas the county of Stark, having subscribed $50,000 to the capital stock of the Western Air Line Railroad, and issued its bonds therefor with interest coupons attached, which said coupons are payable in the city of New York: Therefore it is ordered by the board, that W. W. Webster and Lewis H. Fitch, be and they are hereby authorized to confer and make arrangements with Mr. Olof Johnson, for the payment of the first installment of said interest, coming due on the 31st of July next, subject to the approval of the Board."

Also record of meeting held March 10, 1856, on which day the committee, appointed as above, made their report to said board, in substance as follows: "That they had conferred with Mr. Johnson, and that he had proposed to receive the amount of interest coming due July 31st, being three thousand dollars, adding exchange on New York thereto, and deducting interest from date to the maturity of said coupons, making $2,967.50, and that he would enter into bond to pay said interest in the city of New York, and to release the said county of Stark from all further trouble or expense in making said payment, and that he would return the interest coupons thus paid, to the board of supervisors, to be cancelled, on or before the 31st of July, 1856." On which report it was ordered, that said report be accepted; and it was further ordered that the proposal of said Johnson be accepted.

Olof Johnson presents his bond to said board, which is approved, and it is conditioned to take up said interest coupons coming due 31st of July, 1856; and it is further ordered by said board, that the treasurer pay to O. Johnson, $2,967.50 for the payment of the interest on Stark county railroad bonds as per contract, this day entered into.

At a special meeting of said board of supervisors, held June 3rd, 1856, there was an order reciting the contract aforesaid with Johnson, and that said Johnson had returned the interest coupons specified in the contract and in his bond, to be cancelled; it was ordered that the said bond be delivered up to said Johnson, he having complied with the conditions thereof.

At a special meeting of said board of supervisors, held June 14, 1857, Olof Johnson proposed to said board, that upon the payment to him of $2,662.50 he would enter into bond to return the interest coupons on railroad bonds coming due July 31st, 1857; which proposal was accepted and the bond filed. To the introduction of which evidence the defendant objected; which objection was overruled by the court, and the said copy of record permitted to be read in evidence by the plaintiff.

Plaintiff introduced a witness, who on his *voir dire* said that he was a stockholder in the Western Air Line Railroad Com-

pany, and that his stock was paid up. Defendant then objected to said witness, on account of his interest, which objection was overruled by the court, and the defendant excepted to such decision; and witness testified as follows: I was an officer of the Western Air Line Railroad Company, July 31st, 1855. The said company was duly organized at that time, and acting as such under their charter, and according to the tenor of their charter. The necessary amount of stock had been subscribed, to enable the said railroad company to organize under their charter. The records of the said railroad company were then shown to witness and identified, and proven by him, and the plaintiff offered to read the same in evidence, for the purpose of showing that the said railroad company was, on the 31st of July, 1855, duly organized, and acting as such, but the defendant dispensed with the reading of the same.

Plaintiff offered in evidence, certified copies of records of the board of supervisors of Stark county, as follows:

Order passed at a special meeting of said board, Feb. 25th, 1856, as follows: "Ordered, that W. W. Webster, chairman, be and he is hereby authorized to cast the number of votes that the county of Stark may be entitled to, for directors of the Western Air Line Railroad, on the 5th day of March, A. D. 1856."

Order passed by said board of supervisors, March 3rd, 1857: "Ordered, that Isaac Thomas be and he is hereby authorized to cast the votes which the county of Stark may be entitled to cast, for directors of the Western Air Line Railroad, at an election to be held at Lacon, March 4th, 1857."

It was also proved, that at an election of the stockholders of the Western Air Line Railroad Company, held in Lacon, in March, 1856, for the election of directors of said company, William W. Webster, chairman of the board of supervisors of Stark county, was present, and cast the vote of Stark county, as a stockholder, in said election; and that at an election of the stockholders of said railroad company, for directors of said company, held in March, 1857, Isaac Thomas was present, and cast the vote of said Stark county, at said election, as a stockholder in said company.

A witness was introduced by plaintiff, who testified that the board of supervisors refused to pay the said interest coupons; the coupon offered in evidence, is one of those presented to the board of supervisors for payment.

The reason the county officers refused to pay the interest, was because the work on the railroad had been suspended.

The bond and coupon were excluded from the jury; to which ruling of the court the plaintiff excepted; and thereupon, no

further evidence being offered, the jury returned a verdict for defendant.

Plaintiff then moved the court to award a new trial in said cause, for the reasons following:

1st. The verdict of the jury is against the weight of evidence given in said cause.

2nd. The said verdict is against law.

3rd. The court mistook the law.

4th. The court erred in excluding the bond and coupon, offered in evidence to the jury.

5th. The court excluded proper evidence from the jury, which was offered by plaintiff; but the court overruled the motion for a new trial.

These objections were made by defendant during the trial below:

To the statute: That it is unconstitutional.

To the order for the election: That it does not conform to the statute.

To the record of the election: That the notice required by the act is not shown.

To the order for the subscription and bonds: That it was not made till a general election had been held, after the vote on the question of subscription. That it was made by the supervisors alone; it should have been made by the County Court, if at all. That it was made at a special meeting, and it does not appear that previous notice was given. That it does not contain the condition of location required by the order for the election.

To the bond: That it is a special contract under seal, and admissible under the common counts. That the interest is payable out of the county. That the supervisors had no power to issue, or cause the issue of such obligations. That Webster and Fuller had no authority to execute and deliver them, and thereby bind the county. That it is not properly indorsed. That the issue of the first bond for $50,000, exhausted the power conferred by the order of the supervisors. That the bond was obtained by the covin and fraud of the plaintiff and the railroad company. That the consideration has failed, by an abandonment of the railroad by the company. That a subscription by the county has not been shown.

To the coupon, beside those assigned to the bond: That no payee is named. That it is not indorsed or assigned. That it is not sealed. That it is not negotiable, neither by law-merchant nor by the statute. That the coupon is not an obligation, but is intended for a mere receipt for interest. That the doctrine of merger prevents their existence as an obligatory instrument. That they are payable out of the county.

To proving by parol the alleged agreement with Webster and Fuller, to issue the first bond as security, and for its return, and the issuing of fifty bonds in lieu thereof: That no such authority is given them by the order of the board of supervisors. That no discretionary power was, or could have been, given to them. That all acts, orders, and proceedings, by which a county can be bound, are required to be recorded, and cannot be proved otherwise than by the record. That an agreement with Webster and Fuller, or either of them, neither did nor could bind the county. That proof of the fact of a prior issue of a bond, and thereby a previous exhaustion of the power, is of a different nature from proof of such an agreement. That even if a surrender of the first bond could be shown, the plaintiff could take nothing thereby; it would not impart any validity to the subsequent issue. And that the pretended authority of the chairman and clerk, is against public policy and the law of the land.

To the evidence of the payment of interest: That a municipal corporation cannot be estopped to deny the acts and authority of its pretended officers and agents.

The assignment of errors was as follows:

The court erred in excluding from the jury, the bond offered in evidence by the plaintiff; in excluding from the jury, the coupons offered in evidence by the plaintiff; in overruling the motion for a new trial, made by the plaintiff; and in rendering judgment against the plaintiff below for costs.

The great importance of the questions of law determined, and the large pecuniary interests settled by this case, induce the reporter to publish with the case the statutes under which the case originated:

"An Act supplemental to an act entitled 'An act to provide for a general system of railroad incorporations.'

"Sec. I. *Be it enacted, etc.*, 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 are 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; and the stock so subscribed for or purchased shall be under the control of the *County Court* of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

"Sec. II. That for the payment of said stock, *the judges of the County Court* of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to

borrow money at a rate not exceeding ten per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal; or if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase, in bonds of the city or county, making such subscription to be drawn for that purchase, in sums not less than fifty dollars, bearing interest not exceeding ten per centum per annum: *Provided*, That no bond shall be paid out at a rate less than par value.

"SEC. III. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company, at par, and in lieu of cash, and to issue their bonds, bearing interest not exceeding ten per centum per annum, for any moneys by them borrowed for the construction of their railroad and fixtures, or for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

"SEC. IV. No subscription shall be made, or purchase or bond issued, by any county or city under the provisions of this act, whereby any debt shall be created by said judges of the County Court of any county, or by the common council of any city, to pay any such subscription, unless a *majority of the qualified voters* of such county or city (taking as a standard the number of votes thrown at *the last general election previous to the vote* had upon the question of subscription under this act for the county officers,) shall vote for the same; and the judges of the County Court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give *at least thirty days' notice* in the same manner as notices are given for election of State or county officers in said counties, requiring said electors of said counties or said 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, and the *time* which the bonds proposed to be issued are to run, and the *interest* which said bonds are to bear; or in case it is proposed to borrow money to pay such subscription, then the notice shall state the *terms* upon which such loan is to be effected; and the opinion of the electors shall be expressed upon their ballots 'for subscription' or 'against subscription,' and counted and returned by the judges and clerks of elections as in other cases; and if a majority of the voters

of said county or city, assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act, is held upon a day of general election, then the number of votes thrown at such general election for county officers shall be the standard of the number of qualified voters as aforesaid. No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when *assessments* upon all the stockholders of said company shall be regularly assessed and made payable.

"SEC. V. This act shall take effect from and after its passage."

The above act was approved in 1849. On the first day of March, 1854, an amendment thereto was approved, to wit:

"AN ACT to facilitate the construction of railroads.

"SEC. I. *Be it enacted, etc.*, That any city or county in this State, which, under the provisions of an act entitled 'An act supplemental to an act entitled "An act to provide for a general system of railroad incorporations,"' approved November 5, 1849, has heretofore subscribed, or may hereafter subscribe, for stock in any railroad company, payable in the bonds of said city or county, it shall be lawful for the city council of such city, or the judges of such county, and they are hereby authorized and empowered to issue and deliver to such railroad company the whole or any portion of the bonds of such city or county, payable on such subscription, at any time hereafter, when, in their opinion the interest of such city or county will be promoted thereby, whether the assessments upon the stockholders of said company have been regularly assessed and made payable or not."

MANNING & MERRIMAN, for Plaintiff in Error.

A. W. ARRINGTON, and C. C. BONNEY, for Defendant in Error.

WALKER, J. It is urged, in affirmance of the judgment below, that the General Assembly had no constitutional warrant for the enactment of 1849, authorizing counties and cities to become shareholders in railroad companies. If this position be true, it then follows that plaintiff has no right to recover on this coupon, and the judgment of the court below must be affirmed. We shall therefore proceed to the consideration of this question. Our attention is called first to the 38th section of article three, of our constitution, as prohibiting the exercise of

this legislative power. In the case of *Prettyman* v. *Tazewell County*, 19 Ill. R. 406, this provision of that instrument was considered, and held by this court not to militate against this enactment, and that the law was not in conflict with it. We have not as yet perceived any reason to change the conclusion then announced.

It is again urged, that this act is in violation of the 8th section of article 13, which is this: "That no freeman shall be imprisoned, or disseized of his freehold or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." This great principle of *Magna Charta* was incorporated into our bill of rights, to better secure the citizen against the exercise of arbitrary power by any of the departments of government. It was feared that in the limitation of the powers of government, in the other part of the constitution, the rights of the citizen might not have been secured, by express provision, against the exercise of power so unjust and oppressive as this section expressly prohibits. The security afforded by this section is deemed essential to the well being of society, and embraces principles that lay at the very foundation of all constitutional government. This act does not profess to disseize the citizen directly of his property, but by incurring this debt, its payment by taxation follows as a consequence. The question then arises, whether the tax thus imposed and collected, would deprive the citizen of his property contrary to the law of the land. It, when levied, would necessarily be imposed on all the property within the limits of the county belonging to individuals, and would be of a uniform rate upon its valuation. That mode alone being recognized by the constitution in the imposition of such taxes. Were an effort made to deprive the citizen of his property or freehold by a tax imposed alone on him, to which the property of other individuals in the same local division was not made subject, it would no doubt violate this section of the constitution, but this act professes no such object, nor can it by any means be held to have such an operation. We are not aware that this provision of the bill of rights, which it is believed has been incorporated into the constitution of each of the several States of the Union, has ever been held to limit or in any way restrict the general taxing power exercised under and in conformity to the constitutional limitations on that subject.

It is also supposed that the enactment under consideration is repugnant to the 11th section of the same article of that instrument. This article provides that the property of the citizen shall not be taken or applied to public use, without the consent

of his representatives in the General Assembly, nor without just compensation being made to him. This eminently just and important provision was designed to secure the citizen in representation, as a condition to the imposition of the burthens of government, and also to secure him a full compensation, in value, for his property, when it might, by enactment of the General Assembly in which he was represented, be taken and appropriated to public use. This provision has made the right to appropriate private property to public use, to depend upon a right to be represented in the General Assembly which should enact the law making such appropriation. Hence this provision has required that it shall not be taken or applied without the consent of his representatives, or without compensation. It was intended to secure, and does secure, the citizen against the appropriation of his property to public use, except it be under and in accordance with legislative enactment. If done in any other mode, it would be without constitutional warrant. But it is believed that this provision has no reference to the taxing power enjoyed by the government. That power depends upon, and is governed by other principles, and is regulated by other provisions of that instrument. This provision was designed to regulate the exercise of the right of eminent domain by the government, and to regulate the mode in which the exigencies of government might be relieved, when it should become necessary to appropriate any species of property owned by an individual, for that purpose. But it in no wise relates to, or affects the general taxing power of the government, and therefore does not prohibit the adoption of this enactment of the legislature.

We come now to the consideration of the fifth section of the ninth article, upon which the weight of the argument in this case, against the constitutionality of this act, was based. It is this: "The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law." As before observed, it is urged that the act under consideration is supposed to be unconstitutional, by defendants in error, because a tax on the property of individuals in the county, to meet this indebtedness, follows its creation as a necessary consequence. This constitutional provision is too clear and explicit, in conferring upon the General Assembly power to authorize the county to levy and collect such a tax, for corporate purposes,

to admit of any question. It then becomes necessary to ascertain, whether the aiding in the construction of a railroad running through its limits, is such a county purpose as authorizes the legislature to confer upon it that power.

That the public at large, the individual shareholders of the company, and the citizens of the county, all have an interest in the construction of such a road, is too plain to admit of any doubt. By its completion, the public have increased facilities for travel and transportation, the shareholders the prospect of profit on their investment, and the citizens of the county have afforded to them increased facilities for trade and commerce, enhanced value to property within their local division, with the more speedy development of their agricultural and other resources. The citizens of the county, while they enjoy advantages common to the public at large, have other and more important benefits resulting from its construction. In the completion of these improvements, the whole community is either immediately or remotely interested, those near the line on which it passes, in a larger, and those more remotely situated, in a less degree. But all participate in its benefits.

In the affairs of life, public and private interests are so closely blended, that it is difficult to draw the line separating, in all cases, the one from the other. Numerous cases may be given, fully illustrating each, but the establishment of any rule by which each may be distinguished from the other, is, perhaps, impracticable. All will perceive that the building of court-houses, jails, poor-houses, the opening and keeping in repair of common highways, and the erection and maintenance of bridges, by which they are rendered useful to the people, are "county purposes," for which the people of the county may be taxed. And that the erection of hotels, mercantile, manufacturing, trading and banking houses, although of great importance to the prosperity of the community, are not such purposes as were contemplated by the framers of the constitution. These are properly regarded as matters of individual enterprise, and cannot, in any reasonable or just sense, be regarded as public or county purposes.

Then, is the construction of a railroad, through a county, within the meaning of this section of the constitution, such a county purpose? Common highways, turnpike roads, toll bridges, and improvements of that character, and for which local taxes may be imposed, have been so held by judicial determination, and so regarded in numerous cases where the power has never been questioned. Then, if a common highway, a turnpike road, or a toll bridge, be a county purpose, which authorizes municipal corporations to become shareholders, to aid in their construc-

tion, no reason is perceived why a railroad is not such a county purpose. It has for its object the same purposes that are attained by the others. But this is not a question of first impression in the courts of this country. It has been presented and judicially determined in numerous cases, in all of which it is believed to have been held to be a corporate purpose, authorizing the levy of a local tax, for the payment of the subscription. *Nichol* v. *Mayor and Aldermen of Nashville*, 9 Humph. 252; *Louisville and Nashville Railroad Company* v. *The County Court, Davidson et al.*, 1 Snede R. 637; *Goddin* v. *Crump et al.*, 8 Leigh, 120; *Talbot* v. *Dent*, 9 B. Mon. 526; *Thomas* v. *Leland*, 24 Wend. 65; *Slack* v. *Maysville and Lexington Railroad Company*, 13 B. Mon. 1; *Commonwealth* v. *Mc Williams*, 1 Jones, (Penn.) 61; *The People* v. *Mayor of Brooklyn*, 4 Comstock, 419.

This doctrine is fully recognized in the case of *Shaw* v. *Dennis*, (5 Gilm. 405,) by this court. And these authorities of our sister States proceed further, and hold, that to render such an improvement a corporate purpose, it need not be confined to or penetrate the limits of the county or city making the subscription. The question, whether such improvements are county purposes, is not presented for decision by this record, and we therefore refrain from the expression of any opinion.

It is also urged, that when the agents of the county executed one bond for the entire subscription, that they had thereby exhausted their authority to bind the county, and that their subsequent acts were unauthorized and void. The evidence shows that when that bond was issued, it was only done for the reason, that there was not on hand the necessary blanks to issue them in any other mode. It was at that time agreed between the parties, as soon as blanks could be procured, that the bond previously issued should be returned, and others issued in sums of one thousand dollars each, which was afterwards done, and the bond to which this coupon was annexed is one of those thus issued. In the view we take of this question, it can matter but little whether or not the authority at first conferred by the county upon these agents, authorized them to take up that bond and issue others for the amount, as the county, by repeated subsequent acts, has fully ratified and confirmed these latter bonds.

That bond was returned and delivered to the agents of the county, and it has never been tendered back or returned to the railroad company to whom it was issued, nor to the plaintiff in this suit. By holding it, they acknowledge the legality of the issue of these bonds. Again, they have, at two elections, cast the vote for directors of this road, which the stock received for these bonds entitled the county to give. They also, by

order of their board of supervisors, have paid two annual installments of interest falling due upon these bonds, and took up and destroyed the coupons therefor. When the president of the board of supervisors was one of those agents of the county, to issue the bonds, it is impossible to believe that the board of supervisors were not fully apprized of the mode in which they were issued, and intentionally regarded them as legally issued and binding, when they performed these several acts. These acts, unexplained, are as satisfactory evidence of a design to ratify the issue of these bonds, as if it had been done by an order of the board of supervisors.

It is also alleged, that informalities have occurred, in giving the notice and in conducting the election, to determine whether the county would, or not, authorize a subscription to this road, and for that reason, the bonds and this *coupon* are void. In the case of *Prettyman* v. *Tazewell County*, 19 Ill. R. 406, it was held, that if such irregularities had occurred, it was necessary, for the purpose of preventing the officers from proceeding, to make the subscription, and to issue the bonds, that steps must be promptly taken by an appropriate remedy to contest the election, and restrain them from proceeding. And that we would not inquire, after any considerable delay, whether fraudulent means had been resorted to for the purpose of procuring a favorable result to the election for subscription. It would be manifestly against every principle of justice to permit the tax-payers and citizens of a county, through their officers, to procure money, labor or materials, upon bonds of the county, issued on an affirmative vote of the citizens at an election held in a case authorized by the law, to escape all liability because of some slight informality in conducting the election, which was, or at least might have been, readily known to every citizen of the county before the bonds were issued. Counties have no right to procure all the benefits of an act which they are authorized to perform, recognized and acted upon by them as legal, and then escape liability, any more than have private individuals. They must respond to their legal engagements to the same extent as individuals.

Nor does it make any difference that the enterprise in which they have engaged has proved to be ill advised, if it was within the scope of their authority. In this case, the whole matter was submitted to the determination of the citizens, to be affected by it. They were left perfectly free to choose for themselves whether they would lend the aid of the county to the enterprise. They have not even the right to complain that they had no choice in the imposition of the burthen. By issuing these bonds to the company, the county became one of the largest owners

of, or shareholders in the road, and, in common with the other shareholders, undertook its control and management, by directors and officers of their own choice. And there can be no pretense of right to impose the loss growing out of the want of success in the enterprise, upon a *bona fide* holder of the identical bonds given by the county to become a part owner of this road. He can, by no process of reasoning, be held liable for the acts of the county, or their agents, in which he had no participation. If the directors of the road, in whose election the county had its voice, have, in executing their trust, exceeded their authority, or acted in a reckless disregard of the interest of the stockholders, or wasted or misapplied the means of the company, the county, as a shareholder, or any citizen of the county, being a tax payer, had the right to restrain them from thus proceeding. They have failed to take any such steps, so far as this record shows, and they, like the other stockholders, must be bound by the acts of their directors.

It was held by this court, in the case of *The People ex rel.* v. *Tazewell County*, 22 Ill. R. 147, that counties and municipal corporations, unless specially authorized by legislative enactment, have no power to make their indebtedness payable at any other place than at their treasury. That proceeding was an application for a writ of *mandamus*, to compel the board of supervisors to issue bonds and coupons, payable in the city of New York. The application was based upon a demand of such bonds and coupons; and as there had been no demand of such securities payable at the county treasury, the question now under consideration was not then before the court, and was not determined. The board of supervisors could not be in default until they had refused to issue bonds and coupons, authorized by law, upon a proper demand. No such demand was made in that case, and therefore the court could not compel them to proceed to issue such securities. This case presents the question, whether instruments, evidencing their indebtedness payable specifically at any other place, are void, or whether they may be upheld as payable at their treasury. This coupon on its face purports to be payable at the city of New York. The doctrine is well recognized, that in exercising a power, all acts performed in excess of, or beyond the power delegated, must be rejected as unwarranted; and if, after their rejection, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts beyond the power delegated. But, on the contrary, if the acts performed beyond the authority conferred, are so inseparably connected with the acts properly performed, that by their rejection, the power remains unexecuted, then the whole transaction must be rejected as void. When

tested by this rule, it will be perceived that this *coupon* may be sustained as valid, and payable at the treasury of the county. The law authorized the county to issue it, and requires no place of payment to be named. And where none is specified, it, by operation of law, is payable at the treasury. If this coupon had not contained the language, "at the city of New York," it would have been a legal instrument, strictly conforming to all the requirements of the law authorizing counties to issue evidences of indebtedness. If, then, this unauthorized portion of the coupon were rejected, it would be in conformity to the law, and for the purpose of upholding it, the law will reject that portion, as surplusage. This doctrine was announced by the very able district judge of United States District Court for Wisconsin, in the case of *Mygatt* v. *The City of Greenbay*, which was precisely similar to this case.

It is also urged, that the plaintiff has no legal title to this instrument, which will authorize a recovery. The bond to which it was annexed was duly assigned to plaintiff; but there is no indorsement on the *coupon*. It seems to be the well-settled doctrine, that state, county, city and other bonds, and public securities of this character, are negotiable by delivery only, without indorsement, in the same manner as bank bills, especially when they are payable to bearer. Redfield on Railways, 595, and authorities cited. It is true, that this coupon names no person as payee, nor is it specifically payable to bearer. But the promise is, "to pay sixty dollars on this *coupon*." The promise is to pay the sum named on the instrument, and it can only be demanded by the person holding it, and precisely as if it was payable in terms to bearer. There is no room to doubt that the specified amount, by the terms of the agreement, is payable to, and may be demanded by the holder after its maturity. Its legal effect is, that the money is to be paid on the coupon, and to the holder presenting it for that purpose. It then follows, that the holder may sue for, and recover the money in his own name.

The only remaining question presented by this record is, whether this coupon was admissible in evidence under the common money counts. We are not aware of any well considered case which has held, that a note not under seal, payable to bearer, is inadmissible under these counts. Nor is there any rule of pleading, or of evidence, which rejects such an instrument. If it, when issued, was delivered to plaintiff, it affords evidence that he has lent money to the maker, for which it was given, or if he purchased it of any other person, that he paid money for the use of the maker, on his debt, for which, the law implies a promise to pay him the amount specified in the instrument when

it falls due. In either event, this *coupon* was admissible under the appropriate money count, and should have been admitted. The court below therefore erred in rejecting it as evidence, and the judgment must be reversed and the cause remanded.

Judgment reversed.

Ethan A. Durham, Plaintiff in Error, *v.* Jeremiah L. Brown, Defendant in Error.

ERROR TO DE KALB.

Where a judgment is entered in vacation, by the clerk, the proper papers should be filed with him, and these become a part of the record, and a bill of exceptions is not necessary to bring them before the Supreme Court.

A power of attorney to confess the judgment should be filed; a statement that it was proved is not sufficient.

Confessions of judgment in vacation, before the clerk, are not judicial acts; they are contracts acknowledged of record, or conclusions of law.

This was a judgment confessed in vacation by virtue of a power of attorney.

The declaration, filed June 14th, 1859, was entitled in vacation, after the February term of the DeKalb county Circuit Court, A. D. 1859.

Declaration in usual form upon an assigned note.

This entry appears of record:

And afterwards, to wit, on the 14th day of June, 1859, there was on file, in the office of the clerk of the Circuit Court aforesaid, a certain promissory note, with letters of attorney to confess judgment thereon thereto attached, of which copies are given, pages 5, 6, 7.

Then follows a cognovit, signed O. S. Webster, attorney for defendant.

Record entry, June 14th, 1859.

And now at this day comes the said plaintiff, by Charles Kellum, his attorney, and files his declaration in an action of trespass on the case on promises, against the said defendant, and filed also a warrant of attorney, signed and sealed by the said defendant, the execution whereof is duly proven, authorizing any attorney of any court of record to appear in this court, waive notice of process and confess judgment in favor of said plaintiff and against the said defendant, for the amount due upon a certain promissory note annexed to said warrant, and also for $25, attorney's fees, besides the costs of this suit.

Thereupon came O. S. Webster, an attorney of this court, in behalf of said defendant, and files his cognovit and confesses judgment for $807.23, releasing all errors, and consenting to the immediate issue of execution.

Amount of note, $679.80, Dec. 12, 1856; interest at ten per cent. Judgment, June 14, 1859.

The following errors are assigned:

1. The declaration is entitled of vacation after February term, A. D. 1859, when there was no such term.

2. Because there is no sufficient proof of the execution of the warrant of attorney, nor does there appear, among the records and papers in the cause, any proof whatever of the same, to authorize a judgment to be entered thereon by the clerk in vacation.

3. General assignment.

B. C. Cook, for Plaintiff in Error.

E. S. Leland, and E. L. Mayo, for Defendant in Error.

Breese, J. There was no affidavit filed with the clerk, proving the execution of the power of attorney to confess the judgment. The statute provides that judgment by confession may be entered in certain courts, of which the Circuit Court of DeKalb is one, at any time in vacation, before the clerk, by filing the proper papers with the clerk, and such judgment shall have the same force and effect, from the time of entry, as if entered in term time. When the proper papers are filed, they become a part of the record, and no bill of exceptions is necessary to bring them before this court — they are on the record. This is the meaning of the statute. When the confession is by an attorney, one of the proper and indispensable papers would be the power of attorney. There was none in this case, and the statement that it was proved, is not sufficient.

We do not regard such confessions taken by the clerk in vacation as a judicial act. They are merely conclusions of law on contracts acknowledged of record, and so far as public convenience is concerned, avoiding expense and protracted litigation, should be encouraged.

For the want of the power of attorney, there being none filed, the judgment is reversed.

Judgment reversed.

JOHN LYLE *et al.*, Plaintiffs in Error, *v.* GEORGE A. MORSE, impleaded with James Hutchins, Defendant in Error.

ERROR TO HENRY.

If it is agreed that a surety is to be released, when a mortgage is executed, the execution of the mortgage is a preliminary act, and should be performed before a release can be set up. And a plea averring the release should show affirmatively, that the mortgage had been executed and tendered in conformity to the agreement.

THIS was an action of assumpsit, in the Henry Circuit Court, counting upon a promissory note, which note is as follows:

Kewanee, Illinois, May 31st, 1855.

For value received, I promise to pay to J. & T. Lyle, or bearer, six hundred dollars, one year from date. (Signed) JAMES HUTCHINS.
GEORGE A. MORSE.

The declaration is in the usual form, counting specially on said note, and containing the common counts.

Service was had on defendant Morse, only.

Morse pleaded, first, the general issue; and secondly, as follows:

2nd. And for a further plea in this behalf the said defendant, George A. Morse, by leave of the court here for this purpose first had and obtained, etc., says *actio non*, because he says that the said promissory note mentioned, referred to and set forth in the said first and second counts of the plaintiffs' declaration, is one and the same, and not other and different notes, and was made, executed and signed by one James Hutchins, as principal, and was signed by him the said George A. Morse, as surety only for said James Hutchins, and not as principal, as by said note would seem and appear, and as in the said first and second counts of the plaintiffs' declaration is alleged, and solely and exclusively for the accommodation of said James Hutchins, and for no other use or purpose whatever, and that he, the said George A. Morse, then and there had received and derived no benefit whatever therefrom. All of which the said John and Thomas Lyle then and there well knew.

And the said defendant, George A. Morse, further avers, that on the 14th day of June, A. D. 1856, and after said note became due, the said George A. Morse, being unwilling to remain surety and liable on said note longer, applied to said John and Thomas Lyle, and James Hutchins, and requested of them that he might be discharged and acquitted of and from said note, and his name erased therefrom, and he be fully discharged from all liabilities on account of said note. And the said George A.

Morse further avers, that the said John and Thomas Lyle then and there, in consideration of the premises, and the request of the said George A. Morse, agreed by and with the said George A. Morse and the said James Hutchins, that they would fully discharge and acquit the said George A. Morse, for and from all liability on account of said note, in consideration that the said James Hutchins would then and there give them in his stead some other security for the payment of said note. And thereupon, the said George A. Morse avers that the said James Hutchins then and there, in consideration of the premises, did offer to make and execute to said John and Thomas Lyle, a mortgage on certain real estate, situate in the town of Kewanee, Henry county, Illinois, to wit, Lot No. 6, in Block 13, with the appurtenances, etc., thereunto belonging, in lieu of George A. Morse, for security on said note, and on condition that the said John and Thomas Lyle would then and there fully acquit and discharge the said George A. Morse from all liability on said note; and the said John and Thomas Lyle then and there, in consideration of the premises, accepted said security, to wit, said mortgage on real estate, in lieu of the said George A. Morse, and then and there, in consideration of the premises, and that the said James Hutchins would, at any time when thereunto requested by the said John and Thomas Lyle, make and execute and deliver said mortgage for the purpose aforesaid to the said John and Thomas Lyle, then and there agreed with the said James Hutchins, and the said George A. Morse, to discharge and acquit said George A. Morse of and from all liability on account of said note. And the said George A. Morse further avers, that the said James Hutchins, in accordance with said agreement, then and there offered to John and Thomas Lyle, to make, execute and deliver to them said mortgage, but the said John and Thomas Lyle then and there waived the making and executing of said mortgage at that time, on the ground and for the reason (and no other) that they had not then time to attend to the same, but they, the said John and Thomas Lyle, then and there, in consideration of the premises, fully acquitted and discharged the said George A. Morse of and from all liability on account of said note. And the said George A. Morse further avers, that the said James Hutchins, from and after that time was always ready, willing and able to make, execute and deliver said mortgage to said plaintiffs for the purposes aforesaid, and often offered to the plaintiffs so to do, but that the said plaintiffs, on their own account, and for their own convenience and accommodation, and without any fault or negligence on the part of the said James Hutchins, or the said defendant, postponed the execution of said mortgage for want of time to attend to it

from time to time until the commencement of this suit, and this the said defendant is ready to verify. Wherefore, he prays judgment, if the said plaintiffs ought further to maintain their aforesaid action thereof against him, etc.

To which plea the plaintiffs replied, that the promissory note in the first and second counts of plaintiffs' said declaration mentioned, was not signed by said defendant as surety, etc.

And for a further replication, as to said second plea, said plaintiffs say *precludi non*, because they say that the said supposed agreement of said plaintiffs, to discharge said defendant from liability on said note, as in said plea mentioned, was wholly and entirely without consideration in this, to wit: that such agreement of said plaintiffs, (if any such was made,) was made upon the parol promise and agreement of said James Hutchins, in said plea named, that he, the said Hutchins, would secure said promissory note, in plaintiffs' said declaration mentioned, by a certain indenture of mortgage to be executed by the said Hutchins, thereby consigning to the plaintiffs, certain real estate, conditioned for the payment of said note to said plaintiffs; and which said agreement of said Hutchins was never executed or performed by him. And said plaintiffs aver that said agreement of said Hutchins, so being a parol agreement to convey real estate, was and is wholly void in law, and furnishes no valid consideration for the said supposed agreement of said plaintiffs, and this they are ready to verify. Wherefore, etc.

To the second replication of said plaintiffs, the defendant interposed a demurrer, and specially assigned the following causes:

1. The said replication is a replication in confession and avoidance, but does not confess.

2. The allegation and subject matter of said replication are not warranted by law.

The court sustained the demurrer to said replication, and the plaintiffs excepted.

The jury returned a verdict for defendant; whereupon plaintiffs moved for a new trial, and in arrest of judgment. DRURY, Judge, presided.

BEARDSLEY, SMITH & HENDERSON, for Plaintiffs in Error.

HOWE & KNOX, for Defendant in Error.

WALKER, J. The assignment of errors questions the judgment of the court below, in not carrying the demurrer to plaintiffs' replication, back to defendant's second plea. We think that this plea only shows an agreement to release the surety,

when the mortgage should be executed by the principal in the note. It is true that the plea avers that plaintiffs released Morse, but it is stated more as a conclusion from the facts stated in the plea, than as an agreement of the parties. This was evidently the meaning of the pleader, as he follows that averment with another, that Hutchins had, at all times since then, been ready, willing and able to make, and had repeatedly offered to make the mortgage, but plaintiffs had postponed its execution. If the agreement of the parties, at the time it was entered into, was for the immediate, unconditional discharge of Morse, there was no necessity to aver an excuse for the non-execution of the mortgage. From this it is manifest that the pleader did not put the construction upon the agreement, that Morse was discharged at the time, but that he would not be until the mortgage should be executed, and this is what the agreement set up in the plea shows.

If Morse was discharged by that agreement, no subsequent acts of the parties, without his assent, could again revive his liability. Then, if his liability was only to cease when the mortgage should be executed and the contract performed, the plaintiffs had agreed to take no steps in the matter, nor to do any act, until the mortgage was executed. They did not agree to have it prepared for execution, nor does the law impose it upon them as a duty. It was the business of the parties agreeing to give it, to have it prepared, executed and tendered, in compliance with the agreement, before Morse could be discharged. If Hutchins failed to do so, the duty devolved upon Morse to have it done. He alone was to be benefited by the consummation of the agreement, and if others have failed to protect his interest, by not doing what he should have had done, he has no grounds of complaint, or for throwing the loss upon them.

The same objection that exists to the plea, applies to the second and third of defendant's instructions. The second directs the jury that if about the time the note fell due, defendant Morse informed plaintiffs that he was unwilling longer to remain security, and that they agreed to release him and take other security from Hutchins, and he agreed to give it, that Morse was discharged, and they should find for him. The third instruction seems to assume that plaintiffs had released Morse, whether the other security was given or not, and the jury must have so understood it. The question then being tried was whether the plaintiffs, by the agreement then made, intended to release him, and the court erred in assuming that such was the fact, or that the proof of the facts supposed in the second instruction, necessarily proved that fact. That such was their

intention, was by no means an uncontroverted fact. There is no evidence in the record which in terms shows it. The plaintiff, John Lyle, in his conversation, which was proved, did not so state, but one of the witnesses thinks he asserted that Morse was not to be released until the other security should be given. The court erred in assuming that there was such an agreement, as that was a fact for the jury to determine from the evidence.

There was no evidence upon which to base the seventh and eighth of defendant's instructions. The evidence fails to show that there was any agreement to extend the time for the payment of the note, either with or without Morse's assent. And when the eighth asserted, that the law and the courts were anxious to protect the security against any material change in the relations of Hutchins and the plaintiffs, it may have been understood by the jury, that they should take into consideration the delay in bringing suit, until the relation of a solvent debtor had changed to that of an insolvent one, and that Morse should therefore be discharged. The mere fact that plaintiffs delayed bringing suit until the principal in the note became insolvent, could not, of itself, release the surety; yet the jury must have understood this instruction as asserting that it would have that effect, as we perceive no evidence in the record that showed any other change in the relations of the plaintiffs and the principal in the note. This instruction was calculated to mislead the jury, and should not have been given.

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

Judgment reversed.

Almiran S. Cole, Appellant, *v.* Alexander G. Tyng *et al.*, Appellees.

APPEAL FROM PEORIA COUNTY COURT.

Where a party purchases a warehouse receipt for grain, which he is informed is subject to charges for storage, he will be liable for such charges, and the warehousemen have a lien therefor.

If the warehousemen permit the grain to be removed before charges paid, they do not thereby lose their recourse against the holder of the receipt.

Tyng & Brotherson brought two suits against Cole, before a justice of the peace—one for $177.98, in their own right, for wheat sold and delivered; and one for $534.93, to the use of their assignees, *for storage on corn*, on which last Cole was

credited with $244, for sacks sold to Tyng & Brotherson. On appeal to the County Court, by Cole, the two suits were consolidated and tried together.

The suits were upon accounts as follows:

A. S. Cole, Bought of Tyng & Brotherson,

169 30-60 bush. Wheat, *a* $1.05	$177.98

A. S. Cole, Esq.,

To J. K. Cooper & R. C. Grier, Assignees of Tyng & Brotherson.

Storage 23,280 Bush. of Corn, from June 1st, 1855, to July 15th, (1½ months) *a* 1½c., $3..	$353.70
Storage 15,265 Bush. of Corn, from July 1st, 1855, to Aug. 15, (1½ months)	152.65
Storage 5,718 Bush. of Corn, from Aug. 15, 1855, to Sept. 15, *a* ½c.	28.58
	$534.93
1856, By Bill of Sacks	$244.00
	$290.93

The wheat and sack accounts were mutually admitted. The controversy was about the storage. If this was found for the defendant, then Cole was to have judgment for the difference between the price of the wheat and his sacks; otherwise judgment was to go for plaintiffs, for so much as the jury should find to be their due, deducting the price of the sacks. The main facts about the storage are these: Curtenius & Griswold held the warehouse receipts of Tyng & Brotherson, for 28,000 bushels of corn *in a particular building*. In February, 1855, and while Curtenius & Griswold still owned the corn, the house where it was stored broke down, and by advice and consent of Curtenius the corn was moved into other buildings. Curtenius & Griswold sold to Kellogg, transferring the receipt. By the terms of this receipt the corn was *subject to storage*, if allowed to remain after June 1st, 1855.

Kellogg took out some four thousand bushels, and sold the residue—say 23,500 bushels—to Cole, in the spring of 1855, also transferring the receipt; and Cole agreed with Kellogg to pay to Tyng whatever storage should accrue on the corn after the said June 1st, 1855.

Cole took away none of the corn before the middle of July, and the last of it not till in September following.

Tyng & Brotherson became partners and joint owners of the warehouses on the 1st of June, 1855, and, at the usual rates, storage accrued as charged in plaintiffs' bill.

The corn was stored in places convenient for Cole, and he received it from thence without objection.

On this showing, the jury found for plaintiffs the amount of

their two accounts, together with some interest, less the sack account of defendant. Plaintiffs thereupon entered a remittitur of the interest, and judgment was rendered in favor of plaintiffs for $468.91, just the amount of their two accounts, less the $244 due defendant for sacks.

The following instructions, which received the approval of the court, relate to matters of general interest, and are therefore inserted at length.

Instructions for plaintiffs:

1. That a warehouseman who receives corn or other grain in store to be delivered at a future day, is responsible for its safe delivery to whoever may be authorized to receive it at the time of delivery, whether he was the owner when it was stored or not, and is entitled to a lien upon the property stored for any charges he may rightfully have for storage on it in the mean time, and has the right to enforce said lien against said property at or before the delivery of the same, unless provided otherwise by contract between the owners; and the fact that the grain stored may have been mixed with other grain, so that the identity of this particular grain is lost, did not affect the right to storage, provided such mixture was made with the consent of the owner, and the warehouseman has on hand during the time a sufficient quantity of grain of like quality to meet the demand and to be delivered when called for.

2. That the place where the corn was stored is immaterial as to the question of storage, if the owner receive the corn without objection from the place where it is stored.

3. That when grain on store in a warehouse is, by consent of the owner, mixed with other grain, though the owner in such case loses his right of property in the specific grain stored, he becomes entitled to an aliquot share of the common mass, and the acceptance by him, without objection, of a like amount, from such common mass, and with knowledge that it is not the identical grain stored, stops him from refusing to pay storage on that account.

4. If the jury believe, from the evidence, that Tyng & Brotherson had grain enough on hand to supply the demand of Cole, and were ready and willing to deliver the same at all reasonable hours, when called for, it shows a performance of their contract, so far as the question of delivery is concerned.

5. If the jury believe, from the evidence, that Kellogg owned a quantity of corn in the warehouse of Tyng & Brotherson, which was subject to storage, or liable to become so, and that he sold the corn to Cole with the understanding that said corn would become or was subject to storage, then Tyng & Brotherson became liable to account to Cole for such corn from the

time they knew of his purchase, and had a lien on the corn for any storage that might be due them at the time of delivery; and if the jury should further believe, from the evidence, that other corn was delivered by Tyng & Brotherson to Cole in lieu of that originally purchased, and that the same was accepted by Cole with knowledge that it was different corn, and without objection made on that account by Cole, the fact that the corn delivered was not the same bought, would not divest the lien for storage, or deprive Tyng & Brotherson of any right they might otherwise have to recover for such storage.

6. If the jury find, from the evidence, that Cole owned the corn when the storage accrued, and purchased the corn of Kellogg with the knowledge that it would be liable to storage if left in the warehouse of the plaintiffs after a certain date, and with the understanding that he was to pay any storage which might accrue, then if the jury should further believe, from the evidence, that storage did rightfully accrue to the plaintiffs upon such corn, the jury should find for the plaintiffs the amount of such storage, subject to any set-off which may be proved or admitted in the case.

7. If the jury believe, from the evidence, that a warehouse receipt was given by Tyng & Brotherson, for the corn in question, and that the same was assigned to Cole, then all the provisions of said receipt should take effect, as well against as in favor of Cole, and if, by such receipt, and the proofs in the case, storage was properly chargeable on the corn when delivered to Cole, the liability to pay rests on Cole.

8. If the jury believe, from the evidence, that Tyng & Brotherson, during the spring and summer of 1855, were engaged in the business of buying and selling corn, and storing the same, and if they further believe that the defendant held a warehouse receipt for corn, this alone would not constitute a delivery of the corn, but it would be an acknowledgment by Tyng & Brotherson that they had on hand the quantity of corn mentioned in the receipt, and an agreement to deliver the quantity of corn mentioned in the receipt to the person entitled to receive the same.

9. If the jury believe, from the evidence, that Cole purchased the receipt from Walker, Kellogg & Co., then Cole took the receipt subject to the same conditions, and the claim of the plaintiffs for storage, in the same way that Kellogg, Walker & Co. would have been, had they held the same.

10. If the jury believe, from the evidence, that Kellogg was to pay storage on the corn after June 1, 1855, and that Cole purchased the corn subject to the same conditions, and if they further believe that the plaintiffs stored the corn, or any part

thereof, after June 1, 1855, and that they delivered the corn from time to time to Cole, as called for by him, the jury should allow the plaintiffs a reasonable compensation for such storage; if the jury further believe, that the defendant purchased the receipt and corn of Kellogg, and that he took it subject to the claim of the plaintiffs for storage.

11. That though a settlement of acceptance is *prima facie* evidence of payment of prior demands, yet it is not conclusive evidence, and is subject to be rebutted by proof that any particular account was not paid.

12. That an implied contract to pay the storage in question may arise from facts and circumstances detailed in evidence, and it is not necessary to raise such implications that there should be positive proof.

Instructions for defendant:

1. The contract offered to the jury between Kellogg and Cole, is no evidence of an express agreement between plaintiffs and Cole that Cole should pay the plaintiffs for storage.

2. Unless the jury believe, from the evidence, that there was a contract, express or implied, between the plaintiffs or their agent, and Cole or his agent, that Cole should pay the plaintiffs for storage, they will find for the defendant.

3. If the jury believe, from the evidence, that after the alleged storage, the plaintiffs had a full settlement of their accounts against Cole, and made no charge for storage, the presumption is that they had no just account against Cole for storage up to the time of such settlement.

4. If the jury believe, from the evidence, that the plaintiffs had no contract, express or implied, with Cole, by which Cole was bound to pay for the storage, then, although the plaintiffs had a lien on the corn for storage, yet if they delivered the corn to Cole without insisting upon such lien, they could not afterwards recover of Cole for the storage.

5. If the jury believe, from the evidence, that the plaintiffs had given a warehouse receipt for the corn, as being in a certain warehouse, then they could not charge the defendant for storing it in any other place, unless the defendant assented to its being stored in another place, or unless some other prior holder of the receipt had assented to it, and Cole had notice of it when he purchased.

6. The plaintiffs could not charge for storing the corn, unless they stored their corn, or an equal amount of other corn, for the defendant, to fill his order when demanded.

7. If the jury believe that Cole permitted the corn to remain in the warehouse at the instance and request of the plaintiffs,

and for their benefit, the plaintiffs cannot recover storage for it while it so remained.

8. If the plaintiffs delivered the corn to Cole, without claiming in any manner that they had any right to charge storage, and they had no contract with Cole, express or implied, by which Cole was bound to pay storage, this is *prima facie* evidence that they had not and have not a right to recover for the storage, of Cole.

9. If the jury believe, from the evidence, that there was not sufficient corn in the warehouse of Tyng & Brotherson, at any time when called for by Cole, the holder of the receipt, to fill the demand made by him, they will find a verdict in favor of the defendant.

10. If the jury believe, from the evidence, that there was no express or implied agreement, on the part of Cole, with Tyng & Brotherson, or their agent, or any other person for them, to pay them storage, they will find a verdict for the defendant.

MANNING & MERRIMAN, for Appellant.

J. K. COOPER, and H. GROVES, for Appellees.

BREESE, J. When Cole purchased the warehouse receipt which the plaintiffs had given to Curtenius & Griswold, and by them transferred to Kellogg, he purchased with a knowledge that the corn was to be subject to charges for storage, if allowed to remain in the warehouse after the first day of June—it was so expressed in the receipt. The corn was taken out in parcels by Cole, during the summer of 1855, and the last was removed in September of that year.

The plaintiffs had always corn enough on hand to satisfy the receipt, if it had been demanded, at any time, and was stored in places so convenient for Cole as to cause no objection on that account. We think the storage was fairly due the plaintiffs, and they had a lien upon the corn for the storage. In suffering the defendant to take it away, they do not forfeit their right to hold Cole personally bound for the storage. The instructions given to the jury for both parties, correctly stated the law of the case, and the evidence fully sustains the verdict. The judgment is affirmed.

Judgment affirmed.

WILLIAM WHEELER, Plaintiff in Error, *v.* THE CITY OF CHICAGO, Defendant in Error; and ROSALIE A. BONNER, Plaintiff in Error, *v.* THE SAME, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

An action may be maintained upon an implied assumpsit by the city of Chicago, to collect and pay over the assessment awarded property holders, for the opening of a street.

The word, "*shall*," in a statute, may be held to be used, as directory merely, when no advantage is lost, no right destroyed or benefit sacrificed, either to the public or individuals, by such a construction.

This rule applied to the word *shall*, in the last sentence of the tenth section of the sixth chapter of the charter of the city of Chicago.

THIS was an action of assumpsit, brought by the plaintiff in error against the defendant in error, in the Cook County Court of Common Pleas, (now Superior Court of Chicago,) to recover of the defendant the sum of fifteen thousand five hundred and forty-five dollars, which the plaintiff claims that the city owes him for damages which commissioners, appointed by the city of Chicago to estimate the benefits and damages to the owners of property by the opening and extending of South LaSalle street, from its present termination at Madison street, to Jackson street, awarded him.

The declaration sets out, that on the 15th day of October, 1855, and until the time of the appropriation for street purposes, the plaintiff was the owner and seized in fee of the west thirty feet of sub-lot 8, and all of sub-lot 7, in lots 1 and 2, in block 118, in the school section addition to Chicago.

On 15th October, 1855, the common council ordered a survey to be made for the extension of South LaSalle street, from its terminus on Madison street, to Jackson street.

On 20th October, 1855, notice was given of the intention of the city to take and appropriate the land necessary for the extension of said street. This notice was published ten days.

January 10, 1856, the common council appointed commissioners to ascertain and *assess* the damages and recompense due the owners of land, which might be taken *on the real estate* of the persons *benefited*, in proportion, as nearly as may be, to the benefits resulting to each.

January 16, 1856, the commissioners were duly sworn to execute their duties according to the best of their ability, etc. That before entering on their duties, they gave ten days' notice, to all persons interested, of the time and place of their meeting, for the purpose of viewing the premises and making their assessment; which notice was published ten days in the corporation

newspaper. The declaration then sets out, that they proceeded to make the assessment, and "did determine and appraise to the owner and owners the value of the real estate appropriated, after making due allowance for benefits, etc. That the commissioners, did in all things comply with the law, and charter, and ordinances of said city, in regard to said assessment, and the opening of said street, and did *describe* the real estate upon which *their assessments were made*." And after having completed and signed said assessment, did, within the extended time allowed them by the said common council, in which to complete and return their said assessment, on the 5th day of April, 1856, return their said assessment to the common council.

Ten days' notice was then given by the clerk of the return of the assessment roll, commencing on the 8th day of April, 1856.

June 10th, 1856, the assessment roll was confirmed, in and by which the plaintiff claims that he is entitled to have and receive from the city of Chicago the sum of $15,545, as damages which the commissioners had awarded him. The plaintiff then avers, "that it thereupon then and there became and was the duty of the said defendants to proceed immediately, and with diligence, to collect money by the means provided by their charter, sufficient to pay the aforesaid assessment and award, as aforesaid assessed and awarded to said plaintiff, and confirmed as aforesaid, and to pay the same to said plaintiff within a reasonable time; and the said defendant, in consideration thereof, then and there undertook and faithfully promised the said plaintiff to faithfully and diligently perform their said duty in all respects in this behalf. Yet the said defendants, disregarding their said undertaking and promise in the premises, did not within a reasonable time pay to the said plaintiff the said award and assessment, etc., but have for an unreasonable time, to wit, for the space of two years and eight months, wholly failed and neglected to pay the said plaintiff the said sum of money so appraised, awarded and allowed to him," etc.

These constitute the main allegations of the plaintiff's declaration.

To this declaration, the defendant in the court below filed a general demurrer, which was sustained by the court. The plaintiff stood by his demurrer, and the case is now brought to this court by a writ of error.

The proceedings were alike, in the foregoing cases.

Farwell, Smith & Thomas, for Plaintiff Wheeler.

Arnold, Lay & Gregory, for Plaintiffs Bonner *et al.*

E. Anthony, for Defendant in Error.

CATON, C. J. We have no difficulty in saying that an action may be maintained upon the implied assumpsit of the city, to collect the assessment and to pay the amount awarded to property holders, for opening a street; but the most embarrassing question in these cases is to determine whether these declarations show that the proceedings were regular for opening this street, and the levy of this assessment, and this depends upon the construction to be given to the word *shall*, in the last sentence of the tenth section of the sixth chapter of the city charter. The sentence is this: "when completed, the commissioners shall sign and return the same to the common council, within forty days of their appointment." In this case, the common council extended the time for the return of the assessment roll beyond the forty days, and within the extended time, the return was made. If this provision was designed by the legislature to be imperative, then the return made after the time specified had expired, was illegal, and the assessment was void; and the whole proceeding fell with it; and if that was so, no right accrued to the city to open the street, and consequently, no implied assumpsit arose, that it would collect and pay over the assessment. But if the return was in time, then the right vested in the city to open the street, and the duty devolved upon it to collect the assessment within the time authorized by law, and to pay it over to the parties to whom it was awarded by the commissioners.

We entirely concur in the remark, that this statute, under which the property of the citizen is to be taken from him for the use of the public, is to be strictly construed, and must be complied with in all its essential provisions, or the whole proceeding is void; but the inquiry still occurs, what is the provision of this statute? What did the legislature mean by it? In other words, is this enactment imperative, or permissive or directory? The word *may* is construed to mean shall, whenever the rights of the public, or third persons, depend upon the exercise of the power or the performance of the duty to which it refers. And so, on the other hand, the word *shall* may be held to be merely directory, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction; but if any right to any one depends upon giving the word an imperative construction, the presumption is, that the word was used in reference to such right or benefit. But where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely.

The general revenue law prescribing the time within which the assessment should be returned, we held to be imperative,

and that an assessment returned after the time appointed by the law, was absolutely void, and the reason for so holding was, that the person assessed "would lose the benefit of an appeal from the assessment; for the statute expressly provides that no application to reduce the valuation shall be made after the June term of the court." And the same reason was assigned for a similar ruling in the case in 7 Conn., referred to in the opinion of the court in that case. But in *Pond* v. *Negus*, 3 Mass., the question arose upon an assessment which was made after the day fixed by the law, and as nobody could have derived any advantage from the assessment having been made within the time, and there being no negative words in the statute, it was construed as directory, and an assessment made subsequently, was held good. The court said, "And although the assessors are directed to assess the tax within thirty days after the certificate, yet there are no negative words restraining them from making the assessment afterwards; and accidents might happen which would defeat the authority if it could not be exercised after the thirty days." These remarks are pertinent to the case at bar. So in *Colt* v. *Eves*, 12 Conn. 243. There the statute required jurors to be selected on a particular day, and the court held that they might be selected on a subsequent day. The court held that the duty which was imposed to select the jury, was imperative, but that the time fixed was directory. In commenting upon the case in 7 Conn., above referred to, the court said, "The principle there assumed seems to be that where the object contemplated by the legislature could not be carried into effect by another construction, then the time prescribed must be considered as imperative, but where there is nothing to indicate that the exact time was essential, it should be considered as directory."

These cases serve as examples of the two classes of decisions which are very numerous, and leave the principle on which they depend as clearly defined as almost any other rule for construing statutes. By the application of this rule to this statute, it was very clearly not the intention of the legislature to make the time specified for the return of the assessment roll indispensable to the validity of the proceedings. There are no negative words used, declaring that the functions of the commissioners shall cease after the expiration of the forty days, or that they shall not make their return after that time. Nor have we been able to discover the least right, benefit, or advantage, which the property owner could derive from having the return made within that time, and not after. No time is limited, and made dependent on that time, within which the owner of the property may apply to have the assessment reviewed or corrected. The next

section requires the clerk to give ten days' notice that the assessment has been returned, specifying a day when objections may be made to the assessment, before the common council, by parties interested, which hearing may be adjourned from day to day, and the common council is empowered in its discretion to confirm or annul the assessment altogether, or to refer it back to the same commissioners, or to others, to be by them appointed. As the property owner has the same time and opportunity to prepare himself to object to the assessment, and have it corrected, whether the return be made before or after the expiration of the forty days, the case differs from that of *Chesnut* v. *Marsh*, at the very point on which that case turned, nor is there any other portion of the charter which we have discovered, bringing it within the principle of that case, which is the well recognized rule in all the books.

This is the only objection which has been pointed out as appearing on the face of these declarations, to the validity of this assessment. If there is anything else which will render the proceeding void, and show that the city acquired no right to the land proposed to be taken for the street, that can be shown in the defendant's pleas. We think the demurrers should have been overruled. The judgments must be reversed and the causes remanded, with leave to the defendant to plead.

Judgments reversed.

Alvin Woodworth, Appellant, *v.* Oliver Fuller *et al.*, Appellees.

APPEAL FROM COMMON PLEAS OF CITY OF AURORA.

Unless parties sue as partners, they must make proof, as at common law, to maintain an action.

This was an action brought by Oliver Fuller, Charles Perkins, and Edward Finch, against Erasmus Woodworth and Alvin Woodworth, before a justice of the peace. The defendants were sued as the guarantors of a note, signed by one Philip Smith. There was a judgment for plaintiffs before the justice, and the defendant, Alvin Woodworth, who alone was served, took an appeal to the Court of Common Pleas of the city of Aurora, Kane county.

The cause was tried before Parks, Judge, without a jury. The court gave judgment for the plaintiffs in the action before the justice, Fuller and Company.

C. J. METZNER, for Appellant.

W. B. PLATO, for Appellees.

CATON, C. J. This action was brought by three persons, as individuals, nothing upon the face of the papers showing that they were partners. Upon the trial, they proved a cause of action in favor of O. F. Fuller & Co., against the defendants, but failed to show that they constituted the firm of O. F. Fuller & Co. On this proof they were not entitled to judgment. Had they sued as partners, our statute might have dispensed with such proof. But unless they sue as partners, the statute does not relieve them from producing the proof which was required by the common law to maintain the action.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

WILLIAM BRADY, Plaintiff in Error, *v.* HORACE G. ANDERSON *et al.*, Defendants in Error.

ERROR TO PEORIA.

A petition to enforce a mechanics' lien for materials furnished, which avers that the time of payment was not extended beyond the period of one year for the time stipulated for the completion of the work, is insufficient.

This lien will not be extended to cases falling within the reason, but not provided for by the language of the statute.

If the petition avers that materials were to be paid for on delivery, evidence that no time was specified for the payment of them, would sustain the averment.

A mechanics' lien is not lost, by the taking of a note bearing interest, from the owner of the premises.

THIS was a petition for a mechanics' lien, filed by Horace G. Anderson and John C. Proctor, against William Brady, Hezekiah M. Wead, and Robert A. Smith.

The petition averred that the petitioners are partners, and that about the 25th of August, 1856, "William Brady, being or pretending to be the owner" of lots 4 and 5, in block 35, in Peoria, and being then about to build a hotel thereon, "contracted with petitioners to sell and furnish such lumber and materials as Brady might want or need in the prosecution of such building." No particular quantity contracted for, and no price fixed, but a reasonable price was to be paid in a reasonable time.

That in pursuance of such contract the petitioners furnished lumber, materials, joists, boards, strips, studding, and other articles.

That Brady received such materials, and appropriated them in said building.

That petitioners took and received from Brady, for lumber, materials, and other articles delivered to him before that time, after deducting $200, paid and credited in account, a note in these words:

$563.21. *Peoria, January 5th,* 1857.

On or before the 28th of September next, I promise to pay to the order of Anderson & Proctor, five hundred and sixty-three and 21-100 dollars, value received, with interest at ten per cent. per annum, it being for material furnished for the building of my hotel, called the Buckeye House, situated in the city of Peoria, payable at the banking house of N. B. Curtis & Co.

(Signed) WILLIAM BRADY.

That since the execution of the note, Brady has received lumber and materials amounting to the further sum of $30.94. And petition charges that there is due $655.14.

That Wead and Smith have some interest in the premises, etc., as security for money borrowed by Brady.

That the premises are worth at least $15,000. "The time for furnishing said lumber and materials was not extended for a longer period than three years, nor the time of payment beyond the period of one year for the time stipulated for the completion thereof."

Prayer for the answer, that an account may be taken, decree made, etc.

Brady filed a demurrer, assigning the following among other reasons: That the extending the time for payment and taking the note at ten per cent. discharged the lien, if any had attached. That the court is asked to enforce not the original, but a subsequent contract, unknown to the statute.

The answer of William Brady admits ownership of lots.

Admits a contract for the first and second items of the account, amounting to $360.44.

Denies that he contracted for any other or further lumber at or about that time.

Sets up payment of $200 on above two items at or about date thereof.

Admits that he received the other items specified in the account, but denies that he received the same under the alleged contract, or under any specific contract to use the same in or upon said hotel buildings.

Admits the making of the note set out in the petition.

Charges that the agreement therein to pay ten per cent. is illegal and void.

Bill was dismissed as to all the defendants except Brady. Trial by jury.

There was this verdict: "We, the jury, find the issues for the plaintiffs, and assess their damages at the sum of $692.04."

The decree dismisses the bill as to Wead and Smith.

The jury found the issues for petitioners, and that amount due them is $692.04, "and sustain their lien," etc.

Court finds petition to be true, that $694.04 is due, and decrees lien on lots, etc.

Directs that Brady pay amount of decree in four months, otherwise sale at court-house to highest and best bidder for cash.

Motions for new trial and to vacate decree overruled.

C. C. Bonney, for Plaintiff in Error.

H. Grove, for Defendants in Error.

Walker, J. The petition in this case fails to allege that any time was fixed or agreed upon by the parties, for the payment of the price of the materials furnished. That a time for payment, within the period limited by the statute, should have been fixed by the parties, was necessary to create the lien in favor of the material man, has been repeatedly held by this court. In this, the petition was clearly defective. Nor was the case in anywise aided by the evidence. To recover, the allegations and proofs must agree, at least in substance. This lien is given by statute, is in derogation of the common law, is secret in its nature, no notice being required, by record or otherwise, either to creditors or purchasers, and it should therefore receive a strict construction. This lien, like all others of the same character, should be fairly enforced, when the party brings himself within the provisions of the statute, but it should not be extended to cases falling within the reason, but not provided for by the language of the statute. Nor can well-established rules of pleading be violated to aid in its enforcement. When the pleadings and evidence show that the party is entitled to its benefits, it will be enforced regardless of the hardships it may inflict upon creditors and purchasers, unless the holder of the lien, by some act of his, has contributed to such a result.

If the petition contains an allegation, that the labor or materials furnished, were to be paid for on performance or delivery, then evidence that no time was specified for payment by the parties, would sustain the allegation. And it is for the reason,

that when no time of payment is specified, the money is due upon delivery or performance. In this case, the petition alleges that the payment was to be made in a reasonable time after the materials were delivered. The evidence fails to sustain the averment, as no such agreement was made; but on the contrary, it appears that no time was specified for the payment. And the legal effect of the contract would be, that the materials were to be paid for on delivery. This evidence shows a contract for payment at a different time from that set out in the petition, and this was a material variance between the petition and the evidence.

It is likewise insisted, that by taking the note of the owner of the premises, the petitioner lost his lien. While the taking of other security, either on property or that of individuals, not parties to the transaction, would have the effect to discharge the premises from the lien, yet the mere settlement and adjustment of accounts, and taking the note of the owner of the premises, who incurred the debt, is in no sense a change of security, or security of any description. The note when taken is only evidence of the debt, and cannot be held to affect the lien. Nor do we perceive, that the fact that such a note was taken with the legal rate of interest, can in any degree change the attitude of the parties. The interest is only an incident to the debt, and is justly given as a compensation for delay in payment. No reason is perceived why the mechanic performing labor, or the material man who contributes materials for the structure, should not be as justly entitled to this compensation, as a mortgagee, judgment creditor, or other person holding a lien on real estate. The statute has not prohibited these liens from bearing interest. But the law has, in general terms, authorized parties to contract for the payment of interest on indebtedness. And we think a debt of this character is embraced in its provisions.

The decree of the court below is reversed, and the cause is remanded, with leave to amend the petition, and for further proceedings.

Decree reversed.

Enock H. Raymond, Appellant, *v.* Anthon H. Strobel, Appellee.

APPEAL FROM LA SALLE.

A party may remit interest, or reduce his demand, and thereby bring his claim within the jurisdiction of a justice of the peace, so as to recover judgment.

THIS suit was originally commenced before a justice of the peace, and taken by appeal to the Circuit Court of LaSalle county. On the trial of the cause in the Circuit Court, HOLLISTER, Judge, presiding, the plaintiff below introduced in evidence a note, in the words as follows:

$95.00. *Ottawa, Dec.* 2, 1858.

Nine months after date, I promise to pay to the order of Augustus Leckelt, ninety-five dollars, value received, with ten per cent. interest per annum.

E. H. RAYMOND.

Indorsed: "A. Leckelt."

And the plaintiff offered to remit all the interest on the note, for the express purpose of giving jurisdiction, and take judgment for $95 only, etc., and rested his case.

There was a motion by defendant below to dismiss the suit for want of jurisdiction in the justice, which was overruled.

Motion for new trial, and motion overruled.

The errors assigned are: overruling the motion to dismiss for want of jurisdiction; overruling the motion for new trial; and rendering judgment for plaintiff below.

BUSHNELL & AVERY, for Appellant.

C. C. BONNEY, for Appellee.

BREESE, J. The justice of the peace had jurisdiction to try this cause, and render the judgment. To say that a party may not remit the interest due him on a note, and expressly contracted to be paid, is to say that he may not release the whole debt, and any decisions of courts, however respectable, going to this extent, we are not disposed to follow.

This court, as its rulings show, has entertained views on this question wholly different from those expressed by the courts of New Jersey and Texas, to which reference has been made by appellant's counsel.

In *Ellis* v. *Snider*, Breese, 263, decided in 1830, it was held, that although the plaintiff had proved more than one hundred dollars, inasmuch as he had claimed a sum less than one hundred dollars, the justice had jurisdiction. The party suing is to judge of the extent of the claim for which he will sue.

The same was held in *Simpson* v. *Updegraff et al.*, 1 Scam. 593, where the suit was on a note for one hundred dollars, sued on long after it was due, and the plaintiff claimed no interest. The court below seemed disposed to compel the plaintiff to claim the interest, and decided that because the interest made the claim more than one hundred dollars, the justice had no jurisdiction. This decision was reversed on the same ground taken

in *Ellis* v. *Snider;* that the claim of the plaintiff must determine the jurisdiction. To the same effect is *Bates* v. *Bulkley*, 2 Gilm. 389.

In the case of *Korsoski et al.* v. *Foster*, 20 Ill. R. 32, this court held, that an indorsement made on a note, of a payment, with the express purpose of giving a justice of the peace jurisdiction, was not open to objection. The cases where a different rule prevailed, arose before the passage of the act of 1833. That act conferred jurisdiction when the sum, though originally above the jurisdiction of a justice, had been reduced by fair credits to a sum within his jurisdiction. But whatever the decisions may have been, we hold, if a creditor chooses, voluntarily, to release and forgive a part of the debt, which it was the duty of the debtor to pay, we cannot think he has any cause to complain, even if the day of payment may be hastened.

The jurisdiction of the justice must depend upon the amount claimed by the plaintiff, and this amount is, by statute, required to be indorsed on the summons, and if paid to the constable serving the summons, the plaintiff would be forever barred from any greater recovery.

A "fair credit," within the meaning of section 18, chap. 59, (Scates' Comp. 687,) is such a credit as may be given without detriment to the defendant, and for giving which, even without his knowledge, he ought not to complain.

But this is not a case of "fair credit" given. It is simply a case where a party suing, chooses to sue for and recover less than he might lawfully claim, and limits such his recovery by his own act of indorsement on the summons. To this extent he can claim, if within a magistrate's jurisdiction, but not beyond it. The case of *Ellis* v. *Snider* is full to the point.

The judgment of the court below is affirmed.

Judgment affirmed.

Samuel A. Hopkins *et al.*, Plaintiffs in Error, *v.* James R. Moon, Defendant in Error.

ERROR TO BUREAU.

In order to hold a party who is special bail, before a justice of the peace, it is necessary that a *scire facias* upon the judgment for the return of the defendant shall have been issued.

This cause was brought by the plaintiffs in error against the defendant in error, before a justice of the peace of Bureau

county, in which court judgment was rendered for the defendant, and the plaintiffs appealed to the Circuit Court of said county.

The suit was brought against the defendant as special bail of one Elias Dakin, entered into by the defendant on a *capias* issued in favor of the plaintiffs and against the said Dakin. In the Circuit Court a jury was waived and the cause was submitted to the court for trial, and the court found the issues for the defendant.

The plaintiffs admitted that no *ca. sa.* had been issued on said judgment against said Dakin, and that if there had been, he could have been arrested, but claimed that no *ca. sa.* was necessary to make defendant Moon liable, but that he should have surrendered up the body of Dakin upon the executions against the goods and chattels of Dakin, which surrender defendant conceded had never been made, and insisted that there never had been any demand made for such surrender.

The court decided that a *ca. sa.* should have issued, and found for the defendant, and rendered judgment against the plaintiffs for costs, to which said decision of the court the plaintiffs excepted.

The cause was tried before Hollister, Judge.

Peters & Farwell, for Plaintiffs in Error.

G. L. Paddock, for Defendant in Error.

Caton, C. J. What is necessary to be done to create, or rather to fix the liability upon this bail bond, depends upon the positive provisions of the statute under which it was given. Whatever the statute requires, whether we may think it useful or sensible, or the reverse, must be done before a right of action can exist upon it. By the defendant in error it was insisted that no right of action exists until a *ca. sa.* has been issued upon the judgment. That is the law for cases in the Circuit Court, but it is not so in cases before justices of the peace. The 92nd section of the 59th chapter R. S. is the one which prescribes what shall be done to fix the liability of special bail before justices of the peace. But unfortunately there is a misprint in that section, which has been followed both in Purple's Statutes and Scates' Compilation. We find, upon examination of the enrolled law in the Secretary's office, that the section referred to reads as follows: "In all cases where the defendant shall give special bail under the provisions of this chapter, and shall not be surrendered on or before the return day of the *scire facias* upon the judgment," etc. In all three

of the printed works referred to, the words "*fieri facias*" are substituted for *scire facias*. Now, although we may think that the writ specified by the printer is a much more appropriate one for the occasion than the one prescribed by the legislature, we are bound by the latter, and must require the issue of a writ of *scire facias* before the bail can be fixed. That was not done here, and consequently the action could not be maintained.

The judgment must be affirmed.

Judgment affirmed.

Georgiana Welch, Administratrix, and Abram Gale, Administrator, of the Estate of Benjamin C. Welch, deceased, Plaintiffs in Error, *v.* James T. Hoyt, Defendant in Error.

ERROR TO COOK.

If an administrator takes upon himself to warrant personal property sold by him, the maker of a note given for such property may show failure of consideration under the warranty.

The declaration in this case counts upon a note for $112.50, and on an account stated, as administratrix and administrator. Defendant pleaded the general issue, with notice that at the time of making said note, on the 15th April, 1857, he purchased of plaintiffs, and they sold a certain side-slat, extension-top, one-horse buggy, for the sum of $225, half of which was paid down, and the note sued on was given for the balance. That at the time of the sale, the plaintiffs warranted the buggy to be of good, sound material, both wood and iron, and well made; and defendant was induced thereby to purchase it, and that sale and warranty were the only consideration of that note. That defendant will prove that the buggy was constructed of very poor materials; the wood was green, cross-grained trash, of a poor quality, wholly unfit for such purpose. That the iron was of the poorest kind—a sort of pot-metal—brittle, without strength, and wholly unfit for the purpose. That the workmanship was bad, and where concealed from view, rough, and carelessly done. That the paint and varnish were thin, and turned dull as soon as exposed to the weather. That the leather-work was rotten and poorly fastened. That as soon as the buggy was put in use, it rapidly fell to pieces, under ordinary wear and use. The hubs shrunk, in a few days, so that the bands were loose, the iron stays snapped, the reach broke, the bows that support the buggy

broke, the thills came off in a very short time, and the springs gave out, and defendant was obliged to take buggy to shop for repairs in wood and iron work every few days, and was put to large expenditure on said buggy, more than $100. That notwithstanding repairs, buggy is still entirely unfit for purpose intended, or for safe carriage of defendant, and is not, nor ever was, worth the cash paid plaintiffs on purchase. That it was not in any respect such a vehicle as they warranted it to be, which they knew at the time of sale. That defendant has suffered in expense of repairs and loss of use of buggy to amount of $200; and that on trial, he would set off against plaintiffs' claim, so much of said amount as might be sufficient to satisfy it, and claim judgment for balance.

Trial and verdict for defendant at June Term, 1859, of Circuit Court, MANNIERE, Judge, presiding.

Motion for new trial,—overruled, and exception taken by plaintiffs.

The facts averred in the notice of defense were sustained by proof on the trial.

W. B. SCATES, and M. A. RORKE, for Plaintiffs in Error.

EVANS & HOYT, for Defendant in Error.

CATON, C. J. This is an action upon a promissory note given for the balance of the agreed price of a buggy, purchased of an administrator, and the question is, whether a false warranty of the buggy may be shown in defense of the action.

If the law did not authorize the administrator to bind the estate by a warranty of the article sold, neither will it authorize him by means of a false warranty to sell the buggy for double its value, and after receiving its full value in cash, procure the purchaser's note for as much more, and then collect the note. The law will not sanction that mode of increasing the amount of the assets of an estate for the benefit of creditors, at the expense of innocent parties. No just law for the government of an upright, fair-dealing people, contains any such traps as this. An estate cannot and should not be augmented in this way. We may, and are bound to presume, that without this warranty, the purchaser would only have given the actual value of the buggy, which, according to the evidence, he paid in cash. The warranty was the consideration of the note, which was the excess of the real value. It was a false warranty, and has entirely failed, and so has the consideration of the note failed. We do not now wish to be understood that the administrator was so authorized to bind the estate by the warranty, or that he

might be sued upon it as administrator; but the proof of the warranty and its failure shows a failure of the consideration of the note. Had the administrator received the full price agreed upon for the buggy, with the warranty, in cash at the time, and this were an action brought to recover back that portion of the money which was in excess of the real value, another question would be presented, which we do not propose now to decide. Whether that money which *ex equo et bono* belonged to the purchaser should be withheld from him and distributed to the creditors, must be reserved for determination till the question actually arises.

The judgment is affirmed.

Judgment affirmed.

THE ROAD COMMISSIONERS OF THE TOWN OF VERMILLION, Plaintiffs in Error, *v.* ASA HOLDRIDGE, Defendant in Error.

ERROR TO LA SALLE.

THIS case is in all respects similar to that published *ante*, page 38.

WALKER, J. The facts presented by this record involve the same legal propositions raised and determined by the case, *McPherson* v. *Holdridge*, determined at the present term of this court. It is therefore unnecessary to discuss them here, that case being decisive of this.

The same judgment is rendered in this case as in that.

Decree modified.

NELSON C. ROE, Plaintiff in Error, *v.* WILLIAM HURLBURT and LAFAYETTE HURLBURT, Defendants in Error.

ERROR TO COOK.

It is erroneous for a court to proceed to adjudicate a case which is not before it.

ON the 19th day of April, A. D. 1855, there was filed with the clerk of the Cook county Circuit Court, a paper purporting to be a transcript of certain proceedings in the County Court of

said county, on the application of Nelson C. Roe, for a discharge under the act concerning insolvent debtors, which transcript contained, among other things, a copy of schedule of the said applicant, but which was without oath or affirmation, an order of the County Court refusing to make an assignee or discharge him. Copy of an appeal bond, reciting the arrest of said Roe upon an execution in favor of the above-named Hurlburts, and such refusal by the court to discharge him, and the taking of an appeal to the Cook County Court of Common Pleas; and the said transcript also contained an order of said County Court, approving said appeal bond, and allowing an appeal to the said Cook County Court of Common Pleas; which said transcript was duly certified by the clerk of said County Court, and indorsed: "Filed, December 4, 1854. W. Kimball, Clerk."

There was also filed at the same time of said transcript, to wit, the 19th day of April, 1855, a motion entitled in the Cook County Court of Common Pleas, to set aside a default in said case; also, an affidavit to support the motion.

Also, petitions for a change of venue from said Common Pleas Court.

On the 24th day of April, 1855, at the March vacation term of said Circuit Court, this cause was ordered to be placed upon the docket of said Circuit Court.

On the 22nd day of June, 1855, the said Circuit Court took the default of said Nelson C. Roe, and the attorneys for the said Hurlburts moved to dismiss Roe's appeal, which the court took under advisement.

On the 28th day of June, 1855, was the following entry: "This day again come the creditors of said applicant, by Messrs. Goodrich, Scoville & Seelye, his attorneys, and the said applicant, by his attorneys, also comes, and the court being now fully advised upon the motion to dismiss the appeal heretofore entered, orders that the said motion be sustained, and this appeal is dismissed.

The taking the default of said Nelson C. Roe, and dismissing the said appeal, are assigned for error.

Scates, McAllister & Jewett, for Plaintiff in Error.

Farwell, Smith & Thomas, for Defendants in Error.

Caton, C. J. This was an appeal from the County Court to the Common Pleas, where a motion was made for a change of venue, which was never decided. While that motion was still pending, the papers and a transcript of the record were by some means transferred to the office of the clerk of the Circuit Court.

The Circuit Court ordered the cause to be placed upon the docket, called and defaulted the appellant, and dismissed the appeal. In this the court erred. It had acquired no jurisdiction of the cause, which was still pending in the Common Pleas, on the motion for a change of venue. The papers should have been sent back to the Common Pleas. This proceeding was, no doubt, the result of inadvertence, but it was none the less erroneous.

The judgment must be reversed, and the cause remanded; with directions to return the papers to the Common Pleas, and to strike the cause from the docket of the Circuit Court.

Judgment reversed.

Peter Ambs, Appellant, *v.* Henry H. Honore *et al.*, Appellees.

APPEAL FROM COOK.

Where a question of fact is left to the court, instead of a jury, the finding of the court will generally be sustained.

This was an action of replevin, brought by appellant against appellees.

Declaration contains only one count. Plaintiff alleges that the defendants, on or about the 3rd day of May, A. D. 1858, took certain liquors and office furniture therein described, the property of the plaintiff, and of the value of two thousand dollars, and unjustly detained the same, etc.

Pleas: 1st, Non cepit.

2nd. Special plea, denying the property of said goods and chattels in plaintiff, and averring the same to have been the property of one John Ambs, at the time when, etc., and praying return.

3rd. Special plea by defendants Honore and Bradley, well avowing the taking of the said goods and chattels by defendant, and justly, etc., because one John Ambs, on the 1st May, 1858, was justly indebted to said Honore and Bradley, eight hundred and seventy-five dollars as rent, for which sum said Honore and Bradley, on the 3rd May, 1858, issued their warrant of distress against the goods and chattels of John Ambs, which was placed in the hands of the defendant Ferris, and which distress warrant was, on the 3rd of May, 1858, levied by said Ferris upon the goods and chattels mentioned in the plaintiff's declaration, the

same being found upon the demised premises, as the property of John Ambs. Also avers that the said goods and chattels were then and there the property of John Ambs, and not of Peter Ambs; prays return, etc.

4th. Plea by E. G. Ferris. Acknowledges the taking of said goods and chattels, and justly, etc. Sets up a levy under the distress warrant mentioned in third plea upon the goods and chattels mentioned in declaration as the property of John Ambs, contains an averment to that effect, and denies that the same were the property of Peter Ambs; prays return, etc.

Issue joined upon first plea.

Replication to second, third and fourth pleas, that the property of said goods and chattels, at the time when, etc., was in Peter Ambs, and not in John Ambs, upon which issue joined.

It was then agreed between the parties that the cause should be tried by the court, without the intervention of a jury.

The court then gave judgment for the defendants, and awarded a writ of *retorno habendo*.

To which judgment and decision the plaintiff's counsel excepted, for the reason that said judgment and decision are contrary to the law and evidence of said cause.

Davis & Nissen, for Appellant.

W. P. and N. Thomasson, for Appellees.

Breese, J. There is no question made upon any decision of the court below, upon points of law appearing in this record. The complaint is, that the court, sitting as a jury, mistook the evidence, and therefore a new trial should have been allowed.

The question before the court, on the evidence, was fraud or no fraud, and there is very much in the case to justify the conclusion at which the court arrived.

On looking at the whole evidence, as it appears in the record, we cannot say we would not have found as the court did find. The evidence, and manner of giving it in, and all the circumstances surrounding the witnesses and the case, were fully before the court. If they do not, as they cannot, make the same impression upon us, they yet are of such a nature as to forbid us from interfering with the verdict to disturb it. In such cases, where the jury might have found either way, we cannot interfere. The evidence of fraud is by no means so weak as to justify us in setting aside the verdict.

The judgment is affirmed.

Judgment affirmed.

Samuel W. Raymond, Appellant, *v.* John D. Caton, Appellee.

APPEAL FROM LA SALLE.

Where a penal obligation arises from a default, in neglecting to execute a principal obligation, the creditor may proceed upon the principal obligation instead of enforcing the penalty.

A penalty does not release a party from his agreement; for, although the penalty is incurred, he must nevertheless perform his contract.

The declaration in this case is, in substance, as follows: John D. Caton, plaintiff in this suit, by his attorneys, etc., complains, etc., of a plea of covenant broken, for that whereas heretofore, to wit, on the 20th day of October, A. D. 1857, at Ottawa, etc., certain articles of agreement were then and there made and entered into by and between the said plaintiff, of the one part, and the said defendant, of the other part, under their hands and seals, which said articles of agreement were and are in substance as follows:

"Articles of agreement, made and entered into this 20th day of October, 1858, by and between John D. Caton, party of the first part, and J. Dean Caton, Samuel W. Raymond and others, parties of the second part, witnesseth, that the said party of the first part shall purchase, at the assignees' sale, the Ottawa Starch Factory and its fixtures and appurtenances, in trust for himself and the said parties of the second part, in the proportion that the stock in the Ottawa Starch Company which each now holds and owns bears to the whole amount of paid up stock which is held and owned by all of the parties hereto specified, as follows: that is to say, the said John D. Caton hold one hundred shares of said stock, and said Samuel W. Raymond thirty-five shares (and other persons hold shares of said stock); and such trust is hereby expressly declared in the proportion and in favor of the parties aforesaid; and the said parties of the second part do severally and respectively, each for himself, hereby agree to and with the party of the first part, to pay, upon the execution of these presents, ten per cent. on the amount of stock held by him toward his proportion of the purchase money of said property, and afterwards to pay his proportion of the purchase money according to his proportion of interest in said trust estate, at the times respectively when, by the terms of said sale, said trustee shall be required to pay for said purchase; and in case any of said parties of the second part shall fail to make said payments promptly, at the time or times appointed, he shall forfeit, and does hereby abandon and relinquish all right and interest, both legal and equitable, of, in and to said property, and

shall be as much a stranger thereto as if he had not been party hereto, and the interest thus forfeited and abandoned shall go to the other parties hereto in the proportion of the interest which each one holds in the remainder of said property; and each one shall immediately, on the call of the party of the first part, pay to the said party of the first part his proportion as aforesaid of the payment which the defaulting party had agreed to, but failed to pay. A failure to meet this last-named call shall forfeit only the interest on which this call is made, and the interest thus forfeited shall go to the other parties hereto in the same, who will pay all the calls made upon them under this agreement, in the same ratio and upon the same principle as before stated. Said party of the first part shall, in the first instance, bid for said property the sum of forty-five thousand dollars, and if there shall be any higher bids for said property, he shall run the same up to such sum as he shall be instructed to do by a committee to be appointed by the parties hereto for that purpose, if need be, to secure the purchase. After said property shall be purchased as aforesaid, the owners thereof shall, if such a charter shall be procured, be incorporated by an act of the legislature of Illinois; said charter to be approved and adopted by a majority in interest of the equitable owners of said property, and the said trustee shall execute said trust by conveying said property to said corporation, or said party of the first part shall execute said trust by conveying said property to such party or parties as shall be appointed and directed by a majority in interest of the equitable owners of said property. Until said corporation shall be created and said conveyance made to it, or until said property shall be conveyed to other party or parties, in pursuance of the appointment of a majority in interest of said owners as above provided, the affairs of this concern shall be managed by three managers, who shall be chosen by a majority in interest of the parties hereto, or their assigns, who shall appoint one of their number as the acting manager of the affairs of the said concern. And whatever funds the said managers shall require, to carry on the business of said concern, shall be contributed by each of the parties hereto, or their assigns, in the proportions of interest held by each. A call for said funds shall be made by said managers, at a meeting of said owners called by them, by leaving a written or printed notice thereof at the post office in Ottawa, addressed to each party at his usual place of residence, if known, and if not, addressed to him at Ottawa, at least twenty days before said call shall be payable; and in case any party shall fail to make payment of said call or calls at the time or times thus appointed, then the interest of the party thus in default shall be forfeited, and the

same is hereby abandoned to the other parties who will pay these calls, the same and upon the principle as is hereinbefore provided in case of non-payment of installments for the purchase money of said property. Subscriptions to this contract shall be closed at five of the clock the afternoon of the twentieth day of October, 1858.

"In witness whereof, the parties have hereunto, in duplicate, interchangeably set their hands and seals, the day and year aforesaid.

Signed	One Hundred Thirty-five shares and thirty others.	J. D. CATON.	[SEAL.]
		S. W. RAYMOND.	[SEAL.]"

As by said articles of agreement now here brought into court, etc. And the said plaintiff avers that he did, in pursuance of said articles of agreement, on the 20th day of October, A. D. 1858, purchase, at the assignees' sale, the Ottawa Starch Factory and its fixtures and appurtenances, for forty-five thousand dollars, upon the terms hereinafter expressed, in trust for himself and the said parties of the second part in said articles of agreement mentioned. And the plaintiff further avers, that he hath well and truly kept, performed and fulfilled all and singular the covenants and agreements in the said articles of agreement mentioned on his part and behalf to be done and performed. And the plaintiff further avers, that by the terms of said purchase, the said plaintiff was to pay and did pay, for said Ottawa Starch Factory and its fixtures and appurtenances, the sum of eleven thousand two hundred and fifty dollars, upon the said day of said purchase, and the sum of sixteen thousand eight hundred and seventy-five dollars three months after the day of said purchase, and the sum of sixteen thousand eight hundred and seventy-five dollars six months after said day of purchase, which said times have long since elapsed. And the plaintiff further avers, that the proportion which said defendant was, by the terms of said agreement and by said sale, required to pay to said plaintiff, was and is the sum of one thousand five hundred and sixty-six dollars and twenty-five cents, of which said sum the sum of three hundred and fifty dollars was due and payable on the day of the execution of said agreement; twenty-six dollars and twenty-five cents was due and payable on the 20th day of October, A. D. 1858; the sum of five hundred and sixty dollars became and was due and payable on the 25th day of January, A. D. 1859, and the sum of six hundred and thirty dollars became and was due and payable on the 25th day of April, A. D. 1859; and the plaintiff avers that said defendant has never paid to said plaintiff the said sum of twenty-six dollars and twenty-five cents aforesaid, nor the said sum of five hundred and sixty

dollars, nor the said sum of six hundred and thirty dollars, the same then and there being said defendant's proportion of the purchase money, and that defendant, though requested, refused and neglected to pay, and still refuses, etc.

Defendant filed a general demurrer to this declaration.

The court overruled the demurrer, and the defendant abiding by his demurrer, judgment was entered on same.

Assessment of damages by jury, $1,243.55.

Motion by defendant to set aside inquest, and motion overruled.

Judgment was rendered on inquest, and an appeal was taken.

The cause was tried before HOLLISTER, Judge.

The appellant assigns for error, that—

The court erred in overruling defendant's demurrer to plaintiff's declaration; and

In overruling motion of defendant below to set aside the inquest.

O. C. GRAY, and J. AVERY, for Appellant.

B. C. COOK, for Appellee.

BREESE, J. The object of providing a penalty in a contract like this before us, is not to excuse a party, but to compel him to perform his contract.

In 1 Pothier on Obligations, 280, in treating of the third principle of penal obligations, it is said, "the object of the penal obligation is to assure the execution of the principal." "Therefore, where the penal obligation attaches from a default in executing the principal, the creditor may, instead of enforcing the penalty, proceed upon the principal obligation."

In *Howard* v. *Hopkyns*, 2 Atkins, 371, Lord Hardwicke held that a penalty does not release parties from their agreement, for though the penalty is incurred, they must perform it notwithstanding.

In this case the penalty was, the forfeiture of the stock, and to become a stranger to the property, at the option of the appellee. Yet the party is bound to pay the calls on his stock, as that is his contract. How else could a trustee in such case, protect himself under the great responsibilities he had assumed. Declaring a forfeiture, would not put the trustee in funds to meet the liabilities of his trust.

The case of *Mason* v. *Caldwell*, 5 Gilman, 204–5, is in principle precisely like this case, and is decisive of it. The penalty in that case, as in this, was to insure a prompt performance of the contract the parties had entered into with the appellee. It is for him to declare a forfeiture, and until he does, the subscribers are bound to pay their subscriptions.

The evidence is not preserved by bill of exceptions, so that we cannot determine what facts were before the court to justify the finding the precise sum as found. In the record itself we see no error, and therefore affirm the judgment.

Judgment affirmed.

CATON, C. J., did not sit in this case, nor take any part in the hearing and judgment.

JOHN HOSSACK, Appellant, *v.* JOHN D. CATON, Appellee.

APPEAL FROM LA SALLE.

BREESE, J. This case is in all respects identical with that of *Raymond* v. *Caton*, *ante*, and must be decided in the same way. The judgment is affirmed.

Judgment affirmed.

CATON, C. J., did not sit in this case, nor take any part in the hearing and judgment.

JOHN D. PAHLMAN, Ex'r of A. Rossiter, dec'd, HENRY L. RUCKER and JAMES CAMPBELL, Guardians of Minor Heirs of A. Rossiter, and MARTHA A. ROSSITER, Widow, Plaintiffs in Error, *v.* HORATIO G. SHUMWAY, MILLER & DAVIS, JOHN B. KING, E. BLACKMAN, Adm'r, and H. H. MAGIE, Survivor of High & Magie, H. STEVENS, Adm'r of F. M. Kerwin, Defendants in Error.

ERROR TO SUPERIOR COURT OF THE CITY OF CHICAGO.

Judgments are liens upon the residuary interest of a party who executes a deed in trust, to secure a creditor; but to make the liens available, they should be enforced against the trust property by a levy and sale, subject to the incumbrance of the trust deed.

A sale of the trust property under the trust deed, cuts off the liens created by the judgments. If the grantor under the trust deed, is deceased, any surplus arising out of the sale, after satisfying the debt secured by the trust, will be distributed under the Statute of Wills.

THIS bill charges that Asher Rossiter and wife made a deed of trust to Shumway, on 12th March, 1857, to secure certain

indebtedness and the performance of certain covenants, on lands in School Section Addition to Chicago. The indebtedness was on eight notes, dated 12th March, 1857, each for $2,000, due in twelve months, with interest, and certain taxes and liens were also secured by same deed. It was duly recorded and is made exhibit.

That default being made, on application of Bacon Wheeler, the owner of the indebtedness, on or about 14th March, 1859, Shumway caused the premises to be advertised, according to the provisions of the deed of trust, and on the 25th March, 1859, he sold the same according to the power in said deed, at public auction, for the sum of $30,000 cash.

That out of proceeds he paid the indebtedness, amounting to the sum of $18,591.47, and after deducting costs, expenses and commissions, now holds the balance subject to the direction of the court, and he prays that the court will direct how the surplus shall be applied.

That the purchasers were induced to pay that sum for the property by the understanding and agreement of the executor of said Rossiter, that he would, as executor, also make a deed for the estate to the purchaser at said sale, and without which the land would have been sold at a great sacrifice, and that said deed is now ready for delivery upon payment being made to him of the said surplus now in Shumway's hands.

That after said sale, the executor transferred all his right and interest in the surplus to Henry L. Rucker, who now claims the same, or as much as the estate is entitled to receive, after deducting costs, etc., and subject to the claim of James Campbell, under the following state of facts, viz.:

That at the maturity of the notes, Wheeler applied to Shumway for a sale. James Campbell, being the guardian of two of the infant children of said Rossiter, entered into an agreement with said Wheeler to pay, and did pay out of his own private moneys the interest, amounting to $2,000, in order to stay the sale, and which was so stayed for one year thereby; said payment being indorsed on said notes, in full of interest up to 12th March, 1859, and Campbell now claims to be subrogated to Wheeler's rights, to have the same refunded.

That Rossiter died about 25th February, 1858, leaving a widow and three children, heirs-at-law; all of whom claim to have some right to the surplus in Shumway's hands.

That Rossiter made his will, and Pahlman is the sole qualified acting executor, and said executor and his assignee claim said surplus.

That Edwin Blackman, in his own right, and as executor of John High, Jr., H. H. Magie, survivor of said High, Jno. B.

King, Buckner S. Morris, John F. Miller and Gilbert F. Davis, Henry Stevens, administrator of F. M. Kerwin, Geo. Scoville, John D. Pahlman, Geo. C. Smith, John E. Smith, Francis A. McIntyre, assignee of Rossiter, and Pahlman and Smith, all have a claim to have a lien upon, or some other interest in, the surplus, and all which are undetermined.

That said Shumway is and always has been ready to pay over said surplus, after deducting costs, etc., to such persons as may be legally entitled.

Prays that persons before named be made defendants, answer, etc., and that an order be made for the distribution of the surplus, etc.

The trust deed is set out, and is in usual form, with power of sale under notice.

Notes and advances, and interest and expenses, set forth, showing balance due, of $18,591.47.

Miller and Davis, by their answer, admit trust deed, that a default was made and sale of premises for $30,000, and the payment of the secured indebtedness. Also that balance remains as alleged. Do not know whether Pahlman assigned, or whether H. L. Rucker now claims the surplus, nor whether Campbell paid said Wheeler, or whether he extended the time of sale.

They deny that Pahlman had any right to assign the overplus, and that Rucker or Campbell has any right to the same. They say that at November term, 1857, they recovered a judgment against said Pahlman, Geo. C. Smith, J. E. Smith, and said Asher Rossiter in his lifetime, for $1,037.18, and that on 5th April, 1858, they sued out an execution, directed to the sheriff of Cook county, and delivered to him, and in July it was returned unsatisfied; that same judgment remains unpaid and in full force.

They insist that, by that judgment, they acquired a lien on the premises in the deed of trust, subject to the indebtedness in the deed of trust, and now have an equitable lien on the surplus in the hands of said Shumway, to the amount of their judgment, and that it is prior and better than the claims of Pahlman, Rucker and Campbell.

The others, by their answers, admit substantially all the facts admitted in the foregoing answers, and set up their judgments and insist upon their liens.

The answers of Pahlman, executor, M. A. Rossiter and James Campbell, admit substantially as in above answer first made, and they insist that Pahlman agreed to execute a conveyance as executor, upon the express condition that the surplus should be paid over to him to pay debts; that he did assign the

same to H. L. Rucker in writing, made an exhibit, authorizing him, as attorney, to receive the same for him, as executor, after deducting his reasonable fees due for services rendered the estate.

Campbell says he was and is guardian of the minor heirs of said Rossiter, and was, at the maturing of the notes, secured by the deed of trust, and to prevent a sale and sacrifice of the premises, and to gain time until the premises would sell better, he, as guardian, entered into an arrangement with Wheeler to pay up all interests to March, 1859, and did pay Wheeler $2,300, and procured an extension accordingly.

Pahlman, executor, claims that he and H. L. Rucker, or either of them, were justly entitled to the surplus in the hands of said Shumway, after deducting the expense of said sale and the amount due said Campbell, and said Rucker is entitled to receive said surplus under said assignment.

They wholly deny that there was any occasion for filing this bill, and ask to have their answers taken regarded as a demurrer, and disclaim any admission thereby.

The decree of the Superior Court awards that said Shumway, out of the surplus, pay as follows:

First, to himself, two per cent. of $30,000, is $600.

Second, for service and summons, etc., $29.70.

Third, the several amounts claimed by judgment creditors or their assigns, mentioned in their several answers.

The case was heard upon bill, answers, replications, disclaimers, and deposition of B. S. Morris, and following agreed state of facts, namely:

Deed of trust as set forth in bill.

The following judgments:

F. M. Kerwin, November 5th, 1857	$1,214.25
Miller & Davis, November 19th, 1857	1,047.73
H. H. Magie, November 19th, 1857	1,219.86
J. B. King, November 24th, 1857	1,219.20
E. Blackman, January 11th, 1858	1,029.55
E. Blackman, January 11th, 1858	1,009.63
	$6,740.22

That executions were issued and left with sheriff for service in all said judgments.

That said execution of Kerwin was levied on these premises and they were sold by the sheriff, on 25th February, 1858, for $10.50. That the judgments all remain unpaid, except the said $10.50 so made on Kerwin's.

That on Nov. 7, 1857, Rossiter conveyed said premises by warranty, to B. S. Morris, without consideration paid, or knowledge of Morris.

That Morris conveyed said premises to Pahlman, as executor.

That Rossiter died, leaving, as heirs, the parties mentioned in said bill; that he left a will, which was duly proven, and J. D. Pahlman is the sole qualified acting executor.

That James Campbell is the legal guardian of the infant heirs, and that, at Pahlman's request, at the maturity of said notes under the trust deed, and for the purpose of preventing a sale and sacrifice of said premises, he, Campbell, entered into an arrangement with Wheeler, by which, as his own voluntary act, without any order of any court, and without taking any assignment to subrogate himself as owner or assignee of any part of the claim, he paid one year's interest on said notes, and other charges, amounting to $2,300, by which the time of payment on said notes was extended one year, until March 12, 1859.

That on February 14th, 1859, the premises were redeemed from the sale under Kerwin's execution, by Pahlman, as executor.

That on the 25th March, 1859, Shumway sold the premises under the deed of trust, as set forth in the bill, for $30,000.

That the surplus, after paying Wheeler, etc., was assigned, the same day of the sale, to H. L. Rucker, who made a demand upon Shumway for it; but he, having been previously notified by John B. King, one of the judgment creditors, not to pay over the surplus, and knowing from the records of the court of Cook county, that there were other judgments similarly situated, refused so to do, and thereupon filed said bill for the purpose of having the rights of the parties adjudicated.

That the estate of Asher Rossiter is insolvent.

Pahlman, Campbell, Martha A. Rossiter, and H. L. Rucker, caused this writ of error to be issued.

Scates, McAllister & Jewett, for Plaintiffs in Error.

Mather, Taft & King, for Defendants in Error.

Breese, J. The first question presented by this record is, were the judgments against Rossiter, liens upon the equity of redemption, or residuary interest which he had in the land conveyed in trust, or upon the right he had to the surplus of the purchase money, after the payment of the debt secured by the deed of trust? If they were such liens, then the court very properly appropriated the surplus to their satisfaction. If they were not such liens, then the surplus should have been decreed to the executors of Rossiter, to be distributed among his creditors generally, under the one hundred and fifteenth section of the statute of "Wills."

Our conclusion is, that these judgments were liens upon the

residuary interest of Rossiter in the land. They were a lien on the land, subject to the incumbrance of the trust deed. But to make the lien available, it should have been enforced against the land by a levy and sale, subject to the incumbrance. This the judgment creditors did not do, but suffered the land to be sold to satisfy the incumbrance, which effectually cut off the liens. The incumbrance being prior in time, a sale to satisfy it had the effect to convert the land into money, upon which the judgments were not a lien, and therefore entitled to no priority of payment.

By suffering the title of the land to pass, by the sale under the deed of trust, and thus cutting out these liens, the statute of Wills comes in and distributes the surplus money to the general creditors, judgments not attaching as liens by any statute in force here, to such surplus. Those moneys should be paid over to the executor of Rossiter, and paid out by him, in pursuance of section 115, chap. 90, (Scates' Comp. 1206).

The trustee, defendant in error here, will be discharged from all responsibility, by paying over the surplus in his hands to the executor of Rossiter, in accordance with this opinion.

The decree of the court below is reversed, and a decree entered by this court, that the surplus in the hands of Shumway be paid over to the executor of Rossiter, as herein directed.

Decree reversed.

Alexander Allison, Appellant, *v.* James F. Waldham, Appellee.

APPEAL FROM PEORIA.

Where it appears that the maker of a note had property which could have been reached by the exercise of proper vigilance, it will defeat an action against a guarantor.

This suit was brought by Waldham, against Allison, as guarantor of two promissory notes, executed by John Ramsay, to Joseph P. Allison and Alexander Allison, dated March 31, 1857; one at three months, for $84; the other at six months, for $100. The jury found for the plaintiff below, the amount of the last note and interest, viz., $116.25. Allison appealed.

H. Grove, and C. C. Bonney, for Appellant.

Manning & Merriman, for Appellee.

CATON, C. J. We agree with the Circuit Court, that if the plaintiff could not have recovered anything of the maker of the note, he was not bound under this guaranty to sue him. But the evidence shows that the maker of the note had from one thousand to fifteen hundred dollars' worth of property in his possession, openly in the county, for several months after the note became due. And if two constables, whose testimony does not say much for their vigilance or capacity for the office, did not know how to get hold of it, that forms no excuse for the inaction of the plaintiff. The idea that a man is insolvent, and nothing can be made of him, because he locks his property up in a barn, can hardly receive judicial sanction. The evidence shows that the plaintiff should have sued the maker of the note, and tried, at least, to have collected the debt, before resorting to this special guarantor.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

HENRY MYERS *et al.*, Plaintiffs in Error, *v.* CHARLES WALKER, survivor, etc., Defendant in Error.

ERROR TO PEORIA.

The meaning of terms of art and science, technical phrases, and words of local meaning, when employed in an agreement, may be proved by extrinsic evidence.

The meaning of the word "season," in a contract for the purchase and delivery of corn, at a particular locality, allowed to be proved.

When local terms and phrases are used in an agreement, the presumption is, that the parties understood their meaning, and employed them according to their local significance.

Where the performance of certain acts is limited by a "season," anything occurring afterwards by increasing expenses, will have to be borne by the party benefited thereby.

Corn purchased to be delivered during a certain season, after the expiration of that season, is at the risk of him for whom it was purchased.

Money left with a party to make purchases, without a promise to that effect, will not bear interest, unless there is an unreasonable delay in refunding the money after demand.

THIS was an action of assumpsit, by Walker and Kellogg, against H. Myers & Co., for $20,000, to March term, 1858.

The declaration contained the common counts for goods, etc., delivered; goods, etc., sold; work and materials; money loaned; money paid; money received; account stated; interest; and corn, wheat and grain.

Plaintiff's account filed March 12, 1859, commencing 9th

March, 1853; debits of bal. acct., cash, lumber, sacks, labor, and interest, $14,846.63; credits of corn, sacks, and commissions, $8,160.76; balance, $6,685.87.

Plea: General issue and joinder; also, notice of set-off for work and materials, goods, wares and merchandise, money lent, money paid, money had and received, interest, and account stated.

Replication: calling notice second plea, and denying indebtedness.

Agreement referred to in opinion of the court:

Peoria, Feb. 13, 1854.

This certifies that we have agreed to pay H. Myers & Co. four cents per bushel of 56lbs. for purchasing and delivering corn on board our boats the coming season, they purchasing the same at as low a price as possible; and if, in our opinion, the price should be too high, we are to notify them, and they are to stop buying. It is understood we are to keep them supplied with money as needed for paying for same, and they are to deliver us the same quantity of corn their account shows as being bought for us and charged to our account. It is also understood that they are to purchase for us alone, and not for others; it is also understood the above refers to corn bought at their warehouse at Spring Lake, upon the Illinois river.

(Signed) WALKER & KELLOGG.

Instructions given for plaintiff, and excepted to by defendants:

1st. That the plaintiff in this case is entitled to credit for all the money advanced under the contract, and to interest upon so much as has not been expended by defendants, under the contract, from the time the same ought, by the contract, to have been expended.

2nd. That, by the contract, the corn was to be delivered when called for during the season, without any charges except the price to be paid per bushel, as stipulated in the contract, and four cents per bushel, commission.

3rd. If the jury believe, from the evidence, that the defendants admitted the correctness of the plaintiff's account, given in evidence, and that the account which the defendants furnished of their claims, in 1858, is correct, they will find for the plaintiff the difference between the two accounts — deducting from the defendants' account all charges, except the commission of four cents on the bushel, as stipulated in the contract, so far as the charges for corn are concerned.

4th. That, under the contract in this case, the plaintiff is not liable for any corn spoiled in the hands of the defendants, during the season specified in the contract.

5th. If the jury believe, from the evidence, or from the appearance and conduct of the witness, Pratt, upon the stand, and from his manner of testifying, that he is unworthy of credit, they may disregard his whole testimony.

The jury found for the plaintiff the sum of five thousand five hundred and fifty-eight dollars, and twenty cents.

Motion for new trial, for the following reasons:

The court gave improper instructions to the jury.

The verdict is manifestly against the evidence.

The verdict is against the law of the case.

The damages given by the jury are excessive and impossible.

The court admitted improper evidence for the plaintiff.

The verdict is otherwise erroneous, oppressive, and absurd.

Plaintiff entered a remittitur of $886.34.

Assignment of errors, to wit:

The said Circuit Court admitted improper evidence for the defendant in error, against the objection of the plaintiffs in error, and to their manifest injury, in this, to wit, that such evidence influenced the jury to find against them.

The said Circuit Court gave improper and erroneous instructions for the defendant in error, against the objection of the plaintiffs in error, and to their manifest injury, in this, to wit, that such instructions misled the jury to find against them.

The verdict of the jury is unjust, illegal, and oppressive, in this, to wit: it is against the weight of the evidence; it is against the law of the land; the damages assessed are excessive and impossible; and said verdict ought to have been for the plaintiffs in error.

The said Circuit Court overruled the motion of the plaintiffs in error for a new trial, and gave judgment on said verdict for the defendant in error, whereas the said Circuit Court ought to have allowed said motion, and awarded a new trial.

The remittitur of the defendant in error is a confession of the injustice, illegality and oppressiveness of said verdict, and such injustice, illegality and oppressiveness are not cured by such remittitur; nevertheless, the said Circuit Court, after such remittitur, gave judgment against said plaintiffs in error.

Charles C. Bonney, for Plaintiffs in Error.

N. Purple, for Defendant in Error.

Walker, J. Meaning of terms of art, of science, technical phrases and words of local meaning, may, undoubtedly, when employed in an agreement, be proved by extrinsic evidence; and, by so doing, the rule is not violated which prohibits the introduction of evidence to alter, vary or explain an agreement, or that a written contract cannot exist partly in parol and partly in writing. By receiving such evidence, the court does no more than when it refers to a lexicon to ascertain the mean-

ing of a word. This has no tendency to vary the contract, but is the only means of ascertaining the intention of the parties when they entered into the agreement, and when this can be ascertained, it must govern. When local terms or phrases are employed where they are in use, the presumption is, that the parties understood their meaning, and employed them according to their local signification. And to give effect to the agreement, the court must know the sense in which they were employed. The word "season," as employed in this agreement, must have had reference to the period within which it was customary to purchase corn at that point, on the Illinois River, and the presumption is, that the meaning of the term was well known and understood, in the locality in which the contract was entered into, by the parties. The court below, therefore, committed no error in receiving evidence to show the local meaning of this term.

Under this agreement, the plaintiffs in error were to receive four cents a bushel, for buying, storing and delivering the corn on the boats of defendants in error. The contract limited the performance of these acts to the approaching season, and the plaintiffs in error were not bound either to purchase or store the corn after the expiration of that time. And if the defendants in error neglected to remove the grain within the time limited, the plaintiffs in error had the right to charge the usual and customary rates of storage for the time it subsequently remained in store, and the defendants in error were bound to pay it. The undertaking was not to store it for an indefinite period, but only during the season.

The evidence shows that about the first of May, and some time in the latter part of the same month, the plaintiffs in error gave notice to the other parties, that the corn was all ready for delivery, and that unless they removed it, the plaintiffs in error would not hold themselves liable for any injury it might sustain, or for any warehouse charges that might accrue, and defendants in error then agreed to receive it. They at the time urged no claim that plaintiffs in error were bound to keep it longer, at their risk or charge. The evidence tends to show that the first of June, on that part of the Illinois River, is the end of the season, for buying and shipping corn; and if such was not the case, it is not probable that the defendants in error would have made no objections to removing it at that time, or incurring the risk of loss and expense for storage. The plaintiffs in error having given the notice that the corn was ready for removal, could not be held liable for any loss it may have sustained after the "season" expired, unless they in some way produced or contributed to the loss, and when they paid the warehouse

charges which accrued during the time for which they were bound to store the grain, and preserved it from injury or loss during that time, they had discharged their part of the agreement.

If the defendant in error had removed the grain within the time which plaintiffs had agreed to store it, they would have been bound to place it on board the boats of defendant in error, free of charge. But as it was not removed within that time, if the delay caused a necessary increase of the expense of shipping the grain, plaintiffs in error would unquestionably have the right to recover the additional expense. The evidence tends to prove, that after the first of June and before the grain was removed, the river had fallen and receded from the warehouse, so as to unavoidably increase the expense of putting it on board of the boat, and for any necessary increased expense incurred in shipping it, they were entitled to recover.

It is urged that the court erred in instructing the jury that plaintiff below was entitled to recover interest on any sum of money, furnished defendants below, with which to purchase corn, after it should have been but was not thus appropriated. This instruction may bear the construction, that the court designed to inform the jury that there were funds in the hands of plaintiffs in error, which had not been applied by them in the purchase of corn, and if they so understood it, they in all probability were misled by it. They should have been left to find that fact from the evidence. It is also urged, that even if they had money in the hands of plaintiffs in error, unappropriated, that as the amount was in dispute and unascertained by the parties, and its payment had not been demanded, the defendant in error has no right to recover interest upon any such balance, unless there was an unreasonable delay in its payment, there not being any promise to pay interest. This court has repeatedly held, that the creditor is not entitled to interest on a balance of an account due him, but that there must have been a promise to pay interest, or an unreasonable delay in payment. *Simms* v. *Clark*, 13 Ill. R. 544; *Clement* v. *Mc Connell*, 14 Ill. R. 156; *Kennedy* v. *Gibbs*, 15 Ill. R. 406. In the absence of an agreement to pay interest, or a demand of payment of the money, when it appears that the balance, if any, was in dispute, between the parties, there would be no right to recover interest. The court, therefore, erred in giving this instruction. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

LEWIS SNYDACKER *et al.*, Appellants, *v.* CHARLES J. MAGILL *et al.*, Appellees.

APPEAL FROM COOK.

A. was indebted to B., and B. was indebted to C. A., by agreement with B. and C., conveyed an engine to C., with the understanding that if B. would find a purchaser he, B., should have any surplus which might remain, after his indebtedness to C. should have been paid.

B. cannot sustain an action against C. for the surplus, till after C. has been paid.

It is C.'s duty to use reasonable diligence in collecting the money, and an action lies for neglect of that duty.

THIS was an action of assumpsit, commenced by appellees, in the Cook Circuit Court, against appellants, to recover an amount due them on a contract for the sale of an engine and boiler.

It appeared on the trial, MANNIERE, Judge, presiding, that in October, 1857, one George A. Shufeldt, Jr., owed the plaintiffs, Magill & Pickering, about $1,800, and that the plaintiffs owed the defendants about $2,100, secured by two notes for the amount.

Shufeldt owned an engine and boiler, which he agreed to convey to the plaintiffs, and which the defendants agreed to take from the plaintiffs, with the understanding that if the plaintiffs would sell the engine and boiler before spring, the surplus money, after paying the debt due from the plaintiffs to defendants, and after paying thirty dollars for the storage of the engine, should go to the plaintiffs. In pursuance of this agreement, Shufeldt conveyed the property to the defendants.

The plaintiffs found a purchaser, who offered to pay $2,400, in cash, for the engine, or $2,700, on time, and the sale was made for the latter amount, and $1,000 paid towards the purchase. The remaining sum of $1,700 was due, but unpaid, at the time when this suit was commenced.

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

1. If the jury find, from the evidence, that the engine, etc., in question, were conveyed by Shufeldt, at the instance of plaintiffs, upon the consideration in part, that on the resale of the same before the spring of 1858, through the instrumentality and procurement of the plaintiffs, that they, the said defendants, would pay to the plaintiffs on such resale, out of the sum for for which the same should be resold, the amount remaining, after deducting therefrom the amount of the indebtedness of the plaintiffs to the defendants, with interest, together with the reasonable sum which should be due at the time of such resale for storage; and if the jury further find, that the said engine,

etc., were sold for an amount exceeding the amount due to plaintiffs, including storage, and the amount of interest agreed upon, through the instrumentality and procurement of the plaintiffs, then the plaintiffs are entitled to recover such surplus.

2. If the jury shall find that an agreement was made, as alleged in the declaration, then the same was not void, because it was not reduced to writing, and it is, therefore, competent to prove such an agreement by parol evidence.

3. If the jury shall find, from the evidence, the agreement, as alleged in the declaration, and that the defendants were to pay the excess upon the resale, then it is immaterial whether or not the defendants have received the sum for which the engine, etc., were sold.

The defendants then requested the court to give the following instructions:

1. If the jury believe, from the evidence, that the witness, Shufeldt, sold the engine, etc., to the defendants, and that there was no agreement concluded between the plaintiffs and defendants, relative to the resale of the same, for more than the defendants gave, by which the surplus was to be given to the plaintiffs, then the law is for the defendants.

2. If the jury believe, from the evidence, that the defendant, Snydacker, promised to give the plaintiffs all the engine, etc., sold for, more than defendants gave witness, Shufeldt, for the same, on condition that plaintiffs would pay Snydacker twenty-four per cent., as a consideration for such agreement, and that said plaintiffs refused to accept said condition, then the law is for the defendants.

3. If the jury find that the engine, etc., were not sold through the instrumentality and procurement of the plaintiffs, then the jury will find for the defendants.

4. If the jury find that witness, Shufeldt, was acting as agent of plaintiffs, in the sale of said engine to defendants, and that the sole consideration of such sale was the amount of the defendants' claim against the plaintiffs, and no more, and that there was no new or independent agreement made between the parties, in reference to a resale, then the jury will find for the defendants.

5. That the contracts set up in the plaintiffs' declaration, must be fully proven, as therein stated, without material variance between that alleged and the one in evidence, and if the jury believe, from the evidence, that there is a material difference between the agreement alleged and the one in proof, then the jury should find for defendants.

6. That, although the jury may believe, from the evidence, that the defendants promised to give the plaintiffs all the money

for which they sold the engine, etc., above the amount due to the said defendants, at the time of making the bill of sale of the engine, boiler, etc., by the witness, Shufeldt, to the said defendants, they will find a verdict for the defendants, unless they further believe, from the evidence, that the plaintiffs paid a valuable consideration to the said defendants, as an inducement to such promises, or shall find that, by the terms of the agreement, the plaintiffs were to effect a resale through their own instrumentality and procurement; and that such a resale was so effected through the instrumentality and procurement of the plaintiffs.

7. If the jury shall find, from the evidence, that an agreement was made, as alleged in the declaration, and that the engine, etc., was resold through the instrumentality of the plaintiffs; and if they further find that defendants were only to pay the surplus, over and above the debts, to them, with interest and storage thereon at the rate of two per cent. per month to the time of sale, upon the amount of such indebtedness, then such stipulation is binding upon the plaintiffs, and is not to be regarded as usurious.

8. If the jury believe, from the evidence, that there was an agreement between the said plaintiffs and defendants, by which the defendants were to pay to the plaintiffs whatever they sold the engine, etc., for, more than they paid for the same, but that such surplus was not to be paid until the purchase money was received by the defendants; and that said defendants have not received the consideration they sold the engine, etc., for, and have not received sufficient to reimburse themselves for the original price paid for the same, then the law is for the defendants.

9. That on declaring upon a special contract, it is necessary to specify the consideration upon which the promise is based, with precision—and, in this case, if the consideration is not described as proved, then the defendant is not entitled to recover.

Which the court gave, and so marked them.

The court was also requested, by the defendants, to give the following:

10. If the jury believe, from the evidence, that there was an agreement concluded, between the said plaintiffs and said defendants, by which the said defendants were to pay plaintiffs whatever sum they should sell the same for more than they gave, and that there was no consideration paid to said defendants, or said agreement by the plaintiffs, then the agreement is void, and the law is for the defendants.

Which the court refused.

And also the following:

11. If the jury believe, from the evidence, that the witness, Shufeldt, sold to defendants, the engine, two boilers, etc., for the notes of plaintiffs, and that there was no other agreement concluded between plaintiffs and defendants relative to the resale of the same for more than defendants gave, by which the overplus was to be given to plaintiffs, then the law is for the defendants.

In lieu of which, the court gave the following:

12. If the jury find, that an agreement was made to pay the surplus to the plaintiffs, on a resale of the engine, as alleged in the declaration; yet, if the jury further find, that such surplus was not to be paid to the plaintiffs until the defendants had reimbursed themselves their debt, and that the defendants have not as yet reimbursed themselves, then the law is for the defendants.

To the giving of which, and refusal of the other, defendants excepted.

The defendants then requested the following:

13. That if the allegation was, that a part of the consideration was an indebtedness, due to Daniel Moore, while the proof shows a note, payable to Greenbaum Brothers, not indorsed over by them to him, then the indebtedness is not properly described, and the jury must find for the defendants.

Which the court refused. To all which rulings the defendants excepted.

And the jury having returned a verdict for the plaintiffs, the defendants moved for a new trial. Which motion the court overruled, and the defendants excepted.

W. T. Burgess, for Appellants.

Van Buren & Gary, and W. Hopkins, for Appellees.

Caton, C. J. We find no just ground for complaint of the instructions of the court, and if by the true construction of the contract as proved, the plaintiffs were entitled to recover the excess of the price for which the engine sold, over the amount of the debts due the defendants before such excess was received of the purchaser, then we think the verdict was right, and the judgment must stand, for the proof satisfactorily shows that the plaintiffs found the purchaser, and that the sale was made through their instrumentality. But we think the proof does not show such a contract. Shufeldt is the principal witness to prove the contract. He says: "It was stated by one of the parties, I think by Magill, that the engine cost a good deal more than the debt, and if sold, it ought to go to them after

paying their debt, if it brought more than their debt. Defendants said, all they wanted was their money, and that if Magill and Pickering would sell the engine before spring, the surplus moneys should go to them after paying their debt and interest." Again he says, the defendants were to be made whole for their debt, and that thirty dollars was to be allowed for the storage of the engine till spring. Moore tells us that the engine was sold for $2,700, on time, and that but $1,000 had been paid, although all the money was due when this action was brought. He says the proposition for the sale was $2,400 cash, or $2,700 on time. The latter offer was the one accepted by the defendants. The defendants agreed to pay the surplus to the plaintiffs after paying their own debts and the storage. Until the money was realized for the engine, there could be no surplus to pay over. The defendants were first to be made whole before any surplus was to be paid over to the plaintiffs. The proof shows that they have not yet been made whole. They might, by selling the engine for $2,400 cash, have reimbursed themselves, and had a small balance left for the plaintiff. But they sold it for the larger price, on time, solely for the benefit of the plaintiffs, thereby delaying their own demands, and it would hardly seem to have been in the contemplation of the parties, that they should be bound, not only to wait for their own money, but also to advance the surplus going to the plaintiffs. If it be said that the defendants may forever neglect to collect this surplus, and thus perpetually defeat this cause of action, the answer is, that the duty no doubt devolves upon the defendants to use reasonable diligence in the collection of this money, and for the neglect of this duty, the plaintiffs would no doubt be entitled to their remedy.

We think a new trial should be granted. The judgment is reversed and the cause remanded.

Judgment reversed.

Robert Matson *et al.*, Appellants, *v.* John Connelly, Appellee.

APPEAL FROM PEORIA.

A verdict for plaintiff in trespass, which concludes, "and assess the damages at nineteen dollars," is cured by the statute of Jeofails.

A motion to dismiss an appeal comes too late, if there is a joinder in error.

THIS cause was originally commenced before a justice of the peace, being an action of a trespass to real estate, and was taken by appeal to the County Court of Peoria county.

The jury found a verdict for the plaintiff below for nineteen dollars, which verdict is in the words and figures, to wit:

JOHN CONNELLY, *vs.* ROBERT H. MATSON, JOHN A. MATSON. } "We, the undersigned jurors, find for the plaintiff, and assess the damages at nincteen (19) dollars."

Which verdict is signed by all the jurors.

The defendants then entered a motion for a new trial, for the following reasons:

Because the verdict is contrary to law, contrary to the evidence, is informal and insufficient, and because the damage is excessive.

The court overruled the motion, and the defendants then moved in arrest of judgment for the following reason:

Because the verdict is informal: the suit being in trespass and the verdict being in assumpsit.

The court overruled the motion and rendered judgment, when defendants below excepted, and prayed an appeal, and assign for error, that the verdict is uncertain, informal, and void.

M. WILLIAMSON, for Appellants.

C. C. BONNEY, for Appellee.

BREESE, J. There was no necessity for amending this verdict in the court below. The defect is cured by our statute of amendments and jeofails.

Error having been joined, the motion to dismiss the appeal comes too late. It would have prevailed if made in the first instance, as the judgment does not amount to twenty dollars, exclusive of costs, nor does it relate to a franchise or freehold.

The judgment is affirmed.

Judgment affirmed.

The Chicago and Rock Island Railroad Company, Appellant, *v.* Matthew M. Reid, Appellee.

APPEAL FROM BUREAU.

The proof must determine as to the right of recovery before a justice of the peace, no matter what name he may give the action.

The bell of a locomotive, or the whistle thereof, should be sounded at a reasonable distance, before approaching a road crossing.

If railroad companies construct cattle guards within the limits of towns, they should keep them in repair.

This suit was commenced before a justice of the peace, and appealed to the Circuit Court.

Copy of summons issued by the justice:

STATE OF ILLINOIS, } The People of the State of Illinois, to any Constable
BUREAU COUNTY. } of said County, Greeting:

You are hereby commanded to summon Chicago and Rock Island Railroad Company to appear before me, at my office in Tiskilwa, on the 19th day of August, A. D. 1859, at one o'clock, P. M., to answer the complaint of Matthew M. Reid, for a failure to pay him a certain sum not exceeding one hundred dollars; and hereof make due return as the law directs.

Given under my hand and seal, this 13th day of August, A. D. 1859. I. I. COOK. [SEAL.]

Parties appeared by counsel. Plaintiff claimed damage of defendant for an injury done to plaintiff's mare, by the said defendant, in the running of the cars of the said Chicago and Rock Island Railroad Company. After hearing the testimony in the cause, it is considered by the court that the plaintiff have and recover of the said defendant the sum of one hundred dollars for his damages, and costs of suit.

On the trial, before the evidence was heard, plaintiff's counsel stated to the jury that the suit was brought to recover damages for an injury done to plaintiff's mare by the railroad cars of defendant; that the mare was, at the time of the injury, running at large at or near the village of Tiskilwa.

Glover, Cook & Campbell, for Appellant.

Leland & Leland, and Stipp, for Appellee.

Caton, C. J. We have often decided that, under our statute, the proof alone must determine the right to recover in an action commenced before a justice of the peace. Although the plaintiff or the justice might call the case ejectment or larceny, the

statute requires the court to hear the proof, and if that makes out a case of which the justice has jurisdiction, the plaintiff is entitled to recover.

We are inclined to agree with the counsel for the plaintiff in error, that the proof shows that this mare was struck by the engine while on the railroad crossing. The proof is also uncontradicted, that the engineer did not sound the whistle or ring the bell as he approached that crossing. The statute makes it the imperative duty of the company to cause the whistle to be sounded, or bell to be rung, at all road crossings. It is due to the public that all, either persons or stock, at or near a road crossing, should be warned of the approach of a train of cars, by the bell or whistle, without taking into consideration the importance of this to the traveling public; and until superintendents can enforce the performance of this duty by engineers, we must expect to hear of accidents at road crossings. It may sometimes be carelessness in intelligent beings to drive upon a crossing when a train is approaching, even though no warning is given by the bell or whistle, while the same intelligence may not be expected from a brute. Had the train been run with proper care, and the whistle sounded or the bell rung, for a reasonable distance upon the approach to this crossing, it may be, and indeed the probability is, that this accident would not have happened. It may be true that the mare had, previous to the accident, been upon the railroad grounds east of the crossing, but she reached the crossing before she was overtaken by the train, and there, without the warning which the law required, she was struck, and carried on beyond the crossing, as the testimony introduced by the defendant below pretty satisfactorily shows.

If the fact was, as the proof tends very strongly to show, that the cattle guard was built within the street, and was therefore within the limits of the town of Tiskilwa, it was the duty of the defendant to keep it in proper order. If it will obstruct the street with cattle guards, it cannot thereby excuse itself from keeping the cattle guard in repair.

The judgment must be affirmed.

Judgment affirmed.

Daniel H. Ball, Appellant, *v.* Marcellus G. Leonard, Appellee.

APPEAL FROM BOONE.

Where a bill for discovery is filed, setting up usurious transactions, and asking for a statement of accounts, exhibition of notes, books, etc., the party filing it will not be bound by the agreement of his solicitor, made without his approval, that a statement may be received in lieu of the answer required, especially where the statement accepted is incomplete and unsatisfactory.

A bill of discovery, which sets up usurious transactions, etc., is not an unmeritorious bill.

The facts of this case are stated in the opinion of the court. The decree in this case was pronounced by I. G. Wilson, Judge.

T. L. Dickey, for Appellant.

W. T. Burgess, for Appellee.

Walker, J. The bill in this case was filed for a discovery, and an injunction, against confessing a judgment on a number of notes held by defendant against complainant, or otherwise proceeding for their collection, until a discovery was made and an account stated. The bill alleges that complainant, at various times, borrowed money of defendant, upon which he had paid large sums of interest, given notes for renewals, for balances, and for interest which had accumulated. That the mode of computing interest was by making short rests of from thirty to ninety days, the rate of interest being, a portion of the time, three, and the remainder at the rate of five per cent. a month. That on the face of the notes there appeared to be due about $1,700, when, in truth, if the interest were computed at ten per cent. per annum, and the payments allowed, the true balance would not exceed six hundred dollars, which complainant offered to pay. That he is unable to state the details of the business, but alleges that defendant has in his possession books, papers, and memoranda, which will show the whole transaction, and prays that they may be produced, and for a full and particular answer under oath.

The attorneys in the case, by agreement, stipulated that an account, when sworn to, purporting to give the dates and amounts of loans and payments of money between the parties, when filed, should be taken as an answer. Such a paper was filed, but in the transcript follows the agreement, which refers to the foregoing account. The want of care or skill, on the

part of the clerk who prepared this transcript, may have been the cause of the confusion in the order in which the papers are inserted, and to that fact, we, perhaps, are authorized to refer the uncertainty as to whether the account set out is the one referred to in the agreement. The paper was sworn to on the third of September, 1859, and appears to have been filed on the 24th of the same month—the same time at which the stipulation was filed. On the same date, a motion was submitted to dissolve the injunction, which the court overruled, and the cause was then referred to the master, to hear and report the evidence to the court in vacation, by the 15th of the following November, by agreement of the parties, and a decree to be rendered and entered as of that term.

At the March term following, the master's report of the evidence was filed. And complainant at that time entered a motion to vacate the order of reference, entered at the previous term, and for a rule on the defendant for a full answer. This motion was based upon the affidavits of John H. Ball and complainant, alleging that the agreement of complainant's attorney to receive the account instead of an answer, was unauthorized, and as soon as they learned the fact, they remonstrated against it, and insisted that he should procure an answer, which he promised to do, and told them they might return home until the last day of the term, which they did. On their return to court at that time, they found that the answer had not been procured, and the case had been referred to the master by agreement. That the attorney was requested to state the facts to the court, and to make an effort to get the order set aside, and to procure a rule for an answer, which he promised he would do, but neglected and failed to make any such motion. That a few minutes before court adjourned for the term, he was again urged to make the motion, and informed that if he did not, some other person would be procured to do so, when he arose in court and withdrew his appearance in the cause, and attempted to have the injunction dissolved. That this sudden withdrawal by his attorney, took complainant by surprise, and it only being about ten minutes before the court adjourned for the term, he had no time to procure other counsel, but that John H. Ball made an ineffectual effort to have the order vacated. This motion was overruled, and the decree entered, from which this appeal is prosecuted.

From what is disclosed by this record, it appears to us that a full answer and discovery by the defendant was necessary to enable the court to determine the rights of complainant. And without his assent, his solicitor had no right to dispense with it. And we do not regard it as at all strange that he should pertinaciously insist that it should be made. This account or state-

ment which was filed in its place, afforded but little evidence that was necessary to a full understanding of the case, while a full and fair answer would have presented the whole of the facts, which the complainant had the right to have from the defendant. Without the answer, it threw the burthen upon the complainant to prove his case, while, if an answer had been filed, it would have afforded the evidence sought by the bill. He had also called for a production of the books and papers in the hands of the defendant, which do not appear to have been produced. Why was it not done, if nothing was concealed? The facts were all in the knowledge of the defendant, and complainant had a right to their discovery, unless he has waived that right by the agreement of his attorney. And we think that his withdrawal under the circumstances disclosed in the evidence, and the repeated efforts which he made to get him to have the agreement set aside, entitled him to have a rule on defendant for a full answer to the bill. He does not seem to have been guilty of *laches*, as he had no time to prepare affidavits after the withdrawal of his attorney before the adjournment of the court, and had been misled by the promise of his attorney that he would make the effort to procure the answer. And the order was only interlocutory, and might have been modified at any time before the final decree was enrolled.

Nor does it amount to a waiver, that the complainant proceeded to take his evidence before the master. This court has held that the complainant may proceed to take his evidence at any time after the bill is filed, and it will hardly be contended that by so doing he waives the right to insist upon an answer, or to object to interlocutory orders improperly entered. The proceeding to take evidence before the cause is at issue, waives no such right.

It is no answer to say that usury is a defense that is odious to the community. It is given by the law, and parties must have the same opportunities to make it, as any other. Courts can make no distinction, but must allow the same facility to every defense which the law has given the party. If the law is unwise or unjust, it must be left to the legislature to afford the remedy, but while it is in force, courts must regard its requirements, and extend to those relying upon it the same means to avail themselves of its provisions, as those of any other law. But in this case, the evidence of two witnesses shows, that defendant computed interest, in some instances at three, and in others, at five per cent. per month, and at the end of thirty, sixty or ninety days, added it to the principal, upon which like interest was computed in the same manner. This evidence stands uncontradicted or unexplained. And we cannot con-

ceive that there is anything unconscionable or unjust in an attempt to avoid its payment. It is oppressive in the extreme, is prohibited by the statute, and we can hardly believe any sane man, whose children were not crying for bread, would ever submit to such terms. Instead of its being unmeritorious, we regard it as a just and proper defense.

The master reports that the notes had been left with him to be used in evidence on the trial, and that he returned them to the court. But the transcript in the case fails to give them, or any portion of them. They, or copies, should have been filed and preserved as a part of the evidence in the case. Not appearing in the record, the presumption is, that they have not been preserved as evidence in the case. This court has repeatedly held, that in chancery causes, all the evidence must, in some manner, be preserved in the record, and on failure to do so, it is error, for which a decree will be reversed.

The decree of the court below must therefore be reversed, with an order that the defendant file an answer to complainant's bill, and the cause is remanded.

Decree reversed.

William K. McAllister, Appellant, *v.* Robert R. Ball, Appellee.

APPEAL FROM SUPERIOR COURT OF CHICAGO.

It is error to take judgment on a demurrer to special counts, whilst a plea of the general issue remains undisposed of.

A demurrer may be properly sustained to special counts of a declaration, which were also common counts, if there is only a general breach, which applies to all.

The Cook County Court of Common Pleas could hold its terms by that name until the first Tuesday of April, 1859, when it lapsed into the Superior Court of Chicago.

This action was assumpsit, brought by the appellee against the appellant, to the April term, 1859, of the Cook County Court of Common Pleas.

The *placita* in the record purports to be in the Superior Court of Chicago, before three judges.

The declaration contains three special counts which are precisely alike, except as to the amount of notes declared on, and the time when payable; and are each, aside from said amounts and time when due, as follows:

For that, whereas, the said defendant, heretofore, to wit, on the 11th day of August, A. D. 1857, at Chicago, to wit, at said

county of Cook, made his certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the same to the said plaintiff, in and by which said note, the said defendant, by the name, style and description of W. K. McAllister, promised to pay to the order of the plaintiff, by the name, style and description of R. R. Ball, three months after date, the sum of one hundred dollars, payable at the banking office of R. K. Swift & Co., at Chicago, for value received. By means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said plaintiff the said sum of money mentioned in said note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff, according to the tenor and effect of said note, to wit, at Cook county aforesaid.

No averment of any breach.

Then followed the common counts, thus:

And whereas, also, the said defendant, afterwards, to wit, on the first day of September, A. D. 1857, to wit, at said county, became and was indebted to the said plaintiff in a large sum of money, to wit, the sum of five hundred dollars, for money before that time lent and advanced to the defendant by the said plaintiff, at said defendant's request; and, also, in the like sum for money before that time paid, laid out and expended for said defendant by said plaintiff, at the like special request of said defendant; and in the like sum for money before that time had and received by said defendant, to and for the use of said plaintiff; and, also, in the like sum for goods, wares and merchandise, before that time sold and delivered by said plaintiff to said defendant, at the like special instance and request; and being so indebted, said defendant, in consideration thereof, then and there undertook and promised to pay said plaintiff said several sums of money *last above mentioned*, when thereunto afterwards requested; yet the said defendant, not regarding his said promises and undertakings, although often requested so to do, has not paid said plaintiff *either of said sums of money*, or any part thereof, but so to do hath hitherto wholly refused and neglected, and still doth refuse and neglect, to the damage of said plaintiff of five hundred dollars, etc.

To the said special counts the defendant demurred, and to the common counts pleaded the general issue, accompanied with an affidavit of merits as to those counts.

The record proceeds thus: "And afterwards, to wit, on the 6th day of July, in the year aforesaid (A. D. 1859), said day being one of the days of the July term of the Cook County Court of Common Pleas, the following, among other proceed-

ings, were had and entered of record in said court"; which are: that the court overruled the demurrer to the special counts, with leave for defendant to plead over; that the defendant elected to say nothing; whereupon his default was taken, the plaintiff's damages assessed, and judgment rendered for two hundred and thirty-one dollars and thirty-two cents.

There was no *nolle prosequi* of the common counts entered, nor trial upon them under the general issue.

The defendant prayed an appeal to this court, and assigns for error:

1. That the Cook County Court of Common Pleas continued its name, and to hold terms thereof in July, 1859, after the act of the General Assembly, approved February 17, 1859, abolishing its name and organization, took effect.

2. That it appears, by the record aforesaid, that said court was held by three judges, contrary to the provisions of the constitution of the State of Illinois.

3. That the court erred in overruling the demurrer of appellant to the special counts of appellee's declaration.

4. That the court erred in assessing damages and rendering judgment without any disposition of the issues, formed upon the common counts by the general issue pleaded thereto.

W. K. McAllister, *pro se.*

M. R. M. Wallace, for Appellee.

Breese, J. There is error in this record in this, that the plaintiff took judgment on the demurrer to the special counts, whilst the general issue was filed, and undisposed of, to the common counts. This plea should have been disposed of in some way. For this error the judgment is reversed.

The demurrer to the special counts was properly sustained, as the general breach applied to all the counts.

As to the power of the Cook County Court of Common Pleas to hold terms by that name after the passage of the act of 17th February, 1859, it seems, from the second section of that act, that court continued in existence under that name until the first Tuesday in April of that year. After that, it lapsed into the "Superior Court of Chicago," and was properly held by three judges.

The judgment is reversed and the cause remanded.

Judgment reversed.

Elihu Granger, impleaded, etc., Plaintiff in Error, *v.* John J. McGilvra, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The power of each member of a firm to settle its debts, continues equal to each of the partners after a dissolution, unless restrained by positive agreement, or by an order of the court; nor can one partner deprive the other of this right by notifying the creditors not to pay him.

The giving a note, payable to one of the partners individually, or the payment of a debt of an individual partner by a debtor of a firm, is not such a payment as is binding on the other partner, but is good as to the one to whom it is made.

The bill of complaint of John J. McGilvra, against Wilkinson & Granger, states that he, and Lorenzo Dow Wilkinson, became partners together as attorneys at law in Chicago, under the name of Wilkinson & McGilvra, on a verbal agreement that each should receive one-half of the profits of such business. That the copartnership continued from September, 1856, to February, 1858.

Their aggregate net receipts were $4,237.94 — McGilvra's receipts being $2,127.02; Wilkinson's, $2,110.92.

That the outstanding accounts of the firm amounted to about $2,400, more or less; some good, others doubtful, and some disputed.

The indebtedness of the firm was $225. That there, in all probability, could not be realized from said outstanding accounts over $1,000 after expenses of collection. That whatever might be realized on them, would be wholly insufficient to make McGilvra whole, according to said partnership account, and pay said debt of $225. That Wilkinson also received fees, which were never entered on the books of the firm, and which ought to be charged against him in their partnership account, to the amount of $1,175.

That the moneys received by Wilkinson were, as charged above, $2,110.92; received and not charged, as above, $1,175; making, in all, $3,285.92.

The moneys received by McGilvra were, as charged above, $2,127.02; two notes assumed by him, $150; in all, $2,277.02.

Balance against Wilkinson, $1,008.90.

That in May, 1858, McGilvra, in the name of the firm of Wilkinson & McGilvra, recovered judgment against said Granger, in favor of the firm, for $1,014.25, and against said Granger as assignee, by default, in favor of the firm, for $240.70.

That about that time, said Granger made a proposition to said Wilkinson for a settlement of said judgments. Wilkinson sent for McGilvra, and they had a consultation in relation to

the settlement of the Granger judgments, and it was then and there agreed, between Wilkinson and McGilvra, that they would satisfy the two judgments for $600, (the two judgments being $697.95, after deducting $557 due from the firm to Granger for moneys before then collected by them for him,) at the same time, Wilkinson suggested that he thought he might work some money out of Granger; McGilvra replied that he did not want to use the money under ninety days, and if Granger would give a judgment note for $300, payable to him at ninety days, McGilvra would be satisfied on his part, to satisfy said judgments of record, and that any money Wilkinson could work out of Granger he might apply on his share of the judgments—at this stage of the negotiation, Granger came in. On hearing the subject of their conversation, Granger remarked that he wanted nothing to do with McGilvra in that matter, that he would settle with Wilkinson, without regard to McGilvra. McGilvra replied, he was interested in the matter and had a right to be consulted, and would not recognize any settlement unless he was consulted, and assented to it.

That Granger and Wilkinson are confederating to defraud McGilvra out of his moiety of said judgments.

That Wilkinson pretended he had made a settlement with Granger, and agreed to satisfy the judgments of record without the knowledge or consent of McGilvra, and against his express and repeated remonstrances.

That since the conversation, McGilvra had expressly notified Granger not to make any settlement with Wilkinson without his consent.

The bill charges, that if any settlement was made, it was in fraud of McGilvra's rights, and was wholly fraudulent and void as against him, and asks that it may be set aside as against him.

That Wilkinson had no property but a house and lot in Chicago, worth about $3,000, subject to an incumbrance of $1,600.

That Wilkinson refused to account for the fees received as above, and threatened to satisfy the Granger judgments of record, and Granger boasted that he had settled said judgments, and threatened to have satisfaction entered of record, thereby depriving McGilvra of his moiety of the same, or any benefit whatever from the same.

Prays account against Wilkinson, of the business of the firm, and said fees; for a receiver to collect the outstanding accounts of the firm; that the agreement with Granger (if made) may be set aside, as against McGilvra, and that he may have the full benefit of said judgments, notwithstanding such agreement; and for further relief.

The bill was taken *pro confesso*, and referred to the master to take proofs, and a decree entered, reciting service, default, order to take bill *pro confesso*, reference, and the agreement for partnership.

The total receipts (net) were $5,266. Wilkinson received $3,139.98; McGilvra, $2,027.02; difference, $1,012.96.

That the excess of Wilkinson's receipts was $862.88.

And reciting further: The recovery by the firm of the judgments against Granger, as above, and that Wilkinson and Granger, without the consent and against remonstrances of McGilvra, (of which Granger had notice,) agreed to satisfy said judgments, by Granger paying, or agreeing to pay, Messrs. Joy & Frisbie, $250, on account of a debt due them from said Wilkinson, $50 in cash, and $300 in a note running to Wilkinson individually. That afterward, Granger paid said $250 to Joy & Frisbie, and the said $300 note was turned over by Wilkinson to Joy & Frisbie on his own private debt, all with the knowledge and consent of Granger; and thereupon Wilkinson gave Granger a receipt in full of all demands of the firm in the name of the firm, and in consideration of the sum of $600, as expressed in said receipt. And reciting that Henry S. Monroe had been appointed receiver.

It is decreed that the amount received by Wilkinson over and above the amount received by McGilvra, was $862.88.

That said agreement and settlement between Wilkinson and Granger, and the receipt given them, be set aside as against McGilvra and the firm of Wilkinson & McGilvra. That the judgments against Granger remain in full force and effect for the benefit of the firm of Wilkinson & McGilvra.

That said receiver (after indorsing on the judgments $557) issue execution for $697.95, the balance, and collect the same, with all other the outstanding accounts of the firm; and out of the proceeds, after paying the debts of the firm and expenses of collection, he was ordered to pay McGilvra $862.88 and interest, and the residue he was to pay over, one-half to McGilvra, and the other half to Wilkinson.

Burnham & Martin, for Plaintiffs in Error.

J. J. McGilvra, *pro se*.

Caton, C. J. We do not doubt that the court erred in entering a decree against Granger for the full amount due from him to the firm of Wilkinson & McGilvra. Even without the notice given by complainant to Granger, not to pay Wilkinson without consulting him, Granger had no right to make such

payment for the exclusive benefit of Wilkinson, and to the prejudice of the rights of McGilvra. Granger settled the demand with Wilkinson, by giving his note for a part of the amount to a creditor of Wilkinson, in satisfaction of Wilkinson's individual liability, and by his note to Wilkinson individually, for the balance agreed upon. This was in fraud of the rights of the other partner, and as to his portion of the demand it should be treated as no payment. But as to Wilkinson's half, we are of opinion that it should be treated as a payment. The bill does not pretend that Wilkinson is not able to respond to the decree for the amount claimed to be due from him to the complainant, without resorting to Wilkinson's half of the balance due from Granger, but on the contrary, it states the value of Wilkinson's property over incumbrances, to be more than sufficient to pay the amount claimed to be due from him. But the structure of the bill is such as to show that the complainant only expected or wished to set aside the settlement as to complainant's half or interest in the judgments. It avers that unless the settlement be set aside as to the complainant, he will be in danger of losing his half of the balance due on the judgments, and prays that as to him the settlement may be set aside. But even if the bill and proof had shown that Wilkinson was insolvent, as well as overdrawn with the firm, that would not deprive him of the authority as a member of the firm to settle the firm debts, although forbidden by the other partner to do so. The power of each member of a firm to settle its debts continues equal to the partners after dissolution, unless restrained or limited by positive agreement, or by an order of the court. One partner cannot deprive the other of this power by notifying the creditors not to pay him. Else each partner could thus destroy the authority of the other, and no debtor of the firm could safely pay his whole debt to any one, but must pay half to each, in order to protect himself. Wilkinson, then, still had the same right to receive payment from Granger which the complainant had, and had the payment been such as one partner was authorized to receive for the firm, it would have been binding upon the firm, unless, perhaps, Granger had known that it was the intention of Wilkinson to misapply the money and defraud the other partner; and in this case, so far as Granger did pay Wilkinson in cash, we must hold it a good payment, and binding on both partners. The balance of the payment, being in part in the payment of an individual debt of Wilkinson, and part in a note payable to him individually, is not such a payment as can bind the other partner, whose right should not be prejudiced by it. But as to Wilkinson's interest in the judgments, we are unable to understand why he should not be

satisfied, when he has received the whole of what was due from Granger and appropriated all to his own use. If Granger was amenable to him, and paid him as he did and took the risk of meeting further responsibility to the other partner, we can see no good reason why the whole settlement should be set aside and Wilkinson allowed to collect his half over again of Granger. This we do not think required by the case nor justified by the law. We think the fifty dollars paid in cash, by Granger to Wilkinson, should be credited to him as a good payment to the firm; and that he should also be credited with one-half of the balance due the firm on the judgments, as Wilkinson's proportion thereof. If, upon a final settlement of the concern by the receiver, he has funds in his hands which would otherwise go to Wilkinson, he should pay those funds to the complainant, to the amount remaining due upon the judgments, and if the receiver shall not have enough of Wilkinson's funds in his hands to satisfy the balance due to the complainant, then such funds should be applied so far as they will go, and that the complainant have execution for the balance against Granger.

The decree of the Superior Court is reversed and the suit remanded, with directions to enter a decree according to the principles here stated.

Decree reversed.

Robert M. Snapp *et al.*, Plaintiffs in Error, *v.* Abiram Peirce, and Hans Patten, Defendants in Error.

ERROR TO WARREN.

A deed, made in pursuance of a recorded bond, relates back to the date of the bond, and conveys the title as it stood at the time the bond was recorded.

The record of the bond is notice to creditors and subsequent purchasers.

Facts which rest in parol may be proved by parol, but that which rests in writing must be proved by the writing, or its loss or destruction established, and its contents proved.

The fact that a bond for the conveyance of land has been given up to the obligor, may be proved by parol, and when that is shown, there is a very strong probability, if not an actual presumption of law, that the bond was destroyed by the obligor.

When there is no written assignment of a bond, the conveyance to the assignee by delivery is sufficient, when acted upon by the obligor, voluntarily, or in obedience to a decree of a court, to connect the deed with the bond.

This was an action of ejectment, commenced at the April term of Warren Circuit Court, A. D. 1854, by defendants in

error against plaintiffs in error, to recover the north-west quarter of section fourteen, township eight north, in range one west, and declaration filed in usual form, to which the defendants below filed a plea of general issue. The case was tried before WEAD, Judge, the jury in the cause having been discharged by agreement of parties, and judgment for the plaintiffs below.

The facts are sufficiently stated in the opinion.

MANNING & MERRIMAN, for Plaintiffs in Error.

GOUDY & JUDD, for Defendants in Error.

CATON, C. J. Hans Patten executed to Clement Peirce a bond for a deed of the premises in question, which was duly recorded on the 4th of April, 1836. Patten subsequently mortgaged the same premises to Morse, which mortgage was recorded on the 30th of December, 1836. This mortgage was foreclosed, and under it the lands were sold to Ralsten, in 1844, and Ralsten conveyed to the defendants in 1852, who are in possession, and the presumption of law is, till they show some other title, that they are in possession under this one, so that it is only necessary for the plaintiffs to show a better title from Hans Patten, the common source of both.

The record shows the execution of a deed from Hans Patten to Abiram Peirce, the plaintiff, dated on the 11th of October, 1836, and recorded on the 8th of May, 1837, subsequent to the record of the mortgage to Morse, under which the defendants derive title. Abiram Peirce claims that his deed from Hans Patten was executed in pursuance, and in satisfaction, of the bond for a deed executed by Hans Patten to Clement Peirce, who had assigned the bond to him. If this be so, then we think that the deed made in satisfaction of the bond, must relate back to the date of the bond, and convey the title as it stood at the time the bond was recorded. Our recording laws make the record of the bond notice to creditors and subsequent purchasers. This notice affected Morse at the time he took the mortgage, and all purchasers under that mortgage. It told them that Patten had already sold the land, and bound himself to convey a good title to the obligee or his assigns. This must be the effect of our recording laws, else their beneficial purpose is very limited indeed. Such is the effect of the recording of a mortgage, and yet that does not of itself convey the absolute fee to the land; but when that fee is conveyed under and in pursuance of the provisions of the mortgage, such conveyance relates back to the date of the mortgage, and passes the title unaffected by any conveyance subsequent to its record.

The real question, then, is, did the plaintiff, Abiram Peirce, show that his deed was made in pursuance, and satisfaction, of the bond given by Patten to Clement Peirce? This is unequivocally sworn to by Clement Peirce and Amos Peirce, the former of whom swears that he assigned the bond to Abiram Peirce, who, the latter swears, paid the balance of the money due thereon to Patten, who thereupon executed the deed to Abiram Peirce, in satisfaction thereof, and took up the bond. This is all very well, and very satisfactory, if it was competent to prove these facts in this mode. The general rule is, that that which rests in parol may be proved by parol, but that which rests in writing must be proved by the writing, or its loss or destruction established, and its contents proved. If the assignment of this bond was a part of the proof indispensable to show that the deed was executed in satisfaction of the bond, and that it was in writing, then the bond and assignment should have been produced, or its absence accounted for. The fact of the delivery up of the bond to the obligor, at the time of the execution of the deed, resting as it did in parol, was well proven by parol, and when that was proved, there is a very strong probability, if not an actual presumption of law, that the bond was destroyed by the obligor, as a paid note or mortgage would be likely to be; and if the law will not presume, without proof, that it was destroyed, this probability of its destruction is so strong as to require but very slight cumulative evidence to show that it could not be produced on the trial. The only legitimate proof on this point is in the testimony of Clement Peirce, who swears that he went to the house of Hans Patten, who was absent in California, and searched among all his papers, which were produced by his family, and could not find the bond. That he wrote to Patten in California, inquiring for the bond, and produced his reply, stating that he had executed the deed in satisfaction of the bond, which he had taken up at the time, and subsequently destroyed. This letter was admitted in evidence, against the objection of the defendants. This, we think, was wrong, and if the case depended upon it, would of itself reverse the judgment, but the court held the proof of the loss of the bond insufficient, and refused to admit parol evidence of the contents of the assignment. But we are inclined to think that the testimony of Clement Peirce, of the search which he had made among the papers of Patten, aided by the probability of its destruction by the obligor, after it had been satisfied and taken up by him, sufficient proof of its loss or destruction to have admitted the parol evidence of the written assignment. There is but little probability that Patten would have taken this canceled bond with him to California, while he left other papers at home

with his family, and if still in existence, the very strong probability is, that it would have been found among those papers.

But the court below held, that the facts testified to by Amos Peirce, that Abiram Peirce had produced the bond to Hans Patten, who received of him the balance of the purchase money due on the bond, and made the deed in satisfaction of it and took it up, were sufficient to connect the deed with the bond, and give it relation back to the date and recording of the bond. In this we are not prepared to say the court erred. If there had been no written assignment of the bond, we think the conveyance to the assignee by delivery, sufficient, when acted upon by the obligor voluntarily, or in obedience to a decree of a court, to connect the deed with the bond; but especially when we feel authorized to consider the parol evidence of the written assignment as competent in the cause, which the court below did not feel authorized to do, we cannot hesitate to find the title of Abiram Peirce to be the better and paramount title. After the evidence was all in, by the agreement of the parties, the jury was discharged and the cause submitted to the court for decision, who found the issue for the plaintiffs, and found that they were seized of the premises in fee simple, and rendered a judgment in favor of both. In this the court, no doubt through inadvertence, committed an error. The proof showed that the title was in the plaintiff, Peirce, and that the plaintiff, Patten, had no title. The judgment must be reversed, and judgment entered here in favor of Abiram Peirce, such as the court below should have rendered.

Judgment reversed.

Charles Mason, Executor of Jesse C. Smith, deceased, Appellant, *v.* Joseph K. Johnson, Appellee.

APPEAL FROM MARSHALL.

The words "beyond seas," as used in the statute of Wills, do not extend the limitation to the State of California, that State being within the Union.

A person is not "beyond seas" who is within the national limits of the United States.

An appeal bond, by an executor, conditioned that he shall pay the debt in due course of administration, is good.

Johnson commenced suit against Mason, executor of Smith, in the Marshall Circuit Court.

The declaration states that Smith, in his lifetime, executed and delivered to Johnson his note, which is as follows:

$2,893.62. *Lacon, April 10th*, 1840.

For value received, five years from date, I promise to pay J. K. Johnson, or order, the sum of two thousand eight hundred and ninety-three 62-100 dollars in goods, or such merchandise as he, said Johnson, or bearer, may select, and if not paid when due, to be cash, on interest from date. JESSE C. SMITH.

The declaration contains two counts on this note, and avers that Johnson was ready to receive the goods, but Smith did not have them to deliver. It states that Smith died on the 31st of July, 1850; and that Mason was appointed his executor, and letters testamentary were issued to him by the County Court of Marshall county, on the 9th day of September, A. D. 1850.

The defendant pleaded *nil debet*, and verified his plea by affidavit, denying the execution of the note by Smith.

Issue taken on this plea to the country.

2nd plea: That as to property inventoried and accounted for, etc., the plaintiff's claim was not filed in the proper court, nor presented to the executor of Jesse C. Smith, till after two years from the time of the granting of letters testamentary, etc.

Plaintiff replied, that at the time of the granting the letters testamentary, etc., plaintiff was beyond seas, to wit, in the State of California, and that he filed his claim within two years after his return from beyond seas, etc.

Demurrer to this replication overruled, and exception taken by defendant.

Defendant rejoined—

1st. That plaintiff was not beyond seas, but was in the State of California, one of the United States of America.

Issue to the country.

2nd. That at the time when, etc., plaintiff was not beyond seas, etc.

Issue to the country.

3rd. That plaintiff did not, within two years after his return from beyond seas, file his claim with the proper court.

Issue to the country.

There were several other issues raised upon pleadings, which are omitted as not coming within the scope of the opinion.

The cause was tried by a jury, which found plaintiff's debt $2,743.62, and damages $2,866.54.

The bill of exceptions shows that the first verdict found by the jury was: "We, the jury, find for the plaintiff." This verdict, the court, BANGS, Judge, presiding, refused to enter up, and sent the jury out. They came in again with the following verdict: "We, the jury, find for the plaintiff indebtedness to the amount of $2,743.62, and damages to the amount of $2,866.54, and that the note was not filed in accordance with law;" which verdict also the court refused to receive, and the

jury were again directed to retire. They did so, and returned again with the following verdict: "We, the jury, find for the plaintiff indebtedness to the amount of $2,743.62, and damages to the amount of $2,866.54." Whereupon, without request of the jury, and against objections made by the defendants, and at the plaintiff's request, the court instructed the jury that—

"The jury will find whether the note was presented to the Probate or County Court, within two years after Johnson returned from California; if he was in California.

"The presentation of the note is sufficient if it was marked filed by the clerk of the County Court, and was left among the files in his office for several weeks; and if the note was afterwards taken from the files by the plaintiff or his attorney, this did not annul the previous presentation, if it had been presented by being marked filed by the judge and left with the files by him."

Defendant objected to these instructions, and requested the court to hear argument and suggestions in relation to the same, and to the propriety of their being given, which the court refused to hear, and again sent out the jury to consider of their verdict. The jury brought in the following verdict: "We, the jury, find for the plaintiff indebtedness to the amount of $2,743.62, and damages to the amount of $2,866.54, and that the plaintiff filed the note in question within two years after his return from California." Which verdict the court directed to be entered, and entered judgment thereon.

While this case was pending, the appellee entered a motion to dismiss the appeal, because the condition of the bond filed was "that the said Charles Mason shall pay the debt in due course of administration." The motion was denied, the bond being declared sufficient by the court.

N. H. Purple, for Appellant.

H. M. and J. J. Wead, for Appellee.

Caton, C. J. The main question which we propose to consider is, the meaning of the words "beyond seas," as used in that portion of our statute of Wills which limits the time, in certain cases, within which claims against the estates of deceased persons shall be presented. These words are borrowed originally from an English statute of limitations, and have been adopted in many if not most of our sister States, and have received constructions by the courts of England and of several of the States of this Union. In Great Britain the term may have a literal application, without doing violence to the evident

legislative intention. There, whoever was within the four seas, was not within the words of the exemption, nor was there any great reason for believing that he was not within the intention of the act. Hence it was held that Scotland was not *beyond seas*, although beyond the jurisdiction of the English courts. The geography of this country has suggested the propriety of departing from the literal meaning of the words, and in doing so, jurisdictional or governmental limits could, with propriety, only be resorted to, as giving a definite rule of limitation to the words. We think our own legislation furnishes a safe index to the intention of our own legislature, and that is in accordance with most of the decisions of our sister States. But those decisions we do not propose to review, confining ourselves to the lights afforded at home.

In adopting a governmental or jurisdictional limit for the construction of these words, either the State or national limit may be resorted to, as seems most accordant with the intention of the law-makers. Had the same expression been used in all our statutes of limitations, we might feel much, or at least more embarrassed, in determining in what sense these words were used. But such is not the case. In every other instance, so far as we have observed, in our statutes of limitations, the limits of this State are defined as the boundaries of the exemption, instead of beyond seas. We must conclude, then, that this change of the mode of expression was made for a purpose. If, in this case, persons beyond the limits of this State, were designed to be exempted from the operation of the act, we may well presume that the same definite and certain mode of expression would have been used which is found in all other kindred acts. We must presume that a different meaning was intended to be conveyed by the use of these words, than by those in the other acts, and as we cannot presume that it was meant to make this restriction more limited than the limits of the State, we think we find the true meaning by applying it to the national limits. And we can see a reason for the more extended application of this limitation law than of the others, in the necessity of closing up and finally settling estates of deceased persons, a policy which pervades the whole of our statute of Wills. We are then prepared to hold that California is not beyond seas, within the meaning of this law; and that the limitation applied to the plaintiff in this action. We think the demurrer to the plaintiff's replication to the defendant's second plea should have been sustained. But after this demurrer was overruled, the defendant filed three rejoinders to this replication; the second of which averred that the plaintiff was not beyond seas, on which issue was taken. The evidence

sustained this rejoinder according to our construction of the law, and so substantially did the special verdict of the jury, although perhaps not so distinctly, as to authorize us to enter a judgment here upon it.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Ezekiel S. Smith *et al.*, Plaintiffs in Error, *v.* Elisha Doty, Defendant in Error.

ERROR TO OGLE.

A plea of failure of consideration, which only alleges that the note sued on was given for an assigned note, which assigned note was given without any consideration to the maker thereof, is defective. Such plea should show that the note was assigned after it became due, or that the plaintiff knew of the want of consideration.

If a party attempts to rescind a contract, he should place the proper party in *statu quo*, by an offer to return what the pleader has received.

This is an appeal from an order of the Ogle Circuit Court, sustaining a demurrer to a plea of the defendants below.

The case in the Circuit Court was an action of assumpsit.

The plaintiff, by his declaration, complains that on, etc., at, etc., Ezekiel S. Smith and Henry A. Mix, defendants below, made their certain promissory note, bearing date the day and year last aforesaid, and delivered the said note to the plaintiff below, by which note the said defendants below promised to pay to Elisha Doty, or order, four hundred dollars, with interest, six months after date thereof, for value received; which he avers had not been paid; and adds the common counts.

Defendants below filed pleas as follows:

And the said defendants, by, etc., their attorney, come and defend the wrong and injury when, etc., and say that said plaintiff ought not to have or maintain his aforesaid action against them, because they say that the sole cause of action in said plaintiff's declaration contained, is the promissory note in said first count in said declaration mentioned; and that said note was given without any valuable consideration whatsoever, in this, that the pretended consideration for said note was the assignment by said plaintiff to said defendants on one other promissory note, dated May 8th, 1856; by which said last mentioned note, one Dan Higly, nine months after date, for value received, promised to pay to said plaintiff, or order, the sum of eight hundred dollars; which said promissory note was then and there, by the said plaintiff, falsely and fraudulently repre-

sented to be a good and valid note, and justly due and payable from said Higly, and given for a good and valuable consideration; when, in truth, the said last mentioned note was given without any consideration, and was then and there entirely worthless and void, and of no value whatever; all of which was well known to said plaintiff at said time when, etc., by means of which said false and fraudulent representations, the said defendants were induced to execute said note in said declaration mentioned, to said plaintiff; and said defendants aver the fact and truth to be, that no other consideration whatever was given for said note, in plaintiff's declaration mentioned, except said note of said Higly, and that said note of said Higly was wholly worthless and void, and therefore aver that no consideration whatever was ever given or paid for said note, for which this suit is brought; and this, etc., wherefore, etc.

And for a further plea in this behalf, said defendants say, *actio non*, because the sole foundation of this action is the promissory note, in said first count of said plaintiff's declaration mentioned, and that the consideration of said note has entirely failed in this, that said note was given in consideration of the assignment to said defendant, Smith, by said plaintiff, of one certain promissory note for eight hundred dollars, made by one Dan Higly, to said plaintiff; which said last mentioned note was then and there, by said plaintiff, falsely and fraudulently represented to said defendants to be a good and valid note, and justly due from and legally collectable from said Higly by said plaintiff, and by said defendants: by means of which said false and fraudulent representations, the said defendants were induced to and did execute and deliver to said plaintiff, said promissory note, in said plaintiff's declaration mentioned, and for no other or different consideration whatsoever; and the said defendants aver, that, in truth and in fact, said promissory note of said Higly was given without any good or valuable consideration whatever, and was wholly and entirely void; all of which facts were, at the time said note was so assigned to said defendants, well known to said plaintiff; wherefore, said defendants say that the consideration of said note, sued on in this case, has wholly failed, and this they are ready to verify; wherefore, etc.

A demurrer, in substance as follows, was filed to these pleas.

And said plaintiff comes and says that both and each of the said pleas are not sufficient in law, because said first plea does not show that the note alleged to have been assigned by this plaintiff, to said defendants, was given without consideration.

And to the said second plea, that said second plea alleges said note declared on in this case was fraudulent and void; and that said note was assigned after said note matured. That said

pleas each show a valid consideration from the plaintiff, to the said defendants, for the promissory note declared on.

The court ordered that demurrer be sustained; and the defendants saying nothing further, the court ordered the clerk to assess the plaintiff's damages; and ordered that the plaintiff recover the same of the defendants, together with the costs of suit; and that he have execution therefor. Whereupon an appeal was prayed and allowed.

The error assigned is, that the court erred in sustaining the plaintiff's demurrer to the pleas of the defendants.

SMITH & DEWEY, for Appellants.

CAMPBELL & CARPENTER, for Appellee.

CATON, C. J. We are of opinion that both the pleas in this record were bad. The substance of both pleas is, that the note declared on was given in consideration of the assignment of another note, which had been given by one Higly to the plaintiff; and that that note was given without consideration, and was therefore void, while the plaintiff fraudulently represented that it was good and collectable, and hence this note was given without consideration. These pleas do not show a want or failure of consideration. For aught that appears here, Smith, to whom the first note was assigned, may have collected the full amount of it, and even assuming that he has not already collected that note, the facts shown would not constitute a defense to that note, in an action by Smith against Higly upon it. There is no pretense that there was any fraud in procuring the execution of that note. All that is shown is, that it was given without consideration. This is not sufficient to constitute a defense to a note in the hands of an assignee. In addition to that, it must be shown that the note was assigned after it became due, or that the plaintiff knew that it was given without consideration. Neither of these facts are shown, and, in this case, if the last were shown, it would destroy the defense altogether, for if Smith knew that the note was given without consideration, he then took it at his own risk, and we are by no means clear that the same consequences would not follow, if he took it after it was due, with that taint of dishonor upon it.

Again, by these pleas, the defendants are attempting to rescind the contract by which the Higly note was assigned to Smith. They could not do this without putting Doty in *statu quo*. In order to do this, they should have brought the Higly note into court with their pleas, re-assigned, or with an offer to re-assign.

We are of opinion that the demurrer was properly sustained, and the judgment must be affirmed.

Judgment affirmed.

Alexander Whitehall, Appellant, *v.* Joel R. Smith, Appellee.

APPEAL FROM IROQUOIS.

The loss or destruction of written instruments must be satisfactorily proven, before parol evidence of their contents can be admitted.

This was an action on the case for a malicious prosecution, commenced by appellee against appellant, at the April term, A. D. 1856, of the Iroquois Circuit Court. Plea, not guilty.

On the trial before Randall, Judge, and a jury, the plaintiff called one *H. C. Bryant*, who testified that he was a justice of the peace of said county, and that when Samuel M. Ayres went away to Virginia, he left his books and a box of papers, saying to him that there was the book and papers belonging to his office, Defendant objected, and the court overruled the objection, and allowed the witness to make the statement. Witness then stated that he never made any examination till the commencement of this trial, for the affidavit and warrant stated in the declaration, and that he had only examined the box which had been kept open on his desk since said Ayers had left, and he could n't find them there, and he had then examined every place in his office where the papers might have been placed, and he could n't find them; that Ayers generally pinned his papers to the docket, and he had examined the docket, as Ayers called it, and he could n't find them; that Ayers had left other papers with G. B. Joiner, but what they were, he did n't know. Witness gave further testimony tending to identify the docket as being the docket of said Ayers; that Ayers gave it to the witness, saying it was his docket, and he (witness) believed it to be his docket; that he knew Ayers' signature, and he believed that to be his signature; to all which, defendant objected—objections overruled. Plaintiff then offered the docket in evidence—objected to by defendant; objection overruled by the court.

The plaintiff then called *S. A. Washington*, to prove the contents of the affidavit and warrant. Defendant objected; the court overruled the objection, and allowed the witness to testify what he believed those two papers contained.

The plaintiff then offered in evidence a memorandum signed by S. M. Ayers, J. P., as follows:

People of the State of Illinois,
vs.
Joel R. Smith and Wm. Smith.

Affidavit filed and sworn to, February 27, 1856. Warrant

issued, 27th day of February, A. D. 1856, returnable forthwith, and subpœna in behalf of the plaintiff, February 28, 1856. Two subpœnas issued in behalf of defendants, and one in behalf of plaintiff, February 29, one subpœna issued in behalf of defendant. The body of the above prisoners were delivered in court, and the suit dismissed for want of jurisdiction.

S. M. AYERS, J. P.

To the reading of which, defendant objected; objection overruled and memorandum read. The witness, Washington, then stated that the affidavit and warrant contained the property named in the declaration, except the wagon, which he could n't remember; that he moved to dismiss the proceeding for want of jurisdiction, which the justice did, and the plaintiff and his son were discharged; that record was made upon that affidavit and warrant. To all which defendant objected; objection overruled, and evidence admitted.

The plaintiff then introduced further evidence, tending to show that he took the property, which he was charged with stealing, with the consent of defendant's agent, who had the property in his possession; and defendant introduced evidence tending to show, that after the commencement of this suit, the parties had settled the matter in controversy.

The jury found a verdict for the plaintiff, and defendant moved for a new trial, which was denied by the court, and to this, and the ruling of the court in admitting secondary evidence of the contents of affidavit and warrant, and admitting the docket of Ayres and his declarations, the defendant objected, which were overruled by the court, and to all which the defendant excepted.

DICKEY & WALLACE, for Appellant.

C. H. WOOD, for Appellee.

CATON, C. J. It was too late to take the objection to the form of the verdict. It was cured by the statute of Jeofails. But the proof of the loss of the affidavit and warrant was insufficient to admit secondary evidence of their contents. The affidavit was made before Justice Ayers, and the warrant issued by him. On some occasion, he went to Virginia, and left a part of his papers with the witness, Bryant, and a part with one Joiner. Bryant swore they were not in the box of papers left with him, nor were they pinned into Ayers' docket, which he was in the habit of doing with papers relating to a cause. If it was impossible to get the testimony of Ayers to prove the loss of these papers, there is no excuse shown for not producing

Joiner, or showing by some one else that they were not with those papers left with him. This was not done.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

David N. Lowe, Plaintiff in Error, *v.* George Bliss *et al.*, Defendants in Error.

ERROR TO KANKAKEE.

A declaration which describes the note sued on, without any place of payment, is not sustained by a note which is payable specifically at a place named; and the variance is fatal.

A note or bill of exchange must be for a specific sum of money, or for a sum that may be ascertained by computation, independent of all extrinsic evidence.

"The current rate of exchange" must be proved extrinsically. The court cannot take judicial notice of it.

A written promise for the payment of a specified sum of money, "with the current rate of exchange on New York," is not a promissory note, and a consideration for such promise must be proved.

A defendant who has allowed a written instrument to be given in evidence, without objection, must be held to have admitted that it is evidence, and that it is duly executed, but not that it is sufficient evidence.

This was an action in assumpsit. Declaration filed December 4th. Counts: 1st. On a promissory note of plaintiff in error, (defendant below,) dated July 28, 1858, made at New York, promising "to pay Geo. Bliss & Co.," (defendants in error,) "plaintiffs, the sum of two hundred and twenty-two and 47-100 dollars, with the current rate of exchange on New York, for value received, in ninety days after the date thereof," alleging non-payment. 2nd. The common counts for goods sold, money lent, had and received, and an account stated.

With declaration, copy of note sued on, as follows:

$222.47-100. *New York, July* 28, 1858.

Ninety days after date, I, the subscriber, of Aroma, county of Kankakee, State of Illinois, promise to pay to the order of George Bliss & Co., two hundred — twenty-two and 47-100 dollars, at the Kankakee Bank, Kankakee, Ills., value received, with current rate of exchange on New York.

DAVID N. LOWE.

Defendant pleaded the general issue.

The issue was tried by the court, jury waived, and finding for plaintiffs below, for $227.28.

Motion for new trial overruled, and judgment for verdict and costs, and thirty days given to file bill of exceptions.

On the trial, the following note, defendant objecting, was received in evidence by the court, which was all the evidence offered:

$222.47-100. *New York, July* 28, 1858.

Ninety days after date, I, the subscriber, of Aroma, county of Kankakee, State of Illinois, promise to pay to the order of George Bliss & Co., two hundred *and* twenty-two and 47-100 dollars, at the Kankakee Bank, Kankakee, Ills., value received, with current rate of exchange on New York.

Indorsed as follows: DAVID N. LOWE.

Geo. Bliss & Co.

J. H. Woodworth.

Defendant excepted to the admission of this evidence.

It was then agreed "that current rates of exchange on New York are one and one-fourth per cent on the dollar."

Defendant below excepted to the overruling of the motion for a new trial.

T. L. Dickey, for Plaintiff in Error.

R. N. Murray, for Defendants in Error.

Walker, J. It is first objected that the instrument read in evidence, varies from that described in the declaration, and should have been excluded. That set out in the special count is described as payable at no specified place, whilst that read in evidence is payable at the Kankakee Bank, Ill. There was a clear and material variance between the two instruments. A note payable at a specified place is essentially different from one which is payable generally. It has been repeatedly held, that a note described in the declaration, without any place of payment, is not sustained by a note which is payable specifically at a place named, and that such a variance is fatal. *Hodge* v. *Fillis*, 3 Camp. R. 463; *Sebur* v. *Dorr*, 9 Wheat. 558. This instrument should therefore have been excluded as evidence under the special count.

The question is then presented whether this instrument was admissible under the common counts without proving a consideration. Promissory notes, bills of exchange, and sealed instruments, all import a consideration, and when they form the basis of an action, a consideration need neither be averred nor proved, but it is not so with other instruments. This instrument is not under seal, nor is it a bill of exchange. Was it a promissory note? That is defined to be "a promise or agreement in writing to pay a specified sum, at a time therein limited, or on demand, or at sight, to a person therein named, or to his

order, or to the bearer." Chit. on Bills. 516. Bayley on Bills, p. 1, defines a promissory note to be a written promise to pay money absolutely and at all events. And in the application of the rule the doctrine seems to be adhered to with entire unanimity, that a note or bill must be for a specific sum, or at least for a sum that may be ascertained by computation, independent of all extrinsic evidence. If an instrument be for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, it would not be a bill or note. Had this promise been for the sum of money named, and for the value of four days' labor, no one would have supposed it to be a promissory note, because proof would have to be resorted to for the purpose of ascertaining the value of the labor, and consequently it would not be for a specified sum of money. Such a promise leaves the sum agreed to be paid wholly uncertain. We know that the current rate of exchange between commercial points is fluctuating, and subject to constant change, depending upon the balance of trade and other causes incident thereto. It is as subject to fluctuation as the value of labor or the price of grain, cattle, or other articles of property. And it has never been held that a court may judicially fix the price of any of those commodities independent of proof, and yet to do so, would be no more unreasonable than to take judicial notice of the rate of exchange between different commercial places. We are aware of no decision that has ever held that a court may take notice of such facts, nor has any decision been referred to which holds such an instrument to be a promissory note. Nor can it be successfully urged that custom has changed the law and rendered such instruments valid promissory notes. These instruments owe their negotiability and evidence of the receipt of a consideration to the operation of the statute, and not to the common law. Prior to the adoption of the statute of Anne, in Great Britain, and our statute regulating negotiable instruments, they, neither in that country nor in this State, possessed such qualities. And under the British statute they must be for the payment of a certain specified sum of money, and so under our statute, and not mere mutual agreements or covenants to have that effect.

Unless the instrument declared upon possesses all the qualities of a bill or note, or be under seal, if declared upon specially, a consideration must be averred and proved, or if offered under the common counts, it must be proved, to authorize a recovery. This instrument being a simple contract not under seal, and neither a note or bill, is subject to all the rules which are applied to other simple contracts. When it was offered under the common counts, as it imports no consideration, to

authorize a recovery, a sufficient consideration should have been proved. When offered under the common counts, it dispensed with no proof that would have been required under a properly framed special count. It, unlike a note or bill, afforded no evidence of either money lent, advanced, or had and received to the use of the plaintiff.

But it is insisted that no objection was made when it was offered in evidence on the trial below, under the common counts, and all objections must be considered as waived. When the defendant permitted it to be read without objection, he must be held to have admitted that it was evidence, and that it was duly executed, but not that it was sufficient evidence to warrant a recovery. It certainly was evidence, and had there been further evidence of the consideration upon which it was based, then a recovery would have been proper, but for the want of such additional proof, the defendant may be held to insist that the evidence, although legitimate, is insufficient. The bill of exceptions embodied in the record, states that it contains all the evidence, and we cannot presume that there was any proof of a consideration, and in its absence, the court erred in rendering a judgment in favor of the plaintiffs below.

The rate of current exchange on New York was fixed by agreement of the parties, and proof as to that fact was thereby rendered unnecessary. The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

Breese, J. I am of opinion the note was evidence under the common counts, and negotiable, as any other note.

Harvey B. Hurd, impleaded, etc., Appellant, *v.* Cyrus R. Haggerty, Appellee.

APPEAL FROM COOK.

The declaration of a partner in reference to the entry upon a book open to the inspection of all the partners, stating why it was made, and explaining the transaction, is proper proof to the jury, such declaration being a part of the *res gesta*.

Whether a partnership has assumed a debt or not, by giving a firm note, is for the jury; and the statements of one of the partners, showing that this had been done, is proper evidence.

The declarations of one member of a firm, stating that a note signed by himself, was for the benefit of the partnership, are not proper evidence to prove a joint liability.

A partner may not avoid a joint note, because it is usurious, unless it appears that he expressly forbid the making of it.

THE declaration in this case is upon a note of Dunlap, Wright & Co., with common counts added.

Hurd pleaded the general issue; and that he did not make the note as partner, etc., or otherwise, or authorize the same to be done; and usury.

There was a default against Dunlap, Colburn and Wright; trial as to Hurd; and assessment against the other defendants.

The cause was tried by a jury, before MANNIERE, Judge, and resulted in a judgment against all the defendants, for $924.52.

H. B. HURD, *pro se.*

HOYNE, MILLER & LEWIS, for Appellee.

BREESE, J. The evidence in this case shows, that on the 27th August, 1855, Dunlap, one of the firm of Dunlap, Wright & Co., of which the appellant was a member, executed his individual note to the appellee, for six hundred dollars, with the guarantee of F. H. Benson. This note not being paid, on the third of March, 1856, Dunlap gave another note to Haggerty, of the following tenor, on which this suit is brought:

$665. *March* 3, 1856.

Eight months after date, we promise to pay to the order of C. R. Haggerty or order, Six Hundred Sixty-five Dollars, value received, with interest 10 per cent. per annum; and it is further agreed that the parties shall pay fifty cents per day for each and every day said note remains unpaid after due, as damages for non-payment; being for money loaned.

DUNLAP, WRIGHT & CO.

The defendant filed a plea, verified by affidavit, denying the execution of the note by him as a partner, or by any person having authority; and usury. The other defendants not pleading, their default was entered.

The appellant showed, on the trial, the note executed in August, 1855, with the signature torn off, and contended that this note was given for the individual debt of Dunlap, and introduced the books of the firm to prove it. In their day book, there appeared, in the handwriting of Dunlap, as a credit to him, this entry: "Aug. 28, 1855. By money borrowed of Cyrus R. Haggerty, $600." In the cash book of the firm, the following entry appeared: "Aug. 28, 1855. To sawing, 62 cts., cash, R. L. Dunlap, $600, $600.62." In the ledger of the firm, in the individual account of R. L. Dunlap with the firm, is the following entry: "Aug. 28, 1855. Cash, $600." Across this entry was a black line drawn with a pen.

The appellant proved by a witness, T. L. Forrest, that these entries were in the handwriting of Dunlap, who had the prin-

cipal charge of the financial business of the firm, and that Hurd was a practicing lawyer; and he further proved, by J. G. Mott, that the note in suit was given to take up this note of August 27th.

The inference sought to be drawn from these facts by the appellant, is, that the money borrowed in August, was borrowed on the individual responsibility of Dunlap, and that he claimed a credit for it on the books, as having loaned it to the company, and that the note in suit was given to take up that note, and which, being for his own individual debt, unconnected with the firm, the firm never was liable for, and therefore, giving this note for such a purpose was a fraud upon the other members of the firm.

The question, what was done with the money raised by the note of August, was left to the jury, on the evidence, and they have found, it went to pay a debt due by the firm to Wilcox, Lyon & Co., and for which each member of the firm was responsible. If this be so, then it could be no fraud on the firm, on a renewal of that note, to pledge the firm for its payment.

Dunlap got no credit really, on the books, as money loaned by him to the firm, for the proceeds of the first note, for that entry, showing a credit to him, was erased, and explained by the book-keeper, Scott, as having been so entered by mistake, according to Dunlap's statement to him. Scott says he was the book-keeper of the firm from Nov. 1, 1855, to May 1, 1856, and when he went there, Dunlap requested him to look over the books, as his former book-keeper had made mistakes, and that sometime early in November he discovered this credit, "slashed over with a pen," and called Dunlap's attention to it; that somewhere between the 10th and 12th of November, 1855, Dunlap said, in speaking of this entry, that it was a partnership transaction—it ought not to be so entered, and therefore it was stricken out. While speaking about it, Wright came in and asked about it; Dunlap called his attention to it, and remarked that the amount was used to pay an indebtedness of the firm to Wilcox, Lyon & Co., and therefore he said it ought not to be placed to his credit, which Wright admitted, in substance. It was left out of the footing of the account; he made the footing and balanced the amount about the 1st June, 1856; the books were left open, so that any member of the firm could see them; thinks he saw Hurd there two or three times; the other members of the firm occasionally looked at the books.

This evidence appellant objected to, and moved to exclude it, but the court admitted it, and we think properly, it being an explanation simply, of an entry in the books which the appel-

lant had put in evidence, and which went to show, that when the note in suit was given, the amount of the first note was not standing to the credit of Dunlap, and that appellant had the opportunity of knowing it, the books being open to him and subject to his daily inspection. It was a part of the *res gesta*, and allowable, on the principle that what a party says in doing an act, or directing it to be done, is to be taken in connection with the act done, to explain it.

This witness also stated, that he was present when Haggerty came with the note given in August, when the note in suit was given, and heard Dunlap speak about it—before or about the time it became due, Dunlap said he was unable to raise the money and meet it; said he would see Hurd and Haggerty, and see if he could get it renewed, and when Haggerty came with the note, Dunlap said to him he had seen Hurd about the matter and had talked with him, and that Hurd had advised him to renew it—the note in suit is the renewal note—Dunlap went away from the office several times to see if he could raise the money.

This testimony was also objected to, but admitted, and exception taken.

The question, as the case then stood, was, had the indebtedness created by the note of August 27th, been assumed by the firm, which was for the jury to decide, and it was competent for that purpose, and for the purpose of showing that the indebtedness in the first instance was created for the benefit of the firm and on the firm credit, and was a part of the entire transaction. It is true, where a note made in the name of one partner is sued on, and there is no evidence to show it was a partnership debt, the declarations of the maker cannot be used for such purpose, but if it has been executed in the partnership name, and attacked as having been made by an individual partner to pay his own debt, then the declarations of the partner who executed the note, with the circumstances attending its execution, must, under some qualifications, go in evidence, the court always having it in its power, in its instructions to the jury, to protect the other partners. This was done by the court, by this instruction: "If the jury find, from the evidence, that the money for which the note in question was given, was a separate loan by the plaintiff to Dunlap, and upon his individual *credit alone*, then the jury will disregard the declarations of R. L. Dunlap, or any of the other defendants, as against Hurd. Those declarations were not given as evidence of the responsibility of defendant Hurd, but only in explanation of the entries made by Dunlap upon the books, *in reference to the transactions;* and it is for the jury to say what effect and weight shall be

given to the entries, and Dunlap's declarations in reference thereto, in determining the question whether the money was borrowed upon Dunlap's individual credit, or upon the credit of the firm."

But upon the broad principle, as evolved by the instructions asked by the parties and the manner in which the court disposed of them.

The instruction quoted above, was given by the court in lieu of the second instruction asked by the defendant, to the effect, if the jury find, from the evidence, that the money for which the note was given, was loaned by the plaintiff to Dunlap, and upon his individual security, then the jury will disregard the declarations of Dunlap or any of the other defendants, those declarations not being admitted as evidence of Hurd's responsibility, but only in explanation of the entry of the credit to Dunlap on the books, and it is for the jury to say what effect shall be given to them in that respect.

The instruction given by the court accomplished all that was designed by the appellant, at the same time it directed the minds of the jury to the true character of the transaction. If the money was borrowed on Dunlap's individual credit, so that he might claim a credit for it from the firm by entering it on the books of the firm to his credit, and had actually so done, his declarations and acts ought to have gone to the jury to show the *bona fides* or the *mala fides* of the erasure of the entry from the books. If it had been entered to his credit by mistake, merely, it was competent for him to direct his book-keeper to erase it, the jury judging of the fairness of the transaction.

The instruction given by the court in place of the defendant's third instruction, presents the law of the whole case, usury and all, to the jury upon the evidence, in a manner as favorable to the appellant as he had a right to require. It is as follows: "Although the jury find that Hurd was a partner of the firm of Dunlap, Wright & Co., at the time, etc., the note was given, unless they shall also find that the note was given in the ordinary course of business of the firm; and for money obtained upon the credit of the firm; or that Hurd expressly authorized the giving of the note, they will find for the defendant, Hurd."

The appellant also asked the court to instruct the jury as follows, being his seventh instruction: "If the jury believe, from the evidence, that the contract between Dunlap and the plaintiff was usurious, and the note was given for a usurious loan, then—unless they also find, from the evidence, that Hurd authorized such contract, or the giving of the note—they will find for the defendant, Hurd." This instruction the court refused. It assumes that appellant must have authorized the

execution of this particular note before he can be held liable, and that no authority can be presumed as having been given by one partner to violate the law, the right of one partner to bind his copartner extending only to lawful contracts; that it is a question of authority, and quite different from that between actual parties to a usurious contract. In support of these views the case of *Hutchings* v. *Turner*, 8 Humphrey's (Tenn.) 415, is cited.

By the law of Tennessee, as appears from the opinion of the court in this case, it is an indictable offense to reserve more than six per cent. interest on the loan or forbearance of money —it is a criminal offense, and it cannot be presumed one partner has authority to implicate his copartner in a criminal act without his knowledge or consent. Not having the laws of Tennessee before us, we cannot say what the provisions of their law on the subject of usury may be, but we would infer from the fact that it is a criminal offense, that the usury forfeited the debt. If not so, then we think this decision is erroneous in not holding the party responsible for the real debt due, stripped of its usury, if it was contracted to raise funds to carry on the business of the firm, and was so applied. In this State, the whole interest only is forfeited, and in a suit brought against a partnership in this State, when one partner sets up usury, the note being for a partnership debt justly due, he could have no relief, except to the extent of the usury—all that was good in the note he would be required to pay, relieved from the bad by his defense of usury. He could be placed on no better ground than any other debtors pleading usury.

Again, it is proved in this case that Dunlap was the financial manager of this concern, and if appellant knew, from the books of the concern, that higher rates for money beyond the legal rates had been frequently allowed by the firm, an authority to do so in this particular case might be implied, if there was any evidence that a higher rate of interest than is allowed by law had been reserved, which we do not find proved.

There are entries on the books of this firm of an allowance of interest on their indebtedness of twenty per cent. per annum. The instruction would preclude the jury from drawing any inference from evidence of this character. If a partnership has to resort to borrowing to carry on its business, and it is shown to be not unusual for the financial manager of such partnership to take up money at heavy rates, and the other partners have means to be informed of it, they ought certainly to be held liable, even if it cannot be shown they had knowledge of the execution of a particular note made under such circumstances.

The court, however, did instruct the jury on the subject of the alleged usury as follows: "If the jury shall find, from the evi-

dence, that the note in question was given by the defendants, and that they are jointly liable thereon; and if they shall further find, that a greater rate of interest than ten per cent. was reserved by the contract—then the jury will find a special verdict, setting forth: first, the amount of the principal sum actually loaned; and secondly, the amount of the whole interest reserved or taken, which is now due." The jury found a general verdict, thus ignoring all proof of usury.

The court further instructed the jury, "If they find, from the evidence, that the loan was originally made to R. L. Dunlap, for a private debt, and upon his individual note and credit; and that the note sued upon was given in lieu of said Dunlap's note, with the knowledge of Haggerty, the jury will find for defendant Hurd." The converse of the proposition was found by the jury to be the fact.

The struggle between these parties was, whether the note in suit was given to pay the individual debt of Dunlap, or of the firm of Dunlap, Wright & Co., of which the appellant was one. If it was the former, and known to be so by the party loaning the money, he could not recover. If, on the other hand, the note first given was the individual note of Dunlap, but given to raise money to pay a firm debt, and its proceeds were appropriated to such purpose, the appellant, as one of the firm, would be liable on the renewal note in suit.

It is evident from Mott's testimony, that appellant knew about this note of August 27th, and that the note in suit was given to renew it. He says he has seen Mr. Haggerty once; heard him converse about the loan in controversy in this suit; Mr. Haggerty came into the office of Hurd and wanted to see some books of account; Dunlap's name was spoken of; Hurd asked Haggerty what per cent. interest the note was on; he evaded the question; two or three other questions were put, which Haggerty did not answer; afterwards, while Haggerty was there, Hurd asked what the date of that Dunlap note was; he said, 27th August, 1855; during the conversation he also said the note in suit was given to take up that note; he said the amount borrowed was $600; he either said it was $600, or assented to Mr. Hurd's question if it was not for that amount; can't state whether he said who borrowed it or not; my impression is, from what was said, that Dunlap gave his note first, but whether from what Haggerty said to Hurd, cannot say; Haggerty was taking copy of some account in the books of Dunlap, Wright & Co. On his cross-examination, he says Dunlap's name was mentioned; it was a kind of conversation that he could not follow out; Haggerty was looking over the books;

Hurd asked Haggerty what interest was to be paid ; he evaded the question ; after a while Hurd asked what the amount of the first note was, and he said, $600.

It does not appear that appellant made any objection to the arrangement, and it is fairly inferable that he knew the proceeds of this August note, as also the proceeds of another note given by Dunlap, at the same time, to D. L. Wentworth, went to pay the debt of his firm, due to Wilcox, Lyon & Co., for which all the partners were bound, and it could make no difference to the appellant whether the money was accounted for by the firm to Dunlap, who borrowed it, or to the parties directly of whom he borrowed it for the firm. It was then no fraud upon the firm for Dunlap to execute the firm note to the original lender.

The case of *Richardson* v. *French*, 4 Metcalf, 577, is directly in point. That was a case where an administrator, a member of a partnership, applied to the partnership concerns money which belonged to the estate of his intestate, and afterwards gave the note of the firm to a creditor of the intestate, to whom such money as he had applied to the partnership concern, was due, the note to be in discharge of the creditor's claim on the estate of the intestate. The firm was held bound to pay the note.

The cases cited by appellant, do not reach or apply to this case. They are cases where the note sued on was the individual note of the partner. Here the note is made by the partnership.

The record shows Wright was served with process, so that there is no error in taking judgment against him.

The judgment is affirmed.

Judgment affirmed.

Alexander Whitehall, Appellant, *v.* William Smith, Appellee.

APPEAL FROM IROQUOIS.

In an action for a malicious prosecution, where the defendant pleads not guilty, with a special notice that defendant would prove a settlement of the cause of action, although the notice may be informal, the court should not strike the notice from the files, after a jury had been impanneled, the defense being a good one.

A notice under one plea of not guilty may stand under a similar plea, if one of them should be stricken out.

This was an action on the case for a malicious prosecution, brought by William Smith against Alex. Whitehall, in the Iroquois Circuit Court.

The first count alleges, in substance, that the defendant, on February 27, 1856, went before Samuel M. Ayres, then and there being a justice of the peace of said county, and maliciously, and without probable cause, on oath charged plaintiff, with one Joel R. Smith, with having stolen seven head of steers, wagon, prairie plow, four ox yokes, and three chains, the property of Whitehall, and also charged them with being common cheats and swindlers; and thereupon maliciously and without cause, procured said Ayres to issue a warrant for plaintiff on said charge, and maliciously and without probable cause procured plaintiff to be arrested on said warrant, and imprisoned, etc., until defendant maliciously, etc., procured plaintiff to be taken before said Ayres, J. P., who discharged and acquitted plaintiff, etc.

2nd count. That defendant on, etc., maliciously and without probable cause, on his corporal oath, charged plaintiff with certain offenses punishable by law, to wit, felonies, and caused plaintiff to be arrested thereon and imprisoned, etc., until, etc., when plaintiff was discharged, and fully acquitted of said charge.

Damages, $5,000.

Defendant pleaded the general issue, and also a plea of not guilty, with notice of settlement, or accord and satisfaction.

Issue was joined on the plea of not guilty.

At the April term, 1857, of said court, issue being joined, a jury was impanneled to try the case, and then plaintiff moved to strike the special plea of defendant from the files, which motion was objected to by defendant, but sustained by the court, and defendant excepted.

The jury rendered a verdict as follows: "We, the jury, find for the plaintiff, and assess his damages at two hundred dollars."

Defendant moved for a new trial, which motion was overruled, and defendant prayed an appeal, which was allowed.

Dickey & Wallace, for Appellant.

C. H. Wood, for Appellee.

Caton, C. J. After the jury had been impanneled, the plaintiff moved the court to strike out the defendant's notice, given under the general issue or plea of not guilty, to the effect that he would prove on the trial, that the grievances complained of, or cause of action, had been settled and satisfied, which the court sustained. Although this notice was somewhat informal, and not as full as it might have been, yet it showed a substantial defense. And especially after the jury was called, it

was too late to amend the notice, or in any other way to amend the pleadings, so as to allow the defendant to introduce the proof of the settlement; the court should not have stricken out the notice. Had it been plain that the defense set up in the notice was inapplicable or unavailable, the court might, no doubt, have stricken it out, or refused to admit evidence under it, upon the trial. But we think if the statements contained in this notice had been proved, then the cause of action was settled and satisfied. Striking out the second plea of not guilty, may have been very well, but the notice could stand under the first plea of not guilty, and should have been retained.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Smith Frye, Appellant, *v.* Nathan Tucker *et al.*, Appellees.

APPEAL FROM PEORIA.

A railroad company can take and negotiate promissory notes in the ordinary course of business.

An assignment by the officer of the company, is *prima facie* the act of the company.

The identity of the note may be established by the docket of the justice, or other proof; the trial in appeal from the judgment of a justice, is *de novo*, and all formal objections are overlooked, if the justice had jurisdiction.

This was a suit brought upon a promissory note, before a justice of the peace, before whom default was made, and judgment and appeal to the Circuit Court.

The transcript of the justice of the peace is in these words:

"Nathan Tucker & Henry Mansfield *vs.* Smith Frye. } In assumpsit. Note filed for $226.40. Summons issued on the 12th day of April, A. D. 1859, returnable on the 19th, at 10 o'clock, A. M., and returned by D. A. Wheeler, const., served by reading to the defendant on the 13th. On the return day, the defendant made default. It is therefore ordered and adjudged that the plaintiffs recover two hundred and twenty-six dollars forty cents damages, and costs of suit."

The usual memorandum of costs is made in the margin of the transcript, and the ordinary certificate of the justice attached thereto.

A promissory note, in these words:

$225. *Peoria, March 11th*, 1858.

Twelve months after date, I promise to pay to the order of Peoria & Oquawka Railroad Company, two hundred and twenty-five dollars, at ————, value received. SMITH FRYE.

On the back of which note are these words: "Pay to the order of Tucker & Mansfield. The Peoria & Oquawka Railroad Company, by Henry Nolte, Secy."

At November term, 1859, of the Peoria Circuit Court, there was a trial by jury, and verdict for plaintiffs for $235.50.

Motion for a new trial was overruled. Judgment on verdict, and appeal to Supreme Court allowed.

The assignment of errors is as follows:

That the note read in evidence is fatally variant from the one described in the justice's transcript.

The plaintiffs below did not establish a valid assignment by the Peoria and Oquawka Railroad Company to them, of the note read in evidence.

The evidence shows that the said promissory note was given without any good consideration, and that the plaintiffs below had notice thereof when they received the same.

The court refused to instruct the jury, that if the plaintiffs below knew when they received said note, that it was given for a worthless consideration, the verdict should be for the defendant below.

The record, proceedings and judgment are otherwise manifestly against the law of the land and the rights of the appellant.

CHARLES C. BONNEY, for Appellant.

MANNING & MERRIMAN, for Appellees.

BREESE, J. That a railroad company can take a promissory note and negotiate it in the ordinary course of their business, cannot be questioned. It is a power inherent in all such corporations. The assignment by the company, was *prima facie* their act through their authorized officer. If it was not their act, it should have been denied by affidavit. *McIntire* v. *Preston*, 5 Gilm. 60.

The entry on the docket of the justice of the peace identified the note, and was sufficient. But if it was not, it could make no difference, as on the appeal the case is tried *de novo* in the Circuit Court, all formal objections of every kind being overlooked, the only inquiry being, had the justice of the peace jurisdiction. *Swingley* v. *Haynes*, 22 Ill. R. 216.

The judgment is affirmed.

Judgment affirmed.

Peter A. Brower, Plaintiff in Error, *v.* Gideon H. Rupert *et al.*, Defendants in Error.

ERROR TO TAZEWELL.

The drawer of a bill may waive notice of protest, and if he had not funds in the hands of the drawee, a notice of protest is not necessary.

A party can recover under the common counts, on protested bills, which are proper evidence to establish the cause of action.

This was an action of assumpsit, brought by Rupert and Haines against Brower, and tried before Harriott, Judge, at the February term, 1860, of the Tazewell Circuit Court.

The declaration contained four special counts.

The first count was upon a bill, drawn by defendant, in favor of the plaintiffs below, on J. W. McGee & Co., of Chicago, Illinois, for one thousand dollars, bearing date June 20, 1859, payable thirty days after date, which was accepted by McGee & Co., alleging that the bill was duly presented to the acceptors when it became due, and payment refused, and that the defendant was notified thereof.

The second count was upon a bill for the same amount, drawn by the defendant below on the same parties, and accepted, alleging presentment when due, and failure to pay, and notice. This bill was dated July 6th, 1859, due thirty days after date.

The third and fourth counts were like the first and second, counting upon bills for $1,000, each drawn by Brower, on J. W. McGee & Co., and by him accepted, alleging presentment when due, and a failure to pay, and notice. One dated the 9th of July, 1859; one the 14th of July, 1859; both payable thirty days after date.

The declaration also contained the common counts for money had and received, money paid, and account stated.

There was a demurrer interposed to each of the special counts, and overruled, and pleas of the general issue filed to all the counts.

The plaintiffs then read in evidence the bills as set forth and described in the special counts under the common counts.

The defendant moved the court to exclude all the evidence from the jury, for the reason that it did not prove that the defendant had due notice of the non-payment of the bills in question; and for the reason that the plaintiffs had no right to prove, under the pleadings in the cause, that the drawee had no funds of the defendant in his hands—which motion was overruled. To the overruling of which, the defendant excepted.

The jury returned a verdict for the plaintiffs for $4,122.31; whereupon the defendant moved for a new trial, for the reason

that the verdict was contrary to law, and the court admitted improper evidence—which motion was overruled.

The errors assigned, are, that the court erred in not excluding the plaintiffs' testimony from the jury, and in not granting a a new trial.

ROBERTS & IRELAND, for Plaintiff in Error.

SCAMMON, MCCAGG & FULLER, for Defendants in Error.

WALKER, J. The record in this case fails to show a sufficient notice to the drawer, of a protest of these bills for non-payment, to support the averments in the special counts. But the law is well settled that the drawer may waive notice, or when he has no funds in the hands of the drawee at the maturity of the bill, a notice of protest is not required to fix his liability. Story on Bills, 75; Chit. on Bills, 325. When he has failed to provide funds to meet the bills, he can have no reason to suppose they will be honored, nor is there any necessity that he should have notice, as he has no funds in the hands of the drawee to be protected. When he has failed to provide funds to meet his draft, he has placed himself in the same situation as if he had expressly waived notice. The evidence in this case shows that the plaintiff in error had provided no funds to meet these bills, and that he stated that he cared nothing for notice, as he expected them to be protested. It also appeared that he was repeatedly notified by the drawee that he must provide funds to protect these bills, which he neglected to do.

The question is then presented, whether this authorized a recovery under the common counts. While cases may be found which hold that a waiver of, or an excuse for not giving notice, cannot be proved under the common counts, still the current of modern decisions both in Great Britain, and this country, sanctions the practice. This is the rule of the American cases. And we think, under our practice, which requires a copy of the instrument sued upon to be filed, as notice of what the defendant is required to meet, there can be no surprise produced by this evidence under the common counts. He is thus apprised that he is sued upon the bill, drawn by himself, and he must know whether notice has been waived, or any legal excuse exists for not giving it, and he can as fully prepare to meet the case as if the excuse was averred in the declaration. We have no doubt that these bills, and the evidence, were admissible under the common counts, and that the verdict and the judgment below, were warranted by the evidence.

The judgment of the court below is affirmed.

Judgment affirmed.

The People of the State of Illinois, on the relation of Martin Ballou, Appellant, *v.* Mark Bangs, Appellee.

APPEAL FROM MARSHALL.

While the General Assembly has power, under the constitution, to create additional judicial circuits, and may also change counties from one circuit to another, it cannot so change them as to deprive a judge of his office, or to authorize the election of another in his stead.

Though a judge elected under a law not authorized by the constitution, shall be ousted because he is not an officer *de jure*, yet his acts *colore officii* will be valid.

This was an information in the nature of a *quo warranto*, filed in the Marshall Circuit Court, May term, 1859, by the state's attorney, on the relation of Martin Ballou, against Mark Bangs. The facts are set forth in the following agreed case between the parties:

It is agreed by the parties in this cause, that under and by virtue of the provisions of an act, entitled "An act to establish the twenty-third judicial circuit, and to fix the time for holding courts in the ninth judicial circuit," approved February 10th, 1857, at a regular election for judge and state's attorney for the twenty-third judicial circuit, held in the counties of Bureau, Putnam and Marshall, in said State, on the 14th day of March, A. D. 1857, Martin Ballou, the relator, was duly elected to the office of judge of the said twenty-third judicial circuit, and that in pursuance of his said election, afterwards, to wit, on the 31st day of March, A. D. 1857, he was duly commissioned by the governor of said State as judge of said judicial circuit, and that thereupon, on the fourth day of April, in the year last aforesaid, the said Ballou duly qualified himself, by subscribing and taking the several oaths in manner and form as required by the constitution and laws of said State, and that he thereupon entered upon the discharge of the duties of said office, and that he has discharged the duties thereof from that time until the present time, and now still claims to hold said office.

That at the time of said Ballou's election as aforesaid, he then did reside, and for more than five years prior thereto had resided in said Bureau county, at which place he ever since has resided, and still does reside.

That at an election for judge and state's attorney for the twenty-third judicial circuit, held in the counties of Putnam, Marshall, and Woodford, on the fifth day of April, A. D. 1859, under and by virtue of the provisions of an act, entitled "An act to repeal a certain act herein named, and to establish the twenty-third judicial circuit," approved February 11th, 1859, said defendant, Mark Bangs, was elected to the office of judge

of the twenty-third judicial circuit, in said State; that in pursuance of his said election, he was thereupon commissioned by the governor of said State, as such judge, and duly qualified by subscribing and taking the several oaths in manner and form required by the constitution and laws of said State, and entered upon the discharge of the duties of said office, and still exercises the duties thereof, and at the time of the filing the information in this cause, he was executing the duties and rights of said office.

That at the time of the election of said Bangs as aforesaid, he then did reside, and for more than five years prior thereto, had resided in said Marshall county, at which place he ever since has resided, and still does reside.

Now it is hereby agreed to submit this cause to the court here on the foregoing stated facts, to be decided in the same way as if the cause was now at issue by due form of pleading, the said defendant entering his appearance in this cause, and waiving process and service thereof, and also waiving all questions of form, either in relation to the mode of proceedings or otherwise.

Now, if the court shall be of opinion that the defendant, Mark Bangs, is legally and rightfully judge of the said twenty-third judicial district of said State, then the court is to decide the cause in favor of said defendant, and against the relator for costs — but if the court shall be of opinion that said defendant, Mark Bangs, is not legally and rightfully judge of the said twenty-third judicial circuit, and that said relator is legally and rightfully judge of said twenty-third judicial circuit, then the court is to decide against said defendant, and in favor of said relator, and give judgment of ouster against said defendant, and for costs.

It is further agreed, that either party may take an appeal from such judgment, to the Supreme Court, upon his own bond, without other security.

MARTIN BALLOU.
MARK BANGS.

The court below gave judgment for the defendant, and against the relator for costs.

Leland & Leland, for Appellant.

H. M. and J. J. Wead, for Appellee.

Caton, C. J. While it is the duty of the court to sustain a law passed by the legislature, unless the law is manifestly in violation of some provision of the constitution, yet we cannot

wink at the violation or evasion of that instrument, no matter in what emergency, or from what supposed necessity the law may have been passed. We were led to consider somewhat the provisions of this law, in the case of *The People ex rel. Ballou* v. *Dubois*, 23 Ill. R. 547, where we said that the legislature could not, by the passage of any law, turn a circuit judge out of office, but the question was not there presented, whether that portion of the law which required the election of another judge, was within the constitutional power of the legislature or not.

The seventh section of the fifth article of the constitution, is this: "The State shall be divided into nine judicial districts, in each of which one circuit judge shall be elected by the qualfied electors thereof, who shall hold his office for the term of six years, and until his successor shall be commissioned and qualified: *Provided*, that the General Assembly may increase the number of circuits to meet the future exigencies of the State." And the fifteenth section of the same article provides: "On the first Monday of June, 1855, and every sixth year thereafter, an election shall be held for judges of the Circuit Courts: *Provided*, whenever an additional circuit is created, such provision may be made as to hold the second election of such additional judge at the regular election herein provided."

In the case above referred to, we held that it is the constitution, and not the act of the legislature, which creates the office of circuit judge. Upon this subject, the legislature is expressly authorized to do two things. One is, to increase the number of circuits; and the other is, in the event of the creation of a new circuit, the legislature may provide that the commission of the judge first elected to supply such circuit, shall expire at the next regular election for circuit judges. So that he may hold his office in fact but two years, instead of six. We will not deny, but are prepared to hold, that, as the legislature is vested with the authority to mark out and fix the boundaries of the circuits, they may change those boundaries, by taking a county or counties from one circuit and attaching them to another, as the public exigencies may require; and that was in fact all that was done, or could be done, in this case. One county was taken from the twenty-third circuit and attached to the ninth circuit; and other counties were taken from another circuit and attached to this. This we hold the legislature might rightfully do. But by doing this, no *additional* circuit was created. No attempt, by a form of words or mode of expression, to abolish the old twenty-third circuit and create another of the same number, or by giving it any other number, or any other name, can change the substance of the thing, and

it is by the substance and essence of the law that it must be adjudged. What was the legislature authorized to do? The constitution says, "The General Assembly may increase the number of circuits to meet the future exigencies of the State." When the circuits are increased, then the number of circuit judges is also increased, by the constitution, to the same extent or number. Have the number of circuits been increased by this law? That is not and cannot be pretended, and hence the number of judges is not increased, and that portion of the law which provided for the election of a circuit judge was not authorized by the constitution, and the election itself was void. It gave Judge Bangs color of office, no doubt, and, acting as he did under color of office, his acts were as valid, of course, as if the law had been constitutional.

But here we are bound by a direct proceeding, to inquire further, and see whether he holds the office of judge *de jure*, and we are forced to the conclusion that he does not, thus depriving the State, as we have no doubt, of a most excellent officer. But there is a judge still remaining in office, upon whom the burthen of performing circuit duties in the twenty-third circuit still devolves, and whom the legislature have not and could not deprive of his office, by the passage of any law.

The judgment of the Circuit Court is reversed, and judgment of ouster must be entered in this court.

Judgment reversed, and judgment of ouster entered.

Augustus Martin *et al.*, Plaintiffs in Error, *v.* Frederick N. Ehrenfels, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The fact that evidence was given to the jury, tending to show that parties sued here had been copartners in Europe, is not so irrelevant as to authorize the setting aside of a verdict.

In order to have this court decide, whether there was a variance between a note declared upon, and the one offered in evidence, the latter should be set out in the bill of exceptions.

If the evidence as to a fact is conflicting, the verdict will be sustained.

The affidavit of a juror, is not to be received, to impeach the conduct of the panel.

Cumulative evidence, or newly discovered evidence, touching upon a fact, about which evidence had already been received, unless it is conclusive as to such fact, or the fact that a witness can be impeached, is not cause for granting a new trial.

Martin et al. *v.* Ehrenfels.

THIS was a suit commenced by an affidavit, for an attachment for $1,773.68, on two promissory notes made by plaintiffs in error, under the firm of A. Martin & Co., one dated 16th September, 1858, payable to defendant in error, for $1,248, two months after date, with interest; the other, made by plaintiffs in error, under the same style, dated 29th September, 1858, payable to Greenbaum Brothers, or order, twelve days after date, for $500, with interest at ten per cent.; last note duly indorsed by payees to the defendant in error.

That Martin had departed from the State of Illinois, and that Rudolph A. and William Slomer, were about to depart from said State, each of them having the intent to remove their effects from said State, to the injury of their creditors as aforesaid.

The declaration was on the two notes set out in the affidavit for attachment, and the common counts.

Ad damnum, $3,000.

General issue by Rudolph A. Slomer, and *similiter*.

General issue by William Slomer, and *similiter*.

Affidavit of Rudolph A. Slomer, verifying his plea.

Affidavit of William Slomer, verifying his plea.

Default of Martin was entered.

A jury was impanneled to try issue, and there was a verdict on issues joined, and damages assessed on default, 8th October, 1859, for $1,876.31.

Motion, on part of Rudolph A. Slomer and William Slomer, for a new trial.

Motion for a new trial overruled by the court, and final judgment on verdict, and exception by defendants Slomers.

Appeal prayed and allowed.

HERVEY & ANTHONY, for Plaintiffs in Error.

VAN BUREN & GARY, for Defendant in Error.

CATON, C. J. We see no objections to the evidence offered, of the relations formerly existing between the defendants when they resided in Europe. It is true, that these relations there may have had but a slight tendency to show that they were partners in Chicago, but we do not think it was so entirely irrelevant that the verdict should be set aside because it was admitted.

When the larger note was offered in evidence, it was objected to, because of an alleged variance between it and the one declared on, which objection was overruled, and an exception taken. The record does not show that there was any variance,

and the presumption is, that the objection was overruled because there was in fact no variance. The note offered should have been set out in the bill of exceptions, had there been any variance, so that we could have seen that there was a variance.

The alteration in the other note was shown, by the testimony of Greenbaum, to have been made before it was executed. But even that note is not given in the record, so as to show that there had been an apparent alteration.

There was a very considerable amount of conflicting testimony upon the fact of partnership. From the testimony, we think the jury would have been justified in finding either way. Perhaps the preponderance is in favor of the verdict. At any rate, we should not be justified in setting aside the verdict, because it is against the evidence.

There were three classes of affidavits read in support of the motion for a new trial. We will first consider the affidavits of the jurors. The only tendency of these affidavits, is to impeach the conduct of the jury. For this purpose the affidavit of a juror cannot be received. Next are the affidavits of newly discovered evidence bearing upon the question of partnership, and this only of a circumstantial character. This is in the strictest sense cumulative evidence, upon a point to which a large amount of evidence had already been introduced upon the trial; and is not of itself of a conclusive and controling character. Such newly discovered evidence never affords grounds for a new trial. Newly discovered evidence upon a point to which testimony has already been given on the trial, must be positive and conclusive, and capable of definitely settling the point in controversy at once and conclusively, before it can justify the granting of a new trial. These affidavits do not even approach this standard.

The remaining affidavits show, that upon another trial the defendants would be able to impeach the testimony of one of the plaintiff's witnesses. This also is an insufficient ground for a new trial.

The judgment must be affirmed.

Judgment affirmed.

Charles J. Wilder, Plaintiff in Error, *v.* William F. De Wolf, Defendant in Error.

ERROR TO COOK.

A note made payable to A. B. or bearer, is assignable by indorsement under our statute.

Where a note or bill is put into circulation with a general indorsement, it may be filled up in the name of any *bona fide* holder, who may recover in his own name.

Notice of non-payment need not be given to an assignor.

This is an action brought against the appellant, as indorser of two promissory notes, payable to the order of the maker, by the holders, who derive their title by delivery merely, and without the indorsement of the party from whom they were received.

This cause is submitted to the court on the following agreed statement of facts:

The notes on which the action was brought were made payable to the order of the maker, and were indorsed in blank, and delivered by the maker to the defendant. The defendant then indorsed the notes in blank, without consideration, and delivered them to the maker, who then delivered the notes, so indorsed, to one Moss, and Moss transferred them by delivery, for a valuable consideration, but without his indorsement, to the plaintiffs. The plaintiffs had no knowledge that the indorsement of the defendant was without consideration, and all said transfers were made before the notes became due. When the notes became due, the maker was insolvent, and so continued to the time when the suit was instituted, so that during that time a suit against him would have been unavailing. The defendant had no notice of the non-payment of the notes when the said notes became due.

It is further agreed, that the defendant filed a plea authorized by the 59th section of the practice act, Rev. Stat. 1845, 2 Purple's Ed. 821, and verified according to the provisions of that act.

It is further agreed and admitted, that the said blank indorsement of the said defendant has been filled up by the said plaintiffs at the time of submitting this cause to the court, with a special indorsement, making the notes payable to them or their order, it being understood and agreed that the defendant does not admit the right of said plaintiffs to fill up said indorsement, without the indorsement of an assignee intermediate between defendant and plaintiffs being proved.

The Circuit Court of Cook county, MANNIERE, Judge, presiding, on the above statement of facts, gave judgment for the plaintiffs.

G. D. NOYES, for Plaintiff in Error.

J. H. THOMPSON, for Defendant in Error.

WALKER, J. The first question which we propose to consider is, whether a note payable to the maker, is such an instrument as is assignable by him under our statute. That act provides that all promissory notes, bonds, due bills, and other instruments in writing, made by any person, or body politic or corporate, by which such person promises or agrees to pay any sum of money or articles of personal property, or any sum of money in such property, to any other person, shall be taken to be due and payable to the person to whom such instrument is made. It also provides that such instrument shall be assignable by indorsement thereon, under the hand or hands of the payee or payees, and of his, her, or their assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property of such instrument in each and every assignee or assignees successively.

The statute of 3 and 4 Anne, has the provision, that such notes made to another person, to his or her order, or to bearer, shall be assignable by indorsement. This language is rather fuller than that employed in our act, but it makes no express provision that a note payable to the maker or to his order, shall be negotiable, and yet it seems now to be the well-settled construction of the act, given by the British courts, that such instruments are within its spirit, and that they may be as fully negotiated, and with precisely the same effect, as other notes. *Brown* v. *De Winton*, 6 C. B. 342; *Wood* v. *Mytton*, 10 Q. B. 805; *Hooper* v. *Williams*, 2 Exch. 13; *Gay* v. *Lander*, 6 C. B. 336; *Absolon* v. *Marks*, 11 Q. B. 19. These decisions of the courts in Westminster Hall, all concurring upon this point, are sufficient to induce us to concur in the construction there given to a statute containing language substantially similar to ours. These cases hold that, while the note is inoperative until it is negotiated, yet, when the maker indorses and delivers it, that it then becomes fully invested with the attributes of such an instrument, and subject to all of its incidents.

It is next objected, that after the note was assigned in blank, it was negotiated by mere delivery. There is no doctrine relating to commercial paper, which may be regarded as better settled, than when a note or bill is put into circulation, with a

general indorsement made by a proper party, that it may be filled up in the name of any *bona fide* holder, and that he may recover in his own name. 1 Pars. on Contracts, 212, bottom page, and authorities cited.

It was likewise urged, that the plaintiff below could not recover on the assignment, because notice of non-payment had not been given to the assignor. If anything may be regarded as settled in this court, it is, that in an action by an assignee against an assignor of a promissory note, a notice of non-payment is unnecessary to charge the latter. *State Bank* v. *Hawley*, 1 Scam. 480; *Holborn* v. *Actus*, 3 Scam. 344; *Pierce* v. *Short*, 14 Ill. R. 144. The right to recover is given by the statute, and when either of the contingencies there specified, occurs, the suit may be maintained. Notice is not required by the statute, and is therefore unnecessary.

The judgment of the court below must be affirmed.

Judgment affirmed.

David Seem, Appellant, *v.* Ingram McLees, Appellee.

APPEAL FROM STEPHENSON.

Where a tenant holds from month to month, he is entitled to a month's notice to quit, before an action of forcible detainer will lie against him.

A copy of the notice to quit, should be left with the occupant.

An appearance before a justice in an action of forcible detainer, does not waive any defect in the notice to deliver possession. An affidavit, read on a motion for a new trial, showing that a copy of the notice had been served, is too late.

This was a proceeding, commenced before a justice of the peace of Stephenson county, upon the following complaint:

The complaint of David Seem, of the city of Freeport, in said county, who being duly sworn, upon his oath gives William Herbert, Esq., one of the justices of the peace of said county, to understand and be informed, that on the twenty-sixth day of October, A. D. 1858, in the county aforesaid, he did demise and lease to Ingram McLees, of the place aforesaid, all that certain house and lot, situate in the city of Freeport, in the county aforesaid, known and designated as follows: Lot number eight (8), in block number fourteen (14), in the city of Freeport, for and during the term of one month from said twenty-sixth day of October, 1858, and that the said Ingram McLees, willfully and without force, after the expiration of said lease, held over and still continues in possession of the premises, without the per

mission of the complainant, notwithstanding demand has been made in writing by the complainant upon the said Ingram McLees, to quit and deliver up possession thereof to him. Therefore he prays that the said Ingram McLees may be summoned to answer to the said complaint.

Sworn to, etc.

There was a trial before the justice, and the jury found the defendant "guilty." It was therefore considered by the said justice, that the complainant, David Seem, recover and be restored to the possession of the tenement and possessions particularly described and designated in said complaint, and that he have a writ of restitution therefor.

The cause was taken by appeal to the Circuit Court, and was tried before SHELDON, Judge, and a jury.

The following notice was the foundation of the complaint:

TO MR. INGRAM MCLEES—*Sir:* Take notice that I hereby demand that you quit and immediately deliver up possession of the house and lot you now occupy and hold of me, situate in the city of Freeport, in the county of Stephenson, and State of Illinois, being the same now occupied by you. DAVID SEEM.

August 2nd, 1859.

On the back of said notice, the following appears, to wit:

Served the within by reading the same to the said Ingram McLees August 2nd, A. D. 1859. PETER BEAUMAN.

On the trial in the Circuit Court, the defendant was found not guilty, and the plaintiff entered his motion for a new trial as follows:

Now comes plaintiff, attorney *pro se*, and files the affidavit of David C. Laird, and his reasons for a new trial in this cause.

TO MR. INGRAM MCLEES—*Sir:* Take notice that I hereby demand that you quit and immediately deliver up possession of the lands, tenements and possessions which you now hold of me, situated in the city of Freeport, in the county of Stephenson, being the same now occupied by you. Mr. George White is hereby authorized to receive possession of said lands and tenements, or house and lot you now occupy. Yours, etc.

Dated the 25th day of July, A. D. 1859. DAVID SEEM.

I, David C. Laird, a constable in and for said county and State aforesaid, being first duly sworn, doth depose and say that he served the above annexed notice upon the defendant, Ingram McLees, by leaving a copy with the defendant, Ingram McLees, on the 25th day of July, A. D. 1859. D. C. LAIRD.

Subscribed and sworn before me this 16th day of January, A. D. 1860.

JOHN COATES, *Justice of Peace.*

On the back of which appears the following indorsement, to wit: "Executed the within notice by reading, and leaving a

copy of the same with the within named Ingram McLees, this 25th day of July, 1859."

The motion for a new trial was overruled.

D. SEEM, *pro se.*

BURCHARD & BARTON, for Appellee.

CATON, C. J. The defendant was a tenant from month to month, and was entitled to one month's notice to quit, before he was liable to be sued in an action of forcible detainer. If the notice offered in evidence was designed to terminate the lease at the end of the succeeding month, then the action was brought too soon, for that month had not expired.

But waiving this, and assuming that the notice offered was designed as the notice required by the statute, as preparatory to bringing the action, and it was insufficient. It did not appear that the notice, or a copy of it, was left with the defendant, but it was read to him. That statute says that the tenant holding over, "after demand made in writing for possession thereof," shall be adjudged guilty of forcible detainer, etc. A demand made by reading a paper to the tenant, is not a demand made in writing. It is but an oral demand. The statute intended that the tenant should have a written demand, to which he could refer, and which he could examine, that he need not depend upon his memory to know what the demand was.

The plaintiff insists, that by appearing before the justice, and contesting the case upon its merits, he waived any defect in the demand, and that it was too late to take the objection on appeal. The objection was not of a dilatory character. Until such demand was made, the tenant was not guilty of forcible detainer under the statute. The proof of the demand was an essential part of the plaintiff's case, as much so, as proof of the tenancy. If no such demand was made, the defendant was not guilty.

Nor did the affidavit, read on the motion for a new trial, showing that a copy of the demand had been left with the defendant, show any excuse why that proof had not been introduced on the trial. There is no pretense that it was newly discovered evidence. The inference is, that the proof was well known to the plaintiff at the time of the trial, and that it was his own fault that it was not adduced.

The judgment must be affirmed.

Judgment affirmed.

JOHN BRYNER, Plaintiff in Error, *v.* THE BOARD OF SUPERVISORS OF PEORIA COUNTY, Defendant in Error.

ERROR TO PEORIA.

Sheriffs are not allowed pay for stationery, or for services in summoning grand juries, etc. There is no legal or moral obligation on the counties to pay such charges. They take the office *cum onere*.

THIS was an action commenced by the sheriff of Peoria county, for the purpose of recovering for official services, rendered the county.

The declaration was in debt, and there was a plea of the general issue.

The case was submitted to POWELL, Judge, for decision, without a jury, on an agreed state of facts. The defendant admitted that the services were rendered as charged in the bill, and that they were of the value as charged in the bill of items, but denied the liability of the county to pay for the same.

The items admitted to be correct, consist of mileage in summoning grand and petit jurors for different terms of the Circuit and County Courts, and amounting to $163.30.

Also, for serving subpœnas before the grand juries and for the court, in different cases, amounting to $50.80.

Also, for money paid out for printing of jury warrants, certificates, bonds and bills of sale, amounting to $32.

All of which was admitted to be correct, as to the items charged, but defendant denied the liability of the county therefor.

The case was submitted to the court on the following agreed state of facts, to wit:

It is agreed in the said cause, that the plaintiff was sheriff of Peoria county, and as such, rendered the services of "mileage" in serving venires duly issued by the county clerk of Peoria county, and in executing orders of court for summoning jurors, as charged in his bill filed with the declaration in said case.

It is also agreed, that the plaintiff rendered services to the value of thirty dollars, of the services charged in that part of the bill filed with that part of the declaration marked as "criminal bill for convictions," etc., which last mentioned services were rendered for serving subpœnas before the grand jury of said county—for serving writs of *scire facias* on forfeited recognizances, in criminal cases, and for serving writs of capias and subpœnas in cases pending in the Circuit Court of Peoria county, in which cases convictions were had. It is further agreed, that the said plaintiff has paid out for printing of blanks of the kind charged in said bill, and which were

proper to be used in the discharge of his duties of sheriff, money, to the amount of thirty-two dollars, as charged in said bill; that he has used a part of said blanks in the discharge of his duties as sheriff, and that he has the remainder of such blanks in his possession to be used in the same manner, and that the same were of the value charged in said bill.

It is further agreed, that no part of the value of said services, as such, has been paid to said sheriff.

It is further agreed, that during the time while the said services in serving venires, and executing orders of court to summon jurors as aforesaid, were being rendered, the defendant allowed and paid to the plaintiff ten dollars for each regular panel of jurors, and ten dollars for every panel of jurors summoned by order of court, both in the Circuit Court and County Court of said county.

The court shall take this agreement as evidence in said cause, and shall determine said cause without the intervention of a jury.

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

M. Williamson, for Plaintiff in Error.

Manning & Merriman, for the County.

Breese, J. We cannot find any statute which in its terms, or by any construction it may have received, allowing sheriffs pay for the services here shown, or for stationery in any form. There is neither a legal or moral obligation on the counties to pay such charges. He who takes the office of sheriff, takes it *cum onere*.

The judgment is affirmed.

Judgment affirmed.

Charles B. Brown *et al.*, Appellants, *v.* George Smith *et al.*, Appellees.

APPEAL FROM COURT OF COMMON PLEAS OF COOK COUNTY.

Whatever may be the form of action, it is error to render a judgment for a larger sum than that claimed in the declaration.

The court has no power to permit an amendment to the declaration, in a matter of substance, without granting a continuance, if desired by the defendant.

Nor has the court power, after verdict, to permit amendments of substance, except upon terms of payment of costs, setting aside the verdict, and granting a new trial.

THIS was an action brought by appellees against appellants, on a bond. Damages claimed in the declaration, five hundred dollars. Trial was had before JOHN M. WILSON, Judge, and a jury, and verdict for the plaintiffs for $1,131.09. The defendants entered motions in arrest of judgment, and for a new trial. The plaintiffs also entered a motion for leave to amend their declaration by inserting the word "twelve" instead of the word "five" in the *ad damnum;* which last motion was granted, and those on the part of defendants overruled, and judgment entered for plaintiffs.

W. W. FARWELL, and SIDNEY SMITH, for Appellants.

F. H. WINSTON, for Appellees.

WALKER, J. This was an action of debt, instituted on a penal bond, with conditions annexed. Breaches were assigned in the declaration, and the damages were laid at five hundred dollars. The jury found a verdict for the sum $1,131.09, and the appellants entered motions in arrest of judgment, and for a new trial. The appellees also entered a motion for leave to amend the declaration, by increasing the *ad damnum* to an amount sufficiently large to cover the finding of the jury. The court allowed the motion to amend, and overruled the motions in arrest and for a new trial, and rendered judgment on the verdict. From that judgment, and to reverse which, the defendants below prosecute this appeal.

This court has repeatedly held, that the damages laid in the conclusion of the count or declaration on a penal bond, must be sufficiently large to cover the finding of the jury, and that it is error to render judgment for a larger sum than is thus claimed. *Fournier* v. *Faggott*, 3 Scam. 347; *Stephens* v. *Sweeney*, 2 Gilm. 375; *Russell* v. *The City of Chicago*, 22 Ill. R. 283. There is no rule of practice better settled, than that it is error to render judgment for a larger sum than that claimed in the declaration, whatever the form of the action.

And by the uniform rule of practice, the court has no power to permit an amendment in the declaration, in a matter of substance, without granting a continuance of the cause, if desired by the defendant. To do so would operate as a surprise, and defeat the object in requiring the declaration to be filed ten days before the term. Where such an amendment is made, it becomes essentially a new declaration, which the party has the right to prepare to defend. There was this material amendment of the declaration, entitling the defendant to a continuance. In that as originally filed, the whole claim of damages amounted

to but five hundred dollars, while it as amended claimed over three thousand. When it was filed, the defendants had a right to believe that no more than the damages there claimed, would be insisted upon at the trial. This amendment authorized a greater recovery, and was as material an amendment as if there had been added a new breach, or count in the declaration, to make it conform to the proof.

Nor has the court any power, after verdict, to permit amendments of substance, except upon terms of the payment of costs, setting aside the verdict, and granting a new trial. *Tomlinson* v. *Blacksmith*, 7 T. R. 132. To permit such a practice, would enable a plaintiff to claim a small amount in his summons and declaration, and to recover a larger amount on the trial. It may be that the appellants have a complete defense to all the damages above five hundred dollars, and may have been induced, by no more being claimed, to make no preparation to establish it. The court below erred in permitting the amendment, except it had been on terms.

The judgment must therefore be reversed, and the cause remanded.

Judgment reversed.

Philip Moser, Plaintiff in Error, *v.* Jacob Matt *et al.*, Defendants in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

In order to enforce a mechanics' lien, there must be a definite time fixed for the completion of the work.

This is a case of a mechanics' lien. There was a demurrer to the bill, because it did not allege that any specific time was agreed upon, when the contract was made, within which the work provided for therein was to be completed.

The demurrer was sustained in the court below, and the plaintiff in that court brings the case to this.

M. W. Fuller, for Plaintiff in Error.

E. F. Runyon, for Defendants in Error.

Breese, J. We see nothing in this case to take it out of the cases heretofore decided by this court. It is essential, a definite

time shall be alleged for the completion of the work. We cannot imply a time. We adhere to the opinions and rulings in *Cook* v. *Heald*, 21 Ill. R. 425; *Same* v. *Vreeland*, ib. 431; *Cook* v. *Rofinot*, ib. 437; *Senior* v. *Brebnor*, 22 Ill. R. 252; *Mc Clurken et al.* v. *Logan et al.*, 23 ib. 79. We can see no difference in principle between the cases, and deem it useless to go again into the argument.

The judgment of the court below is affirmed.

Judgment affirmed.

Noyes D. Bartholomew, for the use of Luzerne Bartholomew, Plaintiff in Error, *v.* Ambrose C. Bartholomew, Defendant in Error.

ERROR TO PEORIA.

It is erroneous to instruct a jury that a receipt for three dollars and twenty-five cents, in full of all accounts, is *prima facie* evidence of the payment of three notes given for a much larger amount, expressed on their face to have been given in trust, for the benefit of another party.

This is an action of debt, which was brought to the March term, 1856, of the Peoria Circuit Court, on the following notes, viz.:

Peoria County, Nov. 18, 1841.

Two years from date, I (or we) promise to pay to Noyes D. Bartholomew or order, for the use and benefit of Betsey Bartholomew, the sum of one hundred and fifty dollars, with six per cent. interest from date, for value received.

A. C. BARTHOLOMEW.

Peoria County, Nov. 18, 1841.

Three years from date, for value received, I (or we) promise to pay to Noyes D. Bartholomew or order, for the use and benefit of Betsey Bartholomew, the sum of one hundred and fifty dollars, with six per cent. interest from date.

A. C. BARTHOLOMEW.

Peoria County, Nov. 18, 1841.

Four years from date, I (or we) promise to pay to Noyes D. Bartholomew or order, for the use and benefit of Betsey Bartholomew, the sum of one hundred dollars, for value received, with six per cent. interest from date.

A. C. BARTHOLOMEW.

The declaration contained one special count on said notes, and the common counts.

The defendant pleaded the general issue, in which the plain-

tiff joins; payment; that defendant was not indebted within five years; and settlement and receipt in full, in words and figures following:

Received of A. C. Bartholomew, three doll. and twenty-five cents, it being in full of all accounts, notes, whatsoever, up to this date.
Newburg, August 23, 1847. N. D. BARTHOLOMEW.

Issue joined on the pleas.

There was an affidavit of plaintiff, denying execution of receipt, and the following replications to said last plea:

1. Plaintiff did not account and settle with defendant. Issue joined.

2. Plaintiff did not execute said receipt. Issue joined.

3. Said receipt was given without consideration received to or for the use of said Luzerne or Betsey Bartholomew.

To said third replication defendant rejoins:

1. Said receipt was given for a good and valid consideration in law.

2. Said receipt was given for a good and valid consideration, received by said Betsey or Luzerne Bartholomew, on which plaintiff joins issue.

There was a trial by jury, at November term, 1857, and verdict for defendant.

Motion for new trial, for reasons following: improper evidence admitted for defendant; exclusion of proper evidence offered by plaintiff; erroneous instructions given for defendant; and verdict against law and evidence.

Motion overruled, and exception taken.

On the trial, plaintiff, to maintain the issues on his part, read to the jury without objection, the three notes above set out, and rested.

Defendant offered the following receipt:

Received of A. C. Bartholomew, one dollar, in full of all demands up to this date. LUZERNE BARTHOLOMEW.
Newburg, Peoria County, May 19, 1848.

To the reading of which in evidence, plaintiff objected. Court overruled objection, and permitted the same to be read to the jury, and plaintiff excepted.

There was much testimony offered as to the genuineness of the signature to the receipt.

The court instructed for the plaintiff in substance as follows:

1. The receipt of plaintiff being denied under oath, the burden of proof is on the defendant, and unless the jury believe the preponderance of proof favors its genuineness, they will disregard said receipt.

2. If the jury believe, from the evidence, said receipt was given, but that the parties did not intend thereby to cut off the notes sued on, they may disregard said receipt.

3. That the facts, that said receipt, if given, is for much less than the notes; that said notes were left in the hands of the party to whom given, without explanation, and that the notes are for the use of another person than the plaintiff; are all proper to be considered by the jury, in determining the application of said receipt.

4. The jury will not consider the receipt given by Luzerne Bartholomew, unless they believe, from the evidence, that when given, Luzerne was the beneficial holder of said notes, or authorized to receive payment of them, and that the parties intended to include said notes in that receipt.

5. That the discrepancy between the amounts named in said receipts, and the notes sued on, is proper evidence for the consideration of the jury, to show that said notes were not in the contemplation of the parties to said receipts, when given.

6. If the jury find for plaintiff, they will assess the amount of principal and interest due on said notes.

7. It is for the jury to determine, from the evidence, what the parties intended in making said receipts, and if they believe, from the evidence, that the parties did not intend to adjust said notes by said receipts, they will disregard said receipts.

8. Said notes being given for the use of Betsey Bartholomew, was notice to defendant that she was the equitable owner of them at the time they were made.

For the defendant, the court instructed as follows:

1. That the receipt of 23rd August, 1847, is *prima facie* evidence of payment to him of the notes sued on, provided the notes then belonged to him, or provided the defendant had no notice of the equitable assignment of said notes to any other person, and the presumption of law is, that the notes belonged to him, and remained his property, until it is shown by the plaintiff that some other person had an interest in the same, and that the defendant had notice of such interest.

2. The receipt of May 19, 1848, signed by Luzerne Bartholomew, is *prima facie* evidence that the notes sued on were paid and settled at that date; provided said Luzerne had any interest in said notes at that time.

3. That Betsey Bartholomew has nothing to do with this case, and no interest of hers, or supposed interest, can be taken into consideration by the jury.

4. That the several receipts read, except those of 23rd August, 1847, and 19th May, 1848, are only in evidence to test the judgment of the witnesses, and the jury are not authorized

to consider the same by way of comparison, to determine the genuineness of the receipt of 23rd August, 1847.

5. A receipt in full of all demands, is *prima facie* evidence of settlement and payment of all notes and claims then existing between the parties, and in this case, if such receipts have been made, the jury will find for defendant, unless the plaintiff has proved, to their satisfaction, that the notes in question were not included in such settlement and receipts.

6. If the jury believe, from the evidence, that the notes in suit were given and payable to Noyes D. Bartholomew, for the use of Betsey Bartholomew, and that Betsey was the wife of Luzerne Bartholomew, and the defendant paid the notes to Luzerne, then the jury will find for the defendant.

7. The affidavit of Noyes D. Bartholomew, that he did not sign the receipt in question, is no part of the evidence in this cause, and is not proper for the consideration of the jury, for any purpose whatever, but the jury are to determine the question of the genuineness of said receipt, upon the testimony of the witnesses acquainted with the hand-writing of the plaintiff only, and should there be a preponderance of evidence in favor of the genuineness of said receipt, the jury should so find.

To the giving of which instructions for defendant, the plaintiff excepted.

MANNING, MERRIMAN & COOPER, for Plaintiff in Error.

N. H. PURPLE, for Defendant in Error.

CATON, C. J. We think the court erred in instructing the jury that the receipt read in evidence was *prima facie* evidence of the payment of these notes. The three notes together amounted, besides interest, to four hundred dollars, and expressed on their face to be in trust, and for the use and benefit of Mrs. Bartholomew, who was a married woman. The receipt is in these words:

> Received of A. C. Bartholomew, three doll. and twenty-five cents, it being in full of all accounts, notes, whatsoever, up to this date.
> *Newburg, August* 23, 1847. N. D. BARTHOLOMEW.

Had the amount specified in the receipt, corresponded with the amount due on the notes, there would have been a greater probability that it was for the payment of the notes. But in this case, there is no presumption in law, nor, as we think, of fact, that this receipt was designed to operate as a discharge of these notes. The legal and rational presumption is, that it was given upon a general settlement of the personal claims which

he plaintiff had against the defendant, and had no reference to these notes, which he held in trust for a married woman.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Ann Carney, Adm'x, Appellant, *v.* Cornelia P. Newberry, Adm'x, Appellee.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The failure of one of the parties to a contract to fulfill his agreement, authorizes the other party to rescind the contract.

But such failure does not of itself destroy the contract. The other party must give notice, within a reasonable time, of his intention to repudiate it.

This was an action of assumpsit by appellee, administratrix of the estate of Amasa S. Newberry, against appellant, administratrix of James Carney.

The declaration contains two counts. The first sets forth the following agreement, to wit: "This agreement, made this 16th day of July, 1853, between A. S. Newberry, of Oneida county, New York, and James Carney, of Chicago, witnesseth: That said Newberry agreed to deliver to said Carney, on some wharf in the city of Chicago, in the autumn of each year, for seven years next ensuing, commencing with the present year, five thousand five hundred pounds of good, merchantable hops; and in the spring of each year, for a like period, commencing with the year one thousand eight hundred and fifty-four, two thousand five hundred pounds, of a like quality; and the said Carney agrees to pay for the same, on delivery, at the rate of fifteen cents per pound for those delivered in the autumn, and fifteen and a half cents for those delivered in the spring;" and states, in substance, that said Newberry has always been ready and willing, and offered to perform the agreement aforesaid in all things; and that on the first day of October, 1856, he delivered for said Carney, under said agreement, at a wharf in said Chicago, 5,500 pounds of good merchantable hops, and that on the first day of March, 1857, he delivered the said quantity of like good, merchantable hops on a certain wharf in Chicago, according to said contract, of all which said Carney had notice, and requested said Carney to accept and pay for the same. Breach—that said Carney in his lifetime, and the said Ann Carney, administratrix, did not, and would not, at any time, accept said hops, or pay for the same.

The second count contains essentially the same matter as the first; and states further, that the plaintiff, from the time of making said agreement, until the refusal and wrongful discharge by the defendant, was ready to perform said agreement; that said Carney, in his lifetime, accepted the hops according to said agreement, up to the autumn of 1856; that from that time hence hitherto, he has wholly refused to receive said hops or any part thereof, and has wrongfully prevented and discharged said Newberry from the further performance of said contract, whereby he has lost the benefits which might and would have arisen from the complete performance of the same. States, that on the 16th of July, 1857, said Newberry was forced to sell and did sell said hops for a much less price than was to be paid by Carney; that the loss thereon was $500, besides costs and charges of such resale, which amounted to $100.

Plea—the general issue, and joinder.

On the trial, the plaintiff proved an offer to deliver 5,515 pounds of hops to defendant, and a refusal to receive and pay for them. The evidence was conflicting as to the quality of the hops.

The court then gave the following instructions to the jury, on the part of the plaintiff, to wit:

1. That if Newberry tendered hops under the contract in the spring of 1856, in good faith, but such hops proved inferior and not of the quality required by the contract, such failure would not release nor could it be taken advantage of by the defendant, unless it was willful or intentional on the part of said Newberry; and the said plaintiff might make tender of hops under the contract the next fall, and at subsequent times of delivery, and claim payment therefor. In such case, the defendant may offset any damages sustained by reason of the failure to deliver as required by the contract.

2. The measure of damages in this case is the difference between the contract price and the market price at the time of the breach complained of, and if the jury find for the plaintiff, they will estimate the quantity of hops which had not been delivered, and give the difference between the market price and contract price, as damages, on so much of the contract as remained to be performed.

To the giving of which, defendant then and there excepted.

Plaintiff then introduced and read the original agreement.

The cause was then submitted to the jury, who brought in a verdict for the plaintiff, and assessed damages at eleven hundred and twenty-five dollars, whereupon the defendant moved for a new trial.

But the court overruled the motion for a new trial, and ren-

dered judgment upon said verdict, and the defendant then and there excepted.

Subsequent to the bringing in of the verdict, the plaintiff remitted therefrom $125, and judgment was entered for $1,000.

RUCKER & PAGE, for Plaintiff in Error.

SCATES & CLAPP, for Defendant in Error.

CATON, C. J. The first instruction given for the plaintiff, we think, was erroneous. It was this: "That if Newberry tendered hops, under the contract, in the spring of 1856, in good faith, but such hops proved inferior and not of the quality required by the contract, such failure would not release, nor could it be taken advantage of by the defendant, unless it was willful or intentional on the part of the said Newberry; and the said plaintiff might make tender of hops, under the contract, the next fall and at subsequent times of delivery, and claim payment therefor."

By the terms of the contract, the plaintiff's intestate was bound to deliver a certain quantity of good, merchantable hops, in the spring and fall of each year for several successive years. Those tendered in the spring of 1856, the proof shows, were not merchantable, and were for that reason declined, and the instruction announces the proposition, that if the party tendering the hops did so in good faith, believing them to be good, this failure to perform the contract would not justify the defendant to abandon the contract, and refuse to receive any more hops under it. The question of good or bad faith could have nothing to do with any of the consequences legitimately flowing from a failure to deliver the hops, according to the terms of the contract. If the good faith would not be an answer to an action for damages, for the breach of the contract, no more would it be to any other remedy to which the defendant was entitled. Here was a failure to fulfill the contract for the delivery, of the spring of 1856, as total and complete as if no hops at all had been tendered. It was not a case where a few pounds, or even a single bale, was inferior, but all were bad, or at least the proof would have justified the jury in so finding. This was, then, a substantial breach of the contract, for which we think the defendant would have been justified in repudiating or abandoning it, and refusing to receive any more under it. If one failure was not sufficient, how many would be? Must she wait till two, or three, or four failures had occurred before she was authorized to abandon this contract, and make other provision for future deliveries? If that failure would not have

justified this course, then a greater number would not, and she must be kept in suspense for the whole time. The simple failure of itself did not rescind the contract, and absolve one party from tendering and the other from receiving the hops in future, but it authorized the party to rescind it. To avail herself of this right, a positive, affirmative act was required,—a notice to the other party not to deliver any more hops, for she had rescinded the contract,—and this, too, within a reasonable time after the failure. She could not lie by till the next lot was actually tendered, and then repudiate the contract and refuse to receive them. Whether she did rescind the contract, as she had a right to do, is not for us now to inquire. That will be for the jury to determine upon another trial. We see no error in the rule laid down for estimating the damages.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

Thomas Newlan, Appellant, *v.* James Harrington, Appellee.

APPEAL FROM KANE.

A guarantor is not liable beyond the express terms of his undertaking, and a material alteration of such terms will avoid it.

This suit was brought upon a note, of which the following is a copy:

Aurora, August 20th, 1858.

One year after date, for value received, I promise to pay Thomas Newlan, or order, the sum of one hundred and thirty-eight dollars, at ten per cent. per annum.

J. H. ORCUTT.

The first count alleges, that defendant was possessed of said note, and exchanged it for a gray mare with defendant, and guaranteed the payment of said note upon the back thereof.

Second count was, that defendant indorsed the note to plaintiff, and that when the note became due, the institution of a suit against the maker would have been unavailing.

Third count, common count for money advanced, money paid, laid out, and expended; money had and received, for goods, wares, and merchandise, for an amount stated, and for interest.

Plea, general issue, verified by affidavit.

Trial by court; verdict and judgment for $148.90.

On the trial, the note was read in evidence, on the back of which was this guarantee:

I guarantee the within note.
Aurora, May 3rd, 1859. THOMAS NEWLAN.

The following stipulations were read:

It is hereby admitted that the assignment of note counted on in the above case, was given in exchange for a gray mare. It is admitted that John Orcutt, the maker, is insolvent, and was at the time of the commencement of this suit. Also, an assignment given by John H. Orcutt to Cornelius Firman, dated August 8th, 1859.

The plaintiff called a witness, who testified, that he was the attorney of plaintiff; that the guarantee on the back of the note read originally, "I guarantee the collection of the within note;" that he tore off the words, "the collection of the," in the presence of James Harrington, plaintiff, so as to have it read, "I guarantee the within note."

GLOVER, COOK & CAMPBELL, for Appellant.

DICKEY & WALLACE, for Appellee.

BREESE, J. It is a familiar principle, that a guarantor is not liable beyond the express terms of his undertaking, and a change in those terms, by which a conditional undertaking shall be made absolute, is such a material alteration as will avoid it.

Here, Newlan guaranteed the collection of the note. This required the party should make some effort to collect the note, for, although a party may be insolvent as to his general liabilities, it may be in his power to pay a particular note.

By cutting off the words, "the collection of," the guarantee becomes an absolute one. This is a material alteration, and avoids the guarantee.

Gillet et al. v. *Sweat*, 1 Gilm. 489; *Chappel* v. *Spencer et al.*, 23 Barbour, 584; *Gardiner* v. *Harback*, 21 Ill. R. 129; 32 Eng. L. & Eq. 162; *Ryan* v. *The Trustees of Shawneetown*, 14 Ill. R. 24; 20 Penn. 12; *Burchfield* v. *Moore*, 25 Eng. L. & E. 123.

It is not good policy to permit a party interested in such papers, to alter them.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Otho W. Perkins *et al.*, Plaintiffs in Error, *v.* J. K. Lewis *et al.*, President and Trustees of the Town of St. Charles, Defendants in Error.

ERROR TO KANE.

The legislature may authorize municipalities to become stockholders in railroad corporations.

This bill sets up, that the complainants are each of them owners of real estate within the corporate limits of the town of St. Charles, and that each of them is liable to be assessed, and to pay his rateable proportion of taxes levied by the said corporation.

The bill charges, that at the last session of the legislature, an act was procured to be passed, entitled, "An act to authorize the inhabitants of the incorporation of the town of St. Charles, to subscribe to the stock of the St. Charles Railroad Company, approved February 21st, 1859." That complainants have never seen said act—that they are informed that it has not been published—that they have not had time to get a copy from the secretary of state, since they were informed of the passage of the said act, and ask leave, when they shall get a copy, to attach the same to this bill and make it a part thereof, and to which complainants refer. That complainants are informed that said act authorizes the corporate officers of said town, or some of them, to call a meeting of the legal voters residing within the corporate limits of said town, to vote, either for or against subscribing to the stock of the St. Charles Railroad Company, or ("that said corporation shall subscribe for or cause to be subscribed for any, and if any, how much of the capital stock of the St. Charles Railroad Company.") That the president of said board of trustees, has directed or requested the clerk of said board to issue and post up notices, calling said proposed meeting, and that the said clerk has posted such notices, etc.

Bill charges, on information and belief, that the St. Charles Railroad Company are authorized to build a branch railroad from any point within the corporate limits of the town of St. Charles, southerly, to connect with the Dixon Air Line, or easterly, with the Galena and Chicago Union Railroad. That a branch road, connecting with either, would have to be built beyond the corporate limits of said town.

It charges, that defendants, or some of them, under pretense of authority to be obtained in pursuance of an election, to be held at a time and place in said notice mentioned, are about to

subscribe stock to a large amount to the stock of said St. Charles Railroad Company, and to issue bonds of said corporation, of a large amount, to pay for said stock, making the same a charge on the said corporation, and upon the property of the complainants; the principal and interest to be paid by taxing all the real and personal property within the said incorporation and of complainants as a sequence.

Bill charges, that it is not designed to have any stock taken in said St. Charles Railroad Company, except such part as shall be taken by said town of St. Charles. That said complainants are advised, and so charge the fact to be, that said town of St. Charles is a municipal corporation for the government of the people of said town, and not a private corporation for pecuniary purposes, and that it is contrary to the constitution of this State to make such a private corporation for the purpose of speculation, and compelling the inhabitants and property owners of said town to invest their property without their consent, and against their wishes in the speculation of said municipal corporation, which is changed from the legitimate constitutional and lawful object.

On the bill a writ of injunction was issued, strictly enjoining and commanding the said officers of the town of St. Charles, and each and every of them, from subscribing for or to the capital stock of the St. Charles Railroad Company, or from issuing, signing, selling, or disposing of any bonds pledging the corporate town of St. Charles aforesaid, for the redemption of the same, pursuant to the said act of the legislature.

At November term of the said Kane Circuit Court, I. G. Wilson, Judge, presiding, the bill was taken as confessed, and the injunction was made perpetual.

J. S. Beveridge, and Eastman & Bottsford, for Defendants in Error.

Hoyne, Miller & Lewis, for Plaintiffs in Error.

Walker, J. This was a bill in chancery, filed in the Circuit Court of Kane county, for the purpose of enjoining the president and trustees of the town of St. Charles, from subscribing to the capital stock of a railroad company, and from issuing the bonds of the city in payment of the same. No objections to the notice calling the election to determine whether the city would subscribe for such stock, or irregularity in the mode of conducting the election, in the canvass of the votes, or any of the other preliminary steps, is urged, but the relief sought is placed alone upon the unconstitutionality of the law authorizing

the city to subscribe for the stock and pay their subscription by issuing its bonds. The act under which this subscription is attempted to be made, was adopted February 21, 1859, (Special Laws, p. 684,) and expressly authorizes the city to become a stockholder in this road, if a majority of its citizens shall so determine by vote, in the mode prescribed.

But the objection urged, is that the legislature has no constitutional warrant to authorize cities, counties or other municipal bodies, to subscribe stock in railroads, within or running through their jurisdiction. This being the only question presented by this record for our consideration, we deem it unnecessary to discuss the various provisions of the constitution involved in the question, in this opinion, as they were all raised, discussed and determined in the case of *Johnson* v. *Stark County*, decided at the present term. *Ante*, p. 75. We, in accordance with the conclusions there arrived at, must hold that the legislature has competent authority to authorize such subscriptions.

The decree of the court below is reversed, and the bill dismissed for want of equity.

Decree reversed.

John Dukes, Appellant, *v.* Reuben Rowley, Appellee.

APPEAL FROM PEORIA.

The *placita*, or convening order of a court, which shows that the judge was present holding the term, the record showing that business was done by the court, is sufficient; it will be presumed that the other proper and requisite officers were present.

A judgment for taxes, which does not show that the clerk of the Circuit Court has recorded the collector's report, and the certificate of publication, is invalid.

The holder of a tax title must show that the collector's report and certificate of advertisement were properly recorded, that a judgment was rendered, and a precept issued.

A collector's deed is *prima facie* evidence that the land had been properly listed and assessed; this may be rebutted by appropriate evidence.

The judgment must in some other way than by the use of numerals, state the sum for which it is rendered.

It will be presumed that proper proof was made to the Circuit Court, before judgment, that the certificate returned, was made by the publisher of the paper in which it appeared.

This was an action of ejectment, by Reuben Rowley against John Dukes, for the recovery of the north-east quarter of section twenty-two, in township eleven north, range six east of the fourth principal meridian, Peoria county.

The declaration was filed at November term, 1857. Trial by jury at November term, 1858; verdict for plaintiff; new trial allowed, and cause continued.

There was a trial by the court at November term, 1859, and a judgment for plaintiff; motion for new trial denied; appeal to Supreme Court allowed. The cause was tried by POWELL, Judge.

The bill of exceptions shows a judgment in the words and figures following, to wit:

"At a Circuit Court begun and held at the court-house in the town of Peoria, in and for the county of Peoria and State of Illinois, on Monday, the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and forty-five, present the Honorable JOHN DEAN CATON, Associate Justice of the Supreme Court of the State of Illinois, assigned to perform the duties of judge of the ninth judicial circuit:" (Here follows a judgment against certain other lands for taxes of 1843.)

Monday, May 26th, 1845.

"STATE OF ILLINOIS, } ss.
PEORIA COUNTY. }

Whereas, Smith Frye, collector of said county, returned to the Circuit Court of said county, on the twentieth day of January, A. D. 1845, the following tracts and parts of tracts of land, as having been assessed for taxes by the assessor of said county of Peoria for the year 1844, and has also returned that the taxes thereon remained due and upaid 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 this county on which the said collector can levy for the taxes, interest and costs due and unpaid on the following described lands, situated in the county of Peoria, and State of Illinois, to wit:

Description.	Acres.	Tax.	Costs.
N. W. 17, 11 N., 6 E.	160	$3 36	.40
N. E. 22, " "	160	3 36	.40
part N. E. 24, " "	71	ac 2 13	.40

And whereas, due notice has been given of the intended application for a judgment against said lands, and no owner hath appeared to make defense or show cause why judgment should not be entered against said lands for the taxes, interest and costs due and unpaid thereon for the year herein set forth: Therefore it is considered by the court, that judgment be and is hereby entered against the aforesaid tracts and parts of tracts of land, in the name of the State of Illinois, for the sum annexed to each parcel or tract of land, being the amount of taxes 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 and costs annexed to them severally, be sold as the law directs."

To which the defendant made the following objections, to wit:

The caption is insufficient.

It doth not show that the officers required to constitute a court were present.

There is, in fact, nothing to show that any *court* rendered the alleged judgment.

Said alleged judgment doth not contain the recitals and set forth the facts required by the statute.

Said alleged judgment is manifestly variant from the report and advertisement of the collector.

Said judgment doth not properly show the amount of tax, interest and costs required by law.

Said judgment is otherwise defective.

Which several objections were overruled by the court, and the said judgment read in evidence.

The plaintiff offered in evidence a precept and the return thereto, in the words and figures following, to wit:

"*The People of the State of Illinois to the Sheriff of Peoria County*, GREETING:

"MONDAY, May 26th, 1845."

Here follows a recital of the judgment set out above, whereto the following certificate and return are appended:

"STATE OF ILLINOIS, } ss.
PEORIA COUNTY. } I, Jacob Gale, Clerk of the Circuit Court, within and for the said county of Peoria, do hereby certify that the foregoing is a full and perfect copy of a judgment and order of the said court, made at the May term thereof, A. D. 1845, and of all proceedings had at said term of said court, on or concerning the list of delinquent lands for the taxes of the year 1844, lying in said Peoria county.

In witness whereof, I have hereunto set my hand and the seal of said
[L. S.] court, at Peoria, this seventh day of June, A. D. 1845.

JACOB GALE, Clerk."

"STATE OF ILLINOIS, } ss.
COUNTY OF PEORIA. } By virtue of the foregoing process, I did, with the assistance of the clerk of the County Commissioners' Court of said county, by his deputy, attend at the court-house in the town of Peoria, in said county, on the ninth day of June, A. D. 1845, at the hour of ten o'clock, A. M., and between that time and three o'clock, P. M., of that day, proceeded to sell each lot or parcel of land described in the foregoing list, at public auction, commencing with the first lot therein described, and sold all the lots and tracts (except those on which the taxes were paid to me before sale), to the W. ½

N.E. ¼ of section 32, of township 7 north, 6 east, inclusive; and afterwards, to wit, at three o'clock, P. M., adjourned the sale to ten o'clock, A. M., of the 10th day of June instant; and on June 10th, at ten o'clock, A. M., proceeded to sell in like manner the lands described in said list, from E. ½ N.E. 2, of 8 north, 6 east, and sold to the part N.W. 2 of township 10 north, 8 east, inclusive; and afterwards, at three o'clock of the last mentioned day, adjourned the sale to ten o'clock, A. M., of the 11th day of June instant; and on the 11th day of June, A. D. 1845, at ten o'clock, A. M., proceeded to sell, in like manner, the remainder of the lands described in said list, to the end of Bigelow & Underhill's addition to Peoria, (excepting, also, such lots of said addition as are situated on the south-west quarter of section 9, of township 8 north, 8 east,) and afterwards, at 3 o'clock, P. M., of the last mentioned day, adjourned the sale to ten o'clock, A. M., of the 12th day of June instant; and on the 12th day of June, A. D. 1845, at ten o'clock, A. M., proceeded to sell, in like manner, the lands described in said list, from Morton, Voris & Laveille's addition to Peoria, and sold to the end of said list, inclusive. The lands in the above list were so sold, in the order the same are therein described, by offering the whole tract or lot of land for the amount of taxes and costs due thereon, and striking them off severally to the person or persons who would pay the amount due on each tract of land or town lot for the least number of acres or the least quantity thereof. The said clerk kept a register of said sales, in which was entered each lot or parcel of land exposed to sale by me as aforesaid, the name of the purchaser, his place of residence, and the quantity of land sold.

Dated June 20th, A. D. 1845. SMITH FRYE, Sheriff.

"Sheriff's return filed June 20th, 1845. JACOB GALE, Clerk."

To which the defendant made the following objections, to wit:

The precept varies from the judgment.

It doth not set forth the facts and prerequisites required by the statute.

It doth not appear to have been executed and returned in the time and manner required by law.

It doth not show any authority to sell the land in question.

Said precept is uncertain as to the tax, interest and costs to be collected.

Said precept is otherwise defective.

Which said objections were overruled by the court, and said precept was read in evidence.

The said plaintiff then offered in evidence a deed in the words and figures following, to wit:

"Know all men by these presents, that whereas, at the May term, 1845, of the Circuit Court of Peoria county, a judgment was obtained in said court in favor of the State of Illinois, against the following described tract of land, situated in said county of Peoria, and State of Illinois, viz.: The north-east quarter of section twenty-two, in township eleven north of the base line, in six east of the 4th principal meridian, for the sum of three dollars and seventy-six cents, being the amount of taxes, interest and costs assessed upon the said tract of land for the year 1844; and whereas, on the tenth day of June, A. D. 1845, Smith Frye, then sheriff of the county aforesaid, by virtue of a precept issued out of the Circuit Court of the county aforesaid, dated the seventh day of June, A. D. 1845, and to the sheriff of said county directed, did expose to public sale at the door of the court-house in the county aforesaid, in conformity with all the requisitions of the statute in such case made and provided, the tract of land above described, for the satisfaction of the judgment so rendered as aforesaid; and whereas, at the time and place aforesaid, John Elting, of the county of Peoria, and State of Illinois, having offered to pay the aforesaid sum of three dollars and seventy-six cents for the whole of the tract of land above described, which was the least quantity bid for, the said tract of land was stricken off to him at that price; and whereas, the said John Elting did, by his indorsement, under his hand, written on the back of the certificate of purchase to him executed by the clerk of the Circuit Court of Peoria county for the tract of land so sold as aforesaid, at the time of the said sale, said indorsement bearing date the tenth day of June, A. D. 1845, assign the said certificate of purchase to Reuben Rowley, of the city, county and State of New York: Now, therefore, I, Francis W. Smith, sheriff of Peoria county, for and in consideration of the sum of three dollars and seventy-six cents to the sheriff of said county aforesaid in hand paid by John Elting, at the time of the aforesaid sale, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said Reuben Rowley, as assignee of the said John Elting, his heirs and assigns, the above described tract of land, viz.: the said north-east quarter of section twenty-two, in township eleven north of the base line, in range six east of the 4th principal meridian. To have and to hold, unto him, the said Reuben Rowley, his heirs and assigns, forever; subject, however, to all the rights of redemption provided by law. In witness whereof, I, Francis W. Smith, sheriff as aforesaid, by

virtue of the authority aforesaid, have hereunto subscribed my name and affixed my seal, this twelfth day of December, 1856.

FRANCIS W. SMITH, [SEAL.]
Sheriff of Peoria county, Illinois."

"STATE OF ILLINOIS, } ss.
PEORIA COUNTY. } I certify that, on the 13th day of December, in the year of our Lord one thousand eight hundred and fifty six, personally appeared before me, Charles Kettelle, Clerk of the County Court of Peoria county aforesaid, Francis W. Smith, Sheriff of said county of Peoria, who is personally known to me, the said Clerk, to be the identical person whose name is subscribed to the foregoing deed, as having executed the same, and acknowledged that he had executed the said deed for the uses and purposes therein expressed.

In testimony whereof, I have hereunto subscribed my name and affixed [L. S.] the seal of the said court, the day and year above written.

CHARLES KETTELLE, Clerk.
per GEO. H. KETTELLE, Deputy."

To which the defendant made the following objections, to wit:

It varies from the judgment and precept in the recitals and the dates and amounts stated.

No authority to make it to the plaintiff is shown.

It is not shown that the plaintiff was assignee of the purchaser.

Said deed is otherwise defective.

Which objections were overruled by the court, and said deed was read in evidence.

It was admitted that the defendant was in possession of the land in controversy, at the time of the commencement of this suit.

The defendant then offered in evidence a collector's report, in the words and figures following, to wit:

"Report of the collector of taxes for the year 1844. List of lands and other real estate, situated in the county of Peoria, and State of Illinois, on which taxes remain due and unpaid for the year 1844.

Patentee.	Present Owner.	Description.	No. of Acres.	Valuation.	Tax.
Nath'l Lee,		SE 21	160	$480	$3 36
Sam'l Rickman,		NE 22	160	480	3 36
* *	* *	* *	* *	*	*

"The costs on each of the above tracts and town lots and part town lots already accrued, is 10 cents.

"Notice is hereby given, that application will be made to the Circuit Court of Peoria county, at the next term thereof, to be held at the court-house in the town of Peoria, within and for the county of Peoria, in the State of Illinois, on the fourth Monday of May next, for a judgment against the lands and

town lots above enumerated, for the taxes and costs due thereon for the year 1844, and for an order to sell the lands and town lots for the satisfaction thereof; and all such lands and town lots against which judgment shall be pronounced, will be exposed to public sale at the court-house of said county, on the second Monday next succeeding the said term of the said court, for the amount of taxes and costs due thereon for the year 1844. SMITH FRYE, Collector for the year 1844.

"*Peoria, January* 15, 1845."

"We hereby certify that the foregoing was duly published on the 15th of January, 1845, in the Peoria Democratic Press, published in Peoria, Peoria county, Illinois, and that the number of transcripts so published corresponds with the number of newspapers printed and distributed for that week.

ZIEBER & SLOAN."

To which the plaintiff objected; but the court overruled the objection, and the said report was read in evidence; to which ruling of the court the plaintiff excepted, and thereupon the defendant made the following points, to wit:

It hath not any proper or sufficient caption.

It doth not show the name of the present owner.

It doth not show that no personal property could be found.

It doth not contain the name of the present owner.

It is not in the form required by law.

It is not made on oath.

It is not certified as the law requires.

The printers' certificate is not sufficient.

The character of Zieber & Sloan is not shown.

Said report is otherwise informal and insufficient, and is not properly filed.

The defendant then offered in evidence an advertisement, and the certificates thereto appended, in the words and figures following, to wit:

"List of lands and other real estate situated in the county of Peoria and State of Illinois, on which taxes remain due and unpaid for the year 1844.

11 North, 6 East.

Patentee.	Present Owner.	Description.	No. of Acres.	Valuation.	Tax.
* * * *		* *	* *	* *	*
Nath'l Lee,		SE 21	160	480	3.36
Sam'l Rickman,		NE 22	160	480	3.36
* *	* *	* *	* *	*	*

"The costs on each of the above tracts of land and town lots, and part town lots, already accrued, is 10 cents."

Here follows a recital of the notice, dated Peoria, January 15th, 1845, and signed Smith Frye, collector for the year 1844;

also of the certificate signed Zieber & Sloan; as set out above in the collector's report, read in evidence. Then follows a certificate in these words:

"STATE OF ILLINOIS, } ss. I, Smith Frye, Collector of said county, do
PEORIA COUNTY. }
hereby certify that the within tracts and parts of tracts of land and town lots were assessed for taxes in said county for State and county purposes for the year 1844, at the sums respectively in the within list set forth, and that the taxes and costs thereon remain due and unpaid. SMITH FRYE, Sheriff,

Collector of Peoria County for the year 1844.

"*January* 20, 1845."

"Filed in the office of the Clerk of the Circuit Court within and for Peoria county, State of Illinois, January 20th, 1845. JACOB GALE, Clerk."

To which the plaintiff objected in the same manner as to the collector's report; but the court overruled the objection, and the advertisement was read in evidence. To which ruling of the court the plaintiff excepted, and thereupon the defendant made thereon the following points, to wit:

The name of the present owner is not given.

The taxes, interest, costs, and lands, are not properly stated.

It doth not contain the recitals and matters of fact required by the statute.

It doth not appear to have been properly published.

It is otherwise manifestly uncertain and insufficient, and is in many respects variant from the collector's report.

It is not properly filed.

The defendant then offered in evidence a record from the office of the recorder of deeds for said Peoria county, in the words and figures following, to wit:

N. E. 22, TOWNSHIP 11 NORTH, RANGE 6 EAST.

Grantor.	Grantee.	Description.	Instrument.	Date Inst.	Date Record.	Vol.	Page.
E. C. Berry, Auditor.	R. B. Stockton, assignee.	whole tract.	deed.	1st April, 1825.	27th Nov. 1826.	C	29
Danl. Low and wife.	John Alstyne.	do do	deed.	1st Nov. 1834.	7th Feb. 1835.	D	219
John Tilson, Jr., and wife.	Daniel Low.	do do	deed.	27th Oct. 1834.	28th Feb. 1835.	D	235
United States.	Samuel Rickman.	do do	patent.	15th Dec. 1817.	14th Oct. 1836.	G	279
Samuel D. Rickman.	John Cox and William D. Lapeyre.	do do	deed.	30th April, 1818.	14th Oct. 1836.	G	279
W. B. Lapeyre and wife, and John Cox.	William R. Barrington.	do do	deed.	10th Sept. 1818.	14th Oct. 1836.	G	280
John Alstyne.	Charles F. Moulton and 12 others	do do	deed.	2nd Dec. 1835.	10th March, 1837.	H	241
Charles F. Moulton, by att'y, and 12 others.	Lemuel Lamb and Thomas Dunlap.	do do	do	30th April, 1838.	21st Feb. 1839.	K	121
L. Lamb and wife, and T. Dunlap and wife.	David H. Nevins and John Alstyne.	do do	deed.	15th Nov. 1844.	18th Nov. 1845.	Q	37
Christopher Orr, Sheriff.	L. Lamb and T. Dunlap.	do do	deed.	3rd June, 1842.	13th Jan'y, 1848.	T	50
Wm. Hunter and 9 others.	Jane Barrington.	whole tract.	deed.	28th January, 1852.	7th August, 1852.	BA	473
Jane Barrington.	William Hunter and Alexander R. Barrington.	whole tract.	power of att'y.	27th July, 1852.	7th August, 1852.	BA	474
Jane Barrington (by att'ys).	Leonard B. Cornwell.	whole tract.	deed.	17th Aug. 1852.	17th August, 1852.	BA	514
Leonard B. Cornwell.	Jane Barrington.	whole tract.	mortgage.	17th Aug. 1852.	18th August, 1852.	No.4	521
C. F. Moulton and Cesarine I. Moulton.	David H. Nevins.		power of att'y.	9th July, 1836.	12th July, 1853.	EA	254
A. R. Barrington, guardian.	Leonard B. Cornwell.	whole tract.	deed.	15th July, 1853.	2nd May, 1854.	KA	120
David H. Nevins and 2 others.	Reuben Rowley.	whole tract.	deed.	1st June, 1847.	3rd Oct. 1855.	PA	373
James T. B. Stapp, Auditor.	John Tilson, Jr., assignee.	whole tract.	deed.	16th Jany. 1834.	12th Nov. 1855.	PA	574
Charles F. Moulton, by att'y, and 12 others.	Lemuel Lamb and Thomas Dunlap.	whole tract.	deed.	30th April, 1838.	16th Jan. 1858.	WA	456
Leonard B. Cornwell and wife.	John Dukes.	whole tract.	deed.	21st July, 1854.	8th June, 1857.	XA	109

To which the plaintiff objected in the same manner as to the report and advertisement; but the court overruled the objection, and the record was read in evidence; to which ruling of the court the plaintiff excepted, and the defendant made the following points thereon, to wit:

This record rebuts any presumption that the present owner of the land, when said tax was assessed, and when said report was made, and when said advertisement was published, was not known.

As the name of the owner is not in the advertisement, he is in no respect concluded by the judgment, but may make any objection whatever upon this trial.

The plaintiff admitted that the defendant had a regular patent title to the land, derived under patent issued by the United States for bounty land in the year 1817 or 1818, at the time of the sale under which the plaintiff claims.

The defendant rested, and the plaintiff offered in evidence an assessment from the assessor's return of the assessment of lands for the purpose of taxation for the year A. D. 1844, and for and in the county of Peoria and State of Illinois, in the words and figures following, to wit:

"Assessor's Book. Peoria County, 1844. Filed in the office of the Clerk of the County Commissioners' Court of Peoria county, Illinois, this fifteenth day of July, A. D. 1844.

WILLIAM MITCHELL, Clerk of said Court."

"Abstract of lands lying in the county of Peoria, State of Illinois, subject to taxation for the year A. D. 1844.

TOWNSHIP 8 NORTH, RANGE 5 EAST.

Patentee.	Present Owner.	Description.	Sec.	No. Acres.	Value per acre.	Total.	State Tax.	County Tax.	Road Tax.
					$	$	$ cts.	$ cts	$ cts.
		11 NORTH, 6 EAST.							
Sam'l Rickman.		N. E.	22	160	3	480	96	1 92	48

"STATE OF ILLINOIS, }
PEORIA COUNTY. } I, William M. Dodge, Assessor, within and for the said county, do hereby certify that the within contains a full and perfect assessment of the real and personal property subject to taxation for State, county and road purposes in the said county of Peoria, for the year 1844, so far as the same has come to my knowledge. Given under my hand this fifteenth day of July, in the year of our Lord one thousand eight hundred and forty-four.

WILLIAM M. DODGE."

To which the defendant then and there made the following objections, to wit:

It does not appear that said assessor was duly qualified.

No authority for making such assessment is shown.

Said assessment is not made in the form required by law.

It is otherwise irregular and insufficient.

Which objections were overruled by the court, and said assessment was read in evidence; whereto the defendant excepted.

The plaintiff then, against the objection of the defendant, called Enoch P. Sloan, to prove the character of said Zieber & Sloan, and that the Democratic Press was a newspaper, etc. The defendant objected that such testimony was incompetent, and that the statute allowed no evidence in that behalf but the certificate and any proof which may be made against it. But the court overruled the objections, and said Sloan testified that he was said Sloan, and that he and Zieber were the publishers of the Democratic Press at the time of said advertisement, and that said Democratic Press was a newspaper then published in the city and county of Peoria aforesaid.

The court found the plaintiff guilty, and assessed his damages at one cent.

The defendant moved for a new trial, for the following among other reasons, to wit:

The verdict of the court is against the evidence.

The verdict is against the law of the land.

The court admitted improper evidence for the plaintiff.

The court overruled proper objections made by defendant.

By the law and the evidence, the verdict ought to have been for the defendant.

Assignment of errors:

The verdict and judgment are against the evidence and the law.

The Circuit Court erred in refusing a new trial.

The assessment, the collector's report, the advertisement, the judgment, the precept, and the deed, read in evidence, are respectively erroneous and insufficient.

The proceedings are otherwise insufficient.

N. H. Purple, and C. C. Bonney, for Appellant.

Manning & Merriman, for Appellee.

Walker, J. The questions raised by the assignment of errors, on this record, with two or three exceptions, have been settled by previous decisions of this court, and we deem it unnecessary to again discuss them in this opinion. The first objection raised, which we propose to consider, is, whether the

placita, or convening order of the court, is so defective in not stating that the clerk and sheriff were present, as to render all of the proceedings void. It shows that the judge was present holding the term, and we find that the record does show that business was done by the court, and that a record of its proceedings was kept. This is sufficient, if those officers were a constituent part of the court, to raise a presumption that they were present and discharging their duties. The court seems to have been held at the time required by law, and by the judge who was regularly authorized to hold the term, and finding the proceedings regularly entered of record, we must presume that it was all performed by the proper officers. We judicially know that every Circuit Court has these officers, and we know that certain duties are imposed upon them by law, and the conclusion is, that they were present and performed them, when we see they have been discharged.

By the 57th section of the revenue act, (Scates' Comp. 997,) it is required, that the clerk of the Circuit Court, upon the return, shall file the collector's report and the certificate of publication, and record the same in a book to be kept for that purpose, in which he shall enter all judgments, orders, and other proceedings of the court in relation thereto. This is a positive requirement, and its omission will invalidate the judgment. It is a requirement, with others, which confers jurisdiction upon the court. This is required by the statute, and may not be dispensed with. While this is true, the 73rd section of this act makes the collector's deed *prima facie* evidence in all controversies and suits, that the sale was conducted in the manner required by law, that the land was subject to taxation, and had been listed and assessed in the mode required by law, that the taxes were not paid, that the lands had not been redeemed, that they were advertised as required, that it was sold for taxes, and that the grantor in the deed was the purchaser, but does not make it evidence that the report and certificate were recorded. Then, this deed is not evidence that the collector's report and certificate were recorded as required by the statute. It has been held that, notwithstanding this provision, the holder of the tax title must produce a judgment and precept upon which the sale was made, before the deed can be admitted in evidence. This provision only relates to the time, place and mode of conducting the sale, and raises no presumption that the collector's report and certificate of advertisement were recorded, or that a judgment was rendered or a precept issued. These are facts that must be shown by the holder of the tax title, to authorize him to rely on it as title. And for the want of such evidence, the tax deed was improperly admitted in evidence.

It was urged, that it did not appear that any tax was assessed against this land, for the non-payment of which, it was sold. That a levy and non-payment of a tax on land are necessary to a sale, is unquestionably true, but the statute has declared, that the collector's deed shall be *prima facie* evidence that the land had been listed and assessed in the time and manner required by law. And to have overcome this *prima facie* presumption created by the statute, the appellant should have rebutted it by evidence that those acts had not been performed. This he failed to do, and the presumption still exists, that the law was complied with in that regard.

By the record in this case, it does not appear that there was employed any words, marks, figures or characters, denoting for what sum the judgment was rendered, or the precept was issued. This, we have repeatedly held, is insufficient to sustain a sale for taxes. The judgment must in some way indicate the amount in dollars and cents, for which the recovery is had. The employment of numerals alone, unexplained, is not sufficient. There is in this case no character, word or mark opposite to the numerals annexed to the description of this land, or at the head of the appropriate column, to indicate the amount they were designed to represent. For the want of such certainty, the judgment was insufficient to authorize the introduction of the tax deed in evidence.

It was objected that the certificate of publication was insufficient, as it failed to show that the persons who signed it were publishers of the newspaper in which the tax list was advertised. The evidence on the trial shows that they were the publishers, and the presumption is that the fact was proved to the court, at the time the case was heard on the application for a judgment, for the taxes. This is certainly true in a collateral proceeding, whatever might be the presumption, if it was questioned in error. There is a certificate of publication, and it is in proper form, except that it does not state that the persons signing it were the publishers of the paper. The court, on the application for an order of sale, had to be satisfied that the certificate returned was made by the printer or publisher of the newspaper, and the statute has not prescribed the mode of proof, and no exclusive mode having been designated, any legitimate evidence of that fact may be received by the court, and the legal presumption is, that such proof was made.

We are unable to perceive any other errors in this record for which the judgment should be reversed. But for that indicated, the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

Michael Boyle, Appellant, *v.* Ann Levings, Appellee.

APPEAL FROM JOE DAVIESS.

Where it appears that a jury did not understand the evidence, which is strongly against the verdict, and that injustice has been done, the judgment will be reversed.

This was an action of trover for a promissory note. The declaration also charged a conversion of bank notes and coin.

The general issue was pleaded; also a special plea that the note which was payable to the plaintiff below, was only nominally hers, but really the property of the defendant below.

Verdict and judgment for plaintiff. The defendant below appealed.

M. Y. Johnson, and Leland & Leland, for Appellant.

B. C. Cook, for Appellee.

Breese, J. The evidence in this cause is so strong in favor of the defendant below, as to cause a well-grounded apprehension, either that the jury did not understand it, or sympathized so strongly with the plaintiff, as to prevent their receiving and appreciating the force of it. The evidence shows most conclusively there were two certificates of deposit given by the Bank of Galena, one a small one for about one hundred and eighty dollars, of recent date; the other for upwards of seven hundred dollars, being the old certificate, on which a large amount of interest had accumulated. This is the testimony of Perkins, the teller of that bank. He says they were both in the name of the plaintiff, but about the last of March or first of April, 1857, the wife of the defendant and the plaintiff came to the bank, and drew out the deposit and delivered up the certificates. That he calculated the interest on them, and paid the money over to the plaintiff, Ann Levings. Mrs. Boyle did most of the talking, and wanted witness to pay Ann seven per cent. instead of six, and compound interest, on the ground that Ann was a poor, hard-working girl, and the money had been there so long. He did not notice any division of the money, or who carried it off; thinks the interest on the old certificate amounted to one hundred and fifty-seven dollars, and but a trifle on the more recent and smaller certificate.

One *Roberts* testified, that he was overtaken on the road going home from Galena, by defendant and his wife, in a two-horse wagon, and he got in and rode. Carter's banking house

had suspended at that time, in which he had money deposited. Mrs. Boyle asked him how he got along with Carter, and said Ann had drawn her money from Corwith's bank, and deposited it with Carter, and that it would be a pity for Ann, a poor girl, to lose her money, and she thought he ought to pay her. Boyle took no part in the conversation.

James Carter testified, that on the ninth of April, 1857, there was deposited in his bank, about nine hundred dollars, to the credit of Ann Levings; that in October, after he had suspended, the defendant's wife, Margaret Boyle, called on him for the money, and as he knew Mrs. Boyle and Ann both, he told her he had nothing to do with her—that the money stood on his books as the money of Ann Levings, and she must bring Ann; don't remember that she showed him the certificate of deposit, but he stated that he only knew Ann in the transaction, as the money stood on his books in her name. Soon after, he says, Ann and Mrs. Boyle came to the banking house together, and wanted payment of the certificate. Ann's case had been specially called to his attention as a peculiar one—then gave her the note on Harris & Co. for $926.80, which paid the amount of the deposit and interest. They both did the talking. The note was made payable to Ann Levings, and was dated October 16, 1857.

This note, it appears, was put in suit in the name of Ann Levings, for the use of Michael Boyle, and judgment obtained, and the amount collected by Boyle, the defendant, and for which money, so obtained, this action is brought. In this suit, Ann interpleaded, which fact went to the jury as evidence only to show that she did not assent to the prosecution of the suit.

The defendant then introduced and examined *Mrs. Creighton*, who testified, that she was the sister of Ann Levings, and Margaret Boyle, the defendant's wife; that the defendant and his wife had been in this country about seventeen years, and that the plaintiff had been in this country about ten years; that witness, plaintiff, Matthew Levings, their mother and her child, came over from Ireland together; that her sister Ann had been at service as a hired girl ever since she had been in this country, except about three years; that she lived off and on, and made her home at Margaret's, (the defendant's wife.) That last May, two years ago, witness was in Galena, and had been below town to see another sister, and returning with Ann, the plaintiff, she had a conversation with her, in which Ann stated to witness, that she and Margaret (the defendant's wife) had drawn their money from Corwith's bank, and she (Ann) had loaned her money (two hundred) to Curley & Omara, at ten per

cent. interest, and Margaret had deposited her money in Mr. Carter's bank, in her (Ann's) name. She did not state the amount Margaret had deposited in her name. She did say she had loaned her money (two hundred dollars) to Curley & Omara, at ten per cent. This is all the talk she had about the money.

Jane McGinn testified, that she was a niece of the plaintiff, and defendant's wife, and acquainted with all the parties; that two years ago last Christmas, witness and Ann Levings, the plaintiff, were at the defendant's house — Margaret Boyle, the defendant's wife, had gone to Galena; that she had a conversation with Ann Levings, in which Ann told her the money belonged to Mrs. Boyle, and asked witness if she thought it would be a sin for her to keep it. Nothing was said about where the money was, the amount, or in whose name it was. Witness further testified, on cross-examination, that no bad feeling existed with her against the plaintiff; that she never had any quarrel with her, and that Mrs. Boyle had never promised her a dress after the suit was determined.

Mrs. P. Levings testified, that she was the sister-in-law of the plaintiff, and defendant's wife, and that she had known all the parties for twenty-five years; that the defendant and his wife had been in this country about seventeen or eighteen years, the plaintiff about ten years; that plaintiff made her home at defendant's house for about three years of the time she has been in this country; that the defendant is a neat, tidy, good, industrious and economical girl; that six years ago this summer, the plaintiff was at her house, and at that time told her that her mother wanted her (Ann) to take Margaret's money, and for them to go back to Ireland and live on it.

On cross-examination, witness said there had never been any difficulty between her and Ann; that Ann had not been to her house for two years, when her son was sick.

Matthew Levings testified, that he was the brother of plaintiff and of the defendant's wife; that he has been in this country ten years; that he came over in company with the plaintiff, his mother, sister, and a child of Mrs. Creighton; that the money that brought them over was contributed by the plaintiff, his mother, himself, and a part was sent over to them from this country by his brother, Patrick Levings, and his sister, Margaret Boyle, wife of the defendant; that the whole made about forty pounds; that he was the purser or cashier, and before they got to Galena the money was all spent; that on arriving at Galena, he had to borrow from his friends here six dollars to pay the freight on their baggage; (Ann's amongst the rest.) He states that Ann had no property in Ireland that he knew of, and does

not know of her having any money; that for eight or nine years in Ireland, before they came to America, Ann was at service and hired with a counselor in Dublin, and received, as he understood, ten pounds a year, boarding and lodging. Don't know but she may have had money and I not known it. This witness further testified, that in A. D. 1852, he was sick at defendant's house, and while there, his mother showed him upwards of $600 of Margaret's money, in gold, and that he counted it himself. Witness further states, in A. D. 1853, he deposited three hundred dollars in bank; that Ann, the plaintiff, loaned him some fifteen or twenty dollars of the money to make up that amount—at the same time she gave him one hundred dollars of her money to deposit in his name, which he did, and it remained in his name until the fall of A. D. 1854, when he was going to New York, when he drew his money, and hers, and paid it to her.

Thomas Simpson testified, that he had lived here for thirty years, and knew what had been the wages of hired girls for the last ten years; said the wages had been from six to ten dollars per month; that it would average about eight dollars per month for a good girl during that time; that hired girls had to clothe themselves; that he had daughters, and knew something about what it would cost a year to clothe them; said it would take all they made to satisfy some of them, depending on the girls; but it would not cost less than forty dollars a year, at least. Witness, on cross-examination, said his estimate was a mere guess.

Edward Irwin testified, that he had known the defendant, Boyle, for about sixteen years; that during all that time he had been in good circumstances, and an independent farmer.

This testimony we think shows conclusively, that it was not possible for Ann to have, at the time the deposit was withdrawn from the Bank of Galena, so large an amount of money as was contained in the old certificate. She was out of money when she landed at Galena, seven years previously, and for three years had been out of service, living with her sister, Mrs. Boyle, leaving four years in which to earn, by wages, her money, which would be a sum about equal to the amount specified in the small certificate, after deducting for her clothing and other necessary expenses. Her brother Matthew states, that in 1852, he counted at Mrs. Boyle's house six hundred dollars in gold, of Mrs. Boyle's money, which, if deposited soon after, would have produced about the amount of interest Perkins says he calculated on the old certificate, when they, in company, withdrew their deposit.

The fact that Mrs. Boyle called it Ann's money, was a device to get more interest; and when speaking about it to Roberts in her husband's presence, it might have been, and doubtless was her policy, to keep the fact that she had so large a sum of money from the knowledge of her husband, as some women do not like to trust their husbands with such knowledge. The testimony of the sister, Mrs. Creighton, makes the matter very plain. Ann told her that she and Margaret (Mrs. Boyle) had drawn their money from Corwith's Bank, and she (Ann) had loaned hers (two hundred) to Curley & Omara, at ten per cent. interest, and Margaret had deposited hers in Mr. Carter's Bank, in her, Ann's, name. Placing implicit confidence in her sister, and wishing to keep from her husband the knowledge of the possession of so large a sum of money, she has it deposited, not only in Corwith's Bank, but with Mr. Carter, in her sister's name, and on settlement with Carter is willing to take Harris' note, payable to her sister.

So the testimony of the sister-in-law, Mrs. P. Levings, goes to show that Ann and her mother had designs upon this money to appropriate it to their own use.

We make no remark on the testimony of Jane McGinn, as that is somewhat weakened by the testimony of her brother.

The testimony of Matthew Levings, her brother, shows very clearly Ann could not own so much money, and that it belonged to her sister, Mrs. Boyle, and from her confidence in her, suffering her to deposit it in her name, she has incurred the hazard of losing it altogether.

We think the evidence is strongly against the verdict, and that justice has not been done. We accordingly reverse the judgment, and remand the cause.

Judgment reversed.

Samuel B. Bancroft, Plaintiff in Error, *v.* Thomas Speer, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The sheriff's return on a summons against Samuel B. Bancroft, was as follows: "Served the within by reading the same to and in the hearing of S. B. Bancroft, June 21, 1858."

This is insufficient. It does not show whether the date refers to the time of the service or of the return. Nor does it show that service was made on Samuel B. Bancroft. S. B. may be the initials of a different person.

THIS case was reversed on the ground of an insufficient return, by the sheriff. The facts are sufficiently stated in the opinion.

GALLUP & HITCHCOCK, for Plaintiff in Error.

T. L. DICKEY, and M. R. M. WALLACE, for Defendant in Error.

WALKER, J. The return to this summons is this: "Served the within by reading the same to and in the hearing of S. B. Bancroft, June 21, 1858." It fails to specify whether the date is designed to indicate the day it was served or returned. In this it was insufficient. *Ogle* v. *Coffey*, 1 Scam. 239. This return also fails to show that the summons was served on the defendant. The officer returns that he served it upon S. B. Bancroft, but fails to say that he was the person named in the summons, and we know that these initials may as well apply to other names as that of "Samuel B.," and we know of nothing by which we can determine that they were designed for the defendant's name, and the officer has failed to return that it was so intended. Had he returned that he had served it on the within named defendant, or employed any language from which we could have seen that such was the fact, the return would have been sufficient. But it was insufficient to warrant the rendition of a judgment, and it must be reversed.

Judgment reversed.

JOHN W. LEECH, Plaintiff in Error, *v.* JOHN WAUGH, who sued for the use of himself and the County of Putnam, Defendant in Error.

ERROR TO PUTNAM.

A party is not liable as a matter of course to the highest penalty imposed for obstructing a highway, and it is erroneous so to charge a jury.

A street of an unincorporated town or village, when dedicated, is a public highway, and any person obstructing it, will be liable to the statutory penalty. Otherwise if it is incorporated, as then the streets are vested in the town, and are subject to the corporate authorities.

The owner of lots abutting on only one side of a street, cannot vacate it.

THIS was an action brought before a justice of the peace, of Putnam county, under the 16th section of the Road Law, Revised Statutes, page 482.

In the court below, the appellee recovered a judgment for ten dollars, and the appellant brings the case to this court.

The bill of exceptions sets out that on the trial of this cause in the Circuit Court, before the court and a jury, the plaintiff's claim or account was stated as follows:

"For penalty given by statute for obstructing a public road running through the town of Florid, in Putnam county, on Main street, in said town, $10. For suffering such obstruction to remain, after being legally notified to remove the same, for the space of thirty days, $90."

T. Dent, and T. L. Dickey, for Plaintiff in Error.

T. M. Shaw, and Peters & Farwell, for Defendant in Error.

Walker, J. The sixteenth section of the statute regulating highways, (Scates' Comp. 562,) imposes a penalty of not exceeding ten dollars, upon any person who shall obstruct any public road, and a sum of not exceeding three for every day he shall permit the obstruction to remain, after being ordered to remove the same. The thirty-ninth section of the same act gives the right of recovery of such penalties before a justice of the peace. On the trial of the cause below, the court instructed the jury for the defendant in error, that if they found the plaintiff in error guilty, they should assess the fine at ten dollars. This instruction was manifestly wrong, as the statute has only fixed the maximum of the penalty at that sum, and has fixed no minimum. It leaves the assessment of the fine discretionary, at any sum less than ten dollars. It was the province of the jury to fix the amount of the fine, and the court had no power to control its assessment, or to instruct as to the amount the jury should assess. It was the duty of the court to instruct the jury, that if they found the defendant below guilty, that they should then assess a fine of not exceeding ten dollars. This instruction was erroneous, and must have controled the jury in assessing the amount of the fine, and should have been refused, or modified before it was given.

It was also urged that the third and fourth instructions asked by and given for the prosecution were erroneous. And as the cause must be remanded for further proceedings, it will be proper to comment upon their accuracy. They assert that a street in a town or village may be dedicated to the use of the public by laying out and platting the town, or by the public use of it as a public highway, and by its being repaired by the proper officers, or by the owner selling lots abutting upon such street, and when thus dedicated, that it becomes a public

highway, and any person by obstructing it will become liable to the penalty. If a town or village be unincorporated, there can be no doubt that all of its streets and alleys used and recognized by the public as such, are highways, and are in all respects to be protected from obstruction in the same manner as other public roads. But when the town or village is incorporated, it is otherwise, as the law has vested the title in the town, and has fully vested the corporate authorities with their control, and given them ample power to protect the public in their enjoyment. In this case the record fails to disclose the fact, whether this town was incorporated or not, and in the absence of such proof, the presumption is that it was not, and that the instructions were properly given.

It is likewise objected, that the court erred in refusing to permit the plaintiffs in error to read in evidence, the judgment, execution and sheriff's deed to the premises adjoining the street in question, as the foundation for the introduction of evidence of a vacation of so much of the plat of White's addition as lay south of the road located in 1849. Even if this evidence had been admitted, we do not perceive that it would constitute any defense to this action. It cannot be the law, that a person owning lots on one side of a street only, can, by vacating the town plat as to them, deprive the owners of lots on the opposite side of the street, of their right to its use and enjoyment, or even deprive the public of its use as a highway. If an individual owned all the lots adjoining the street, he might so vacate the plat as to abolish the street, unless the public, by user, had acquired the right to enjoy it as a highway, but the owner of adjoining lots on one side of a street has no such power. The statute authorizes the vacation of a town plat before a sale of any of the lots has taken place, but not afterwards. When others become the owners of lots within the addition, they are by that means invested with the right to enjoy the use of its streets and alleys, as an incident to their property, and cannot be deprived of it in this mode. The record fails to show that no lots had been sold in the addition, or that it was proposed to make any such proof, and any evidence of an effort to vacate the plat was properly rejected.

But for the error above indicated, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

School Inspectors of the City of Peoria, Appellants, *v.* Ann Hughes, Appellee.

APPEAL FROM PEORIA.

When a verdict is manifestly against the evidence, it will be reversed.

This was an action brought by appellee against appellants, for services in cleaning and taking care of a school-house in the city of Peoria.

Declaration contained common counts. Plea, general issue, and notice of set-off.

On the trial, plaintiff proved that she had performed the labor, and its value.

The evidence for defendants was as follows:

John Hamlin said, before these premises came into possession of the present board, they belonged to the Peoria Female Academy Association, of the directors of which, witness was president. The sale and transfer was made April 17th, 1856. While the premises belonged to the female academy, school was kept in second and third stories, which were heated by a furnace in basement. Other part of basement, where school is now kept, was used for play-room. When weather became cold, a stove was put in to warm it. The premises continued to be used in this way after present board obtained them, till basement was seated, and school put in it. These school premises occupy parts of lots 2, 4 and 6, in block 23, in Peoria. They are 85½ feet one way, by 171 the other. There is a small house, consisting of two rooms and a kitchen, on that part of lot 6 owned by the board. There is a large cistern on premises near school-house. In the fall of 1855, about 1st of September, I, on behalf of the female academy, engaged plaintiff to take charge of these school premises, as janitor, keep up fires, and keep premises in order for schools. Plaintiff was to move into dwelling-house, have use of it and appurtenances, have water from the cistern, and schooling of one child free of charge, in full for her services in taking charge of premises as above. Under this arrangement she went into the house, took charge of premises, kept up fires, swept and dusted them daily, and I think washed them occasionally, and had her rent and schooling of her children free. Before plaintiff went into house, it was moved back from lot 2, and repaired. The association talked of putting a new roof on back of it, and something may have been said to plaintiff about it. I think we offered to make some repairs of this kind after she went in. These arrangements

continued until the premises were sold to the present board. I only know she continued to live in house till quite recently, and take charge of school premises till end of summer term in 1857; that she was not charged by board for schooling her children till after that time; she then began to pay customary entrance fee of one dollar each, at commencement of term. I know this from being treasurer of board—giving out the tickets, and receiving the money for tuition.

Henry B. Hopkins said, I was superintendent of schools under said board from some time in winter of 1855, till about September, 1856. In spring of 1856, shortly after board came into possession of third ward school premises, I called on plaintiff, by direction of the board, to see about continuing her in charge of said premises. She was then living in a house on the premises. I knew on what terms the female academy had employed her, and I told her the board wanted her to continue on same terms. Without anything further being said, she continued in charge, as before, as long as I was superintendent.

I cannot recollect whether the compensation she was receiving, or to receive, was mentioned, and will not be positive that terms of contract with former board were named, but my best impression is, they were. A contract as existing with the former board, was referred to, and the new engagement was made in reference to it. When I found her at this time, she was at work in the school-room, I think washing floors, but will not be certain whether washing or sweeping it. Mr. Hovey began acting as superintendent when I quit.

Verdict for plaintiff; damages, $208.

Motion for new trial: 1st, Because verdict is against law and evidence; 2nd, Verdict should have been for defendant. Motion overruled.

Judgment for plaintiff. Defendant excepted.

J. K. Cooper, for Appellants.

C. C. Bonney, for Appellee.

Caton, C. J. Consulting our private feelings and sympathies, we should, no doubt, be gratified to affirm this judgment. But the proof is positive, uncontradicted, and unsuspicious, that the plaintiff made a contract to do the work for the new board on the same terms as she had done the same work for the old board, and that for the extra work which she should do for the new board, and which she had not done for the old, she should be entitled to a reasonable compensation. Had the jury been governed by this agreement, they would never have rendered the

verdict which they did. Of this, no question has or can be made. The verdict should have been set aside, and a new trial granted.

The judgment is reversed, and the cause remanded.

Judgment reversed.

The Steamboat Delta, Appellant, *v.* Isaac Walker *et al.*, Appellees.

APPEAL FROM PEORIA.

Justices of the peace and police magistrates in the county of Peoria have jurisdiction to hear and determine all complaints, suits and prosecutions mentioned in section seventeen, chapter forty-nine, of the Revised Statutes, in which the amount claimed to be due does not exceed three hundred dollars, and also to hear and determine all cases for all debts, penalties and demands, in which debt or assumpsit, trover or trespass to personal property, will lie, when the amount claimed does not exceed the sum of three hundred dollars.

Process of attachment by justices of the peace having jurisdiction, is allowed by the seventeenth section, chapter forty-nine, of the act of 1845.

Suits by attachment against steamboats, are authorized.

The Circuit Courts have discretionary power to allow or disallow a motion to dismiss an appeal, when such motion is made after full investigation of the case.

This was a suit, commenced by attachment, before a justice of the peace of Peoria county, for the sum of $158.46. Judgment for $24.29. Defendant's attorney entered motion before justice of the peace to dismiss suit, because the justice had not jurisdiction of the amount sued for, which motion was overruled, and judgment rendered as above.

Defendant prayed an appeal to the Circuit Court. And afterwards, the defendant asked the Circuit Court to dismiss the suit for want of jurisdiction of the court below, which motion was overruled by the court, and defendant excepted. And on the trial of said cause, plaintiffs called *Robert D. Mc Clure*, who testified, that he was book-keeper in plaintiffs' house during the time the bill of goods upon which suit was brought was purchased; that he believed the items of said account to be correct; that there was no specific contract between said plaintiffs and the agents of defendant, as to the terms upon which said goods were purchased by defendant; that it was usual with plaintiffs' house to allow accounts against steamboats to run a year, or to the first of January next succeeding the time when the goods were purchased; that he supposed this practice of the plaintiffs' house was known to the defendant, as there had been dealings between them upon the same terms previous to the time that the bill sued upon was

purchased; that plaintiffs were hardware merchants in the city of Peoria. Said witness, on his cross-examination, stated that he presented the account sued on, to defendant, in September or October, 1858, and demanded payment of the amount due thereon, but that no money was paid thereon at that time; that he had never heard any conversation between said plaintiffs and defendant as to the terms upon which said goods were purchased; that the practice of the plaintiffs in regard to the time upon which goods were sold by them was not uniform with them; that he thought defendant knew upon what terms the plaintiffs dealt, as there had been dealings between said parties before that time, upon the same terms; that he did not know of defendant having dealt with them but once previous to the time this bill was purchased, and the bill then purchased was bought in September or October, 1856 or 1857, and presented to defendant the succeeding January, and paid; that the bill sued on could not have been collected by suit before January 1st, 1859. This was all the evidence in the case; and defendant, by his attorney, then and there objected to all the testimony of said witness as proving a custom regulating the terms of doing business in plaintiffs' house, but the court overruled the objection, and defendant excepted. The court thereupon found the issues for the plaintiffs, and rendered judgment against the defendant for the sum of $158.46. Defendant then and there entered and filed his motion for a new trial, but the court overruled said motion, and defendant excepted. Defendant then and there, after the overruling of said motion for a new trial, and before the entry of judgment therein, proposed to dismiss his appeal herein, but the court refused to entertain said motion, or to dismiss said appeal, and defendant excepted. The court thereupon rendered judgment in favor of the plaintiffs, and defendant excepted.

The appellant assigns for error:

1. That the Circuit Court erred in refusing to dismiss this suit for want of jurisdiction in the justice of the peace.
2. That the Circuit Court erred in admitting insufficient and improper evidence of the existence of a custom regulating the terms of trade of plaintiffs' house, to change the legal effect of the contract between the parties to this suit.
3. That the Circuit Court erred in refusing to allow the defendant to dismiss his appeal.
4. That the Circuit Court erred in rendering judgment in favor of plaintiffs for $158.46, when said judgment should have been for only $143.11.
5. That the Circuit Court erred in rendering judgment for the plaintiffs, when by the law of the land judgment should have been rendered for defendant.

H. M. AND J. J. WEED, for Appellant.

MANNING & MERRIMAN, for Appellees.

BREESE, J. The first question presented by this record is, had the justice of the peace of Peoria county jurisdiction of this cause? This is answered in the affirmative, by reference to the several acts of assembly applicable to that subject.

By the act of Feb. 14, 1855, the several justices of the peace and police magistrates in the county of Peoria, have jurisdiction to hear and determine all complaints, suits and prosecutions mentioned and described in section seventeen of chapter forty-nine of the Revised Statutes, in which the amount claimed to be due does not exceed three hundred dollars—and by section two of the same act, they have jurisdiction to hear and determine all complaints, suits and proceedings, for all debts, penalties or demands, in which the action of debt or assumpsit, trover or trespass on personal property will lie, in which the amount claimed does not exceed three hundred dollars. (Scates' Comp. 673.)

Debt or assumpsit will lie for the amount claimed in this case, it being under three hundred dollars. Suits by attachment, against steamboats, are expressly authorized by chapter ten of the act of 1845. (Scates' Comp. 785.)

The act extending the jurisdiction of justices of the peace of Peoria county, should have such a reasonable construction as will advance the object designed by its passage.

The justice of the peace having jurisdiction, the process of attachment is but a mode for putting the jurisdiction in motion, and is allowed by the seventeenth section of the act of 1845, chap. 49. (Scates' Comp. 687.)

Upon the other point, that the court improperly admitted evidence of the custom of those traders to give credit on running accounts until the first of the next January succeeding, we do not perceive wherein such testimony could have injured the defendant. The suit was commenced against the boat in September, 1859, and if such a custom was established, and known to the customers of this house, the suit would have been dismissed, as having been prematurely brought. We do not look upon the evidence as showing any custom or usage, well-known and established, of this character.

We do not distinctly perceive the force of this point made by the defendant, or in what manner it could avail him, if sustained. He could not interpose the limitation provided in the sixth section of the act, as amended by the act of Feb., 1855, as he does not stand in the position of a creditor, or subsequent incum-

brancer, or *bona fide* purchaser. So that it was quite immaterial what was the custom or usage.

Upon the remaining point, that the court refused to allow the appellant to dismiss his appeal, we have this to say, that, as a general rule, a party can dismiss his appeal, but the motion must be made at a proper time. In this case, the parties had proceeded to trial before the court, and a full investigation was had, and the court had found its verdict. Subsequently, the defendant entered his motion for a new trial, which was overruled, at which stage the appellant moved to dismiss the appeal.

We think some discretionary power, in such a case, should vest in a court, to allow or disallow such a motion, at such a stage of the proceeding. Here, a full investigation of the merits of the case was had, by a tribunal of the appellant's choosing, and on the maxim that it is for the interest of the State that an end should be put to litigation, we think the court properly refused to dismiss the appeal.

The justice and merits of the case are clearly with the plaintiffs, and the judgment is affirmed.

Judgment affirmed.

Henry I. Chase, Plaintiff in Error, *v.* Alexander McDonnell *et al.*, Defendants in Error.

ERROR TO PEORIA.

A. being possessed of a farm on which were growing crops and a cabin, made an agreement with B. to move into the cabin and take care of the crops, and in due time to harvest them, and haul one-half of them to A.'s house or the railroad station, and to keep the other half as his compensation for this service. *Held*, that B. is not A.'s tenant, and had no title to the crops until after he had performed his part of the agreement.

Plaintiff in error sued defendants in error, to March term, 1859, of Peoria Circuit Court, in trover, for corn of plaintiff, converted by defendants to their use. Damages laid at $800.

Plea: general issue and joinder.

Cause tried at November term, 1859, before said court and a jury; verdict and judgment for defendants.

The bill of exceptions shows that plaintiff, to sustain the issues on his part, called, first,

Duncan J. Perry, who said: I know parties to suit, and land of plaintiff, rented to Peter Duffy, in 1858. Was present when Duffy surrendered farm and crops to Chase. This was about

last day of July, or early part of August, 1858. Duffy was paying cash rent, and owed for rent of 1858, and some for previous rents. Plaintiff agreed to pay Duffy for a shanty on the land, and give up all claim for rents; and Duffy gave up to Chase the farm and all crops on it, except some potatoes, which he saved for himself, and was to surrender the shanty in a few days. These crops consisted of some wheat in shock, and about forty acres of growing corn. At same time plaintiff contracted with Hugh Winn to go on the place, thresh the wheat, take care of and harvest the corn, deliver one-half of each to plaintiff, at Langdon Station, or at residence of plaintiff, as plaintiff should direct, and for so doing Winn was to have the other half. Winn to occupy shanty, when Duffy went out.

Winn was not in on same terms as Duffy. Duffy was to pay cash rent, Winn to have half the crops, as stated. The contract of sale by Duffy and Chase, and between Chase and Winn, were made the same day, the latter just after the former, Winn and Duffy being present at each contract.

Hugh Winn, called, said: I was present when Duffy gave up farm and crops to Chase. This was in latter part of July, or first of August, 1858. The wheat was in shock at this time. Duffy owed Chase rents, and agreed to give up corn on ground, and wheat, to pay them. Chase was to give Duffy $20 for the shanty. I carried the money for Chase to him a day or two after. Duffy left the next week. I took possession under a contract with Chase, by which I was to take charge of place, tend and harvest the corn, thresh the wheat, and deliver one-half of each to Chase, at his residence, or at Langdon, as Chase might direct, and for doing this I was to have the other half. There were forty acres of corn. I had husked and gathered from 500 to 600 bushels of the corn, which I had in pens on the place. There were still in the field, ungathered, from 200 to 300 bushels, when my horse died, and I became unable to fulfil my contract, and deliver the corn. I had fed about 100 bushels of the corn. I told Chase I could not fulfill my contract, and he came out and I gave up the remaining corn and my contract to him, and Chase put me in possession to take care of the property for him. This was a week or two before Christmas. Some time in first week of January next, defendants came to premises with six teams and sixteen or seventeen men, carried off a part of the corn I had gathered, and gathered and carried off part of the corn in the field. They tore down the fence I had built, and put the corn they left in another pen on the land. They did not gather the corn clean, and left some parts of rows ungathered, and considerable scattered about upon the ground. Some people came next day, gathered and

carried away a good many sacks of corn that defendants had left in field. I do not know, certainly, how much corn defendants carried away. They said they took half of it. When defendants came, I forbid them taking the corn. Told them it was not mine—that I had given it all up to Chase because I could not deliver it as I had agreed, which was true. I did not stay till defendants divided the corn, but went to find Chase.

I had turned the crops over to Chase and given up contract, a week or two before Christmas, and before defendants took the corn away. I had not delivered any of the corn to Chase. I surrendered to Chase because my horse died, and I could not deliver it. I had till the 1st of March, 1859, to complete delivery. Was to have one-half of corn for taking care of it, and deliver the other half to Chase. Witness understood from time he made the contract, that he had right to sell, or mortgage his half of crops.

George W. Odell, *C. J. Jones*, and *James Elson*, being here called, testified that corn was worth from seventy-five to eighty cents per bushel in January, 1859, in Peoria.

Shehan, called, said: It was worth twelve and a half cents per bushel to shell and haul it from this farm to Peoria.

Winn said, corn was worth fifty cents per bushel, or more, at said farm, when defendants took this corn away.

Defendants called *John Kelly*, who said: I was present when Winn and Chase made contract about crops on Duffy farm. It was the last of July or beginning of August, 1858. Winn was to have one-half for tending and delivering the other half at Chase's house, or Langdon Station. Winn was in possession a few days afterwards—had charge of whole crops and farm. I saw some of the corn in pens after it was husked. Saw Chase's man hauling some away, after defendants had carried away what they took. I supposed Winn was in as tenant. I was present; heard the contract between Duffy and Chase, and Winn and Chase. The latter was made just after the former. The same persons were present at both. Winn was to take Duffy's place as I understood, take care of the farm, keep up fence, take care of and harvest crops, deliver one-half where Chase desired, either at Chase's house or Langdon Station, for the other half, and to occupy house where Duffy was living.

David Wendell, called, said: I was present when defendants took away corn. It was in fore part of January last. It was taken from N.W. 29, T. 11 N., R. 6 E., in Peoria county. They had several teams. Some moved the corn in the pens, and some gathered what was in the field. I divided it for them. I first put out 100 bushels to offset what Winn had used, and divided the rest as nearly equally as I could. Corn was worth

about forty-five cents per bushel at farm at this time. About three weeks after defendants took the corn, I carried a written notice to Chase, from defendants, which run as follows:

Princeville, January 24th, 1859.

"MR. HENRY I. CHASE: We, the undersigned, are ready to deliver your part of corn, according to Hugh Winn's contract, at the Langan Depot, which was raised on the N.W. quarter of section 29, twenty-nine, 11 N., 6 E.

ALEXANDER McDONNELL.
JOHN NELSON."

Witness here produced notice, and defendants were permitted by the court to read the same in evidence, to the jury, against the objection of plaintiff. Witness further stated: When said notice was given to Chase, he appeared to get angry, said little, but I understood from him that he did not recognize defendants in the matter, and would have nothing to do with them.

Defendants next offered, in evidence, the following note:

$217.35. *Peoria, Illinois, Sept. 13th,* 1858.

Six months after date, for value received, we, or either of us, promise to pay to Robert Arthur Smith, or order, the sum of two hundred and seventeen 35-100 dollars, with interest at ten per cent. from date, if not paid when due.

(Signed)

HIS
HUGH × WINN.
MARK

WITNESS—EDWARD × GRANT, *for Winn.*
HIS
MARK

ALEX. McDONNELL.

JOHN NELSON.

Also, a chattel mortgage upon the following property, to wit: One-half of forty acres of corn, the same in dispute. Two-thirds 27 acres corn on section 1, Brimfield township. One bay horse, one sorrel mare, dun pony, set double harness. Three plows, and a shovel plow. Forty bushels wheat in pen. Dated September 16th, 1858, and acknowledged, and recorded October 2nd, 1858. Said mortgage purports to be given to secure defendants against their liabilities, as securities of Winn on said note, and provides for possession of goods by Winn till default, or till Winn shall attempt to sell the property without the consent of defendants.

Defendants, at same time, called Hugh Winn and J. Armstrong, who proved the execution of said note, and that said mortgage was made to secure it. Plaintiff objected to the reading of said note and mortgage, in evidence—court overruled objection.

Hugh Winn, again called by defendants, said: I sold two loads of the corn, mentioned in said mortgage, which grew on the land in Brimfield. This is all I sold, or offered to sell, of the mortgaged goods. I sold these loads to get myself a stove,

and with consent of defendants. They knew I needed a stove, and told me to sell some of the corn and get one with the price, which I did. When I gave the mortgage to defendants, I told them how the matter stood between myself and Chase. That I was to harvest the corn and deliver one-half to Chase, as above stated, and for so doing, was to have the other half. I told Chase of the mortgage when I gave up the contract to him. Chase said he did not care for that; that I did not own the corn till I had complied with my contract, and had no right to make such mortgage. Before taking the corn, defendants took the horses, harness and one of the plows, mentioned in the mortgage. I paid $150 for one of the horses. It has since been sold for $100. One of the others was worth $50 to $60, and the pony was worth $40 to $50, when taken and sold by defendants.

This was all the evidence in the case.

Judgment was given for defendants.

J. K. Cooper, for Plaintiff in Error.

McCoy & Harding, for Defendants in Error.

Caton, C. J. Chase being possessed of a farm on which were growing crops, and a cabin, made an agreement with Winn to move into the cabin and take care of the crops till they ripened, and then to harvest them, and haul one-half of the product to the plaintiff's house, or to the railroad station, and take the other half as his compensation for this service, and the whole case is resolved into the question whether Winn acquired an interest in the crops as they stood upon the ground, or before he had fully performed on his part. We do not see how it is possible to give more than one answer to this question. There is nothing like the relation of landlord and tenant here shown. Winn became the servant of Chase for the performance of a particular service, and not his tenant. He was to be paid in a particular way, but this gave him no present title to the specific pay agreed upon, any more than it would were he to have been paid in a horse, or in money. In either event he was bound to perform the service before he was entitled to demand his pay. Long before that was done, Winn found himself unable to perform, and by the mutual agreement of the parties, the contract was rescinded. The title to the entire property was all the while in the plaintiff, without a vestige of it ever having been in Winn. We think the plaintiff was undoubtedly entitled to recover for the trespass committed by the defendants. The judgment is reversed, and the cause remanded.

Judgment reversed.

Daniel Maher, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO LA SALLE.

A party may defend himself by taking life, whether his danger is real or not, if the danger is apparently so imminent and pressing that a prudent man might suppose himself in such peril, as to deem the taking of the life of his assailant necessary to self-preservation.

This was an indictment for murder. A motion to quash the indictment was overruled by the court.

The facts of this case are substantially as follows:

The parties came to the house of deceased in the same wagon, and supped together at the house of deceased. They were neighbors, living about half a mile apart, and in some degree related. The witnesses were the children of deceased. The prisoner and deceased came to the house of deceased about sundown. Both were intoxicated. While at supper, deceased undertook to whip his wife and children with a horsewhip; defendant interfered, and a scuffle ensued. They then agreed to adjourn the fight until next day. They shook hands, and defendant started off. After he got out of the inclosure, he picked up a club; deceased picked up a mop-handle; which took a club first, does not appear. Defendant turned once or twice as he was going away, had angry words with deceased; no proof what the words were, except that deceased said that he did not want him and his wife around him any more—to clear off the place. Prisoner said he had made free to eat supper there. Defendant then started off, and hallooed, and said that the family helped deceased to whip him. Then deceased started after prisoner, with the mop-handle drawn; prisoner was then about twelve rods off, and going away. They came together, and blows were struck; who struck first, does not certainly appear; the mop-handle was found broken, and it seems that it must have been broken before deceased received the blow that caused his death. Dan. Maher, a son of deceased, saw the whole affair, and was sworn, but the People refused to ask him any questions.

Upon the return of the verdict of the jury, the defendant moved the court for a new trial, which motion was overruled by the court, Hollister, Judge, presiding.

The plaintiff in error made the following assignment of error, viz.:

The court erred in overruling the motion to quash the indictment.

The court erred in refusing to allow the plaintiff in error to cross-examine Daniel Maher, a witness called and sworn by the prosecution, and in deciding that if plaintiff in error examined said Maher, it must be as his own witness.

The court erred in giving each of the instructions asked by the prosecuting attorney, severally.

The court erred in refusing to give the seventh instruction asked by the plaintiff in error, as asked, and in qualifying the same.

The court erred in qualifying the sixth instruction asked by the plaintiff in error.

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

GLOVER, COOK & CAMPBELL, for Plaintiff in Error.

W. BUSHNELL, States Attorney, for The People.

WALKER, J. On the trial of this cause in the court below, the defendant asked the court to give this among other instructions.:

"If James Maher made an attack upon the defendant with a deadly weapon, at a time when the defendant was going away from him, and the circumstances of the attack were sufficient to excite the fears of a reasonable person that the said James Maher intended to do the defendant some great bodily harm, and defendant acted under the influence of such fears, and at the time struck the said James Maher and killed him, such killing is neither murder nor manslaughter, but justifiable homicide, and the prisoner should be acquitted."

Which instruction the court refused to give as asked, but qualified it as follows:

"Provided the jury believe the defendant used no more force than was necessary to prevent such bodily harm."

This instruction as asked was not strictly accurate, as it should also have informed the jury, that the defendant must believe, from the surrounding circumstances, that the danger was real, and that he believed it was necessary that he should take the life of his assailant to preserve his own, or to avoid a great bodily injury. But when the qualification was added, this instruction became clearly erroneous. As it was given, and as it must have been understood by the jury, it deprived the defendant of the right of self-defense unless the danger was real and not apparent. This qualification lays it down as a rule of law, that an actual and positive danger must exist, before he could justify the killing. Although this is not the precise language employed, yet this is its manifest import, and the jury must have

so understood it. This court, in the case of *Campbell* v. *The People*, 16 Ill. R. 17, held that a person when threatened with danger, must determine from the appearances and the surrounding circumstances as to the necessity of resorting to self-defense. And that if the danger was apparently so imminent, and pressing, that a reasonable and prudent man would suppose that it was necessary to take the life of his assailant, to preserve his own, or to avoid the infliction of a grievous bodily injury, then the killing would be justifiable. It cannot be true, that a man, when menaced with what would appear to a reasonable mind to be imminent danger, should wait until it is determined to be real, before he can act. There is no question that the person menaced must act in perfect good faith, and believe that it is really necessary that he should destroy life, to avoid what appears to be a real and imminent danger. This doctrine was again announced in the case of *Schnier* v. *The People*, 23 Ill. R. 17, and is decisive of this question.

No other error is perceived for which the judgment should be reversed. But for the giving the instruction as it was modified, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

George W. Campbell, Plaintiff in Error, *v.* Milton Hasbrook, Defendant in Error.

ERROR TO PEORIA.

A constable charged with an execution, must pay over the money made under it, either to the plaintiff or to the justice who issued it; he cannot levy upon it under another execution.

This was an action commenced in the Circuit Court of Peoria county, by motion, under the 116th section of chapter 59, of the Revised Statutes, entitled Justices of the Peace and Constables, to recover the amount of money collected on an execution, by plaintiff in error, with twenty per cent. damages.

The affidavit upon which the motion is predicated, was made by Christian Lammers, and sets out that on the 7th day of November, 1859, said Hasbrook, for the use of Christian Lammers, recovered a judgment against Norman Howe, before Harrison Smith, justice of the peace, for the sum of $84.56, with costs; that execution issued thereon on the 28th day of November, 1859, which was delivered to Campbell, as constable, to execute. That Campbell collected the money during the life-

time of the execution; that he refused to pay it on demand of said Lammers; that the time for returning said execution has long since expired, and Campbell still refuses to pay either to affiant or to the justice of the peace.

In his answer, Campbell admits that he received the execution set out in the affidavit; that he levied the same upon certain goods and chattels of said Howe, which he afterwards sold, and made money enough to satisfy the execution.

He then sets forth, that in the lifetime of said execution, he received from John A. McCoy, a justice of the peace of said county, an execution, dated 21st of January, 1860, in the suit wherein Wm. C. Boilvin and Amos L. Merriman were plaintiffs, and Joseph Herwig and Christian Lammers were defendants, for $274.20 debt, and $7.54¼ costs. That after the receipt of said last mentioned execution, he informed Lammers that he had the sum of $86 ready to be paid to said Lammers on the first execution, but that he (said Campbell) had in his hands the other execution, and would levy upon the money to satisfy it. That Lammers then claimed the money as his own property, whereupon affiant levied upon the same, to satisfy the last execution.

Campbell closes his answer by praying, "that if it should be the opinion of the court, now here, that this affiant had no right to so apply the said money, because the same was in the hands of the law, in process of collection," he now have leave to so apply it.

The executions and returns of said Campbell, thereon, were all the evidence in the case.

The return upon the execution of Hasbrook, for use of Lammers against Howe, is as follows: "By virtue of the within execution, I have levied upon the following property of Norman Howe, (here enumerating it,) December 12th, 1859. G. W. Campbell, Constable."

"I have sold the above described property, by virtue of the above levy, and have applied so much of the money arising from said sale as is due upon the within writ, being the sum of eighty-six dollars, upon an execution in my hands, issued by John A. McCoy, in favor of William C. Boilvin and Amos L. Merriman, against Joseph Herwig and the within named Christian Lammers, this 21st day of January, 1860. G. W. Campbell, Constable."

The return upon the execution of Boilvin and Merriman against Lammers, is as follows: "By virtue of this execution, I have levied on eighty-four dollars, the property of Christian Lammers, this 21st day of January, 1860. G. W. Campbell, Constable."

The court, POWELL, Judge, presiding, rendered judgment for Hasbrook, for the use of Lammers, against Campbell, for $103.20, and costs, to which defendant excepted.

The errors assigned, are, that the Circuit Court erred in rendering judgment against the said George W. Campbell. That the Circuit Court erred in rendering judgment for twenty per cent. damage against the said G. W. Campbell. That the said Circuit Court erred in taking judgment of said motion.

MANNING & MERRIMAN, for Plaintiff in Error.

C. C. BONNEY, for Defendant in Error.

BREESE, J. By section 54 of the statute relating to justices of the peace and constables (Scates' Comp. 706), it is provided, that all executions issued by a justice of the peace shall be directed to any constable of the proper county, and made returnable to the justice issuing the same within seventy days from the date. By section 82, on the return of all executions, the constable shall pay over to the justice of the peace who issued the same, all money not previously paid over to the plaintiff.

The penalty for neglect is found in section 116. The proceeding is summary before a justice of the peace on five days' notice, by motion. In this proceeding, the amount neglected to be paid over is recovered, with twenty per cent. damages thereon for the detention.

Section eighty-two evidently implies that the constable may pay the money going to the plaintiff directly to him, before he makes return of the execution to the justice of the peace. This is his privilege. The plaintiff can intercept the money on its way to the justice of the peace. The constable must do one of two things, either bring the money to the justice on the return of the writ, or the plaintiff's receipt for the money as having been paid over to him. Nothing less will excuse him. He is to be governed by the law, and he is told by the law, very distinctly, when he has collected the money, he must, if he has not paid it over to the plaintiff, pay it over to the justice of the peace. He has no right to determine that he will do neither, but will appropriate it to pay a debt he may suppose the plaintiff owes John Doe, in whose favor he holds an execution against the plaintiff, and so he will pay it to John Doe.

We know of no principle justifying this. The money collected may be subject to the legal or equitable claims of other parties, which the officer cannot cut out, by any act of his own. It is not, in legal contemplation or intendment, the money of the plaintiff in the execution, until it is actually paid over to

him. The party from whom it was collected, might enjoin it in his hands. It cannot be permitted that a constable or other like officer, shall have authority to exercise an equitable jurisdiction over money collected by him, and appropriate it according to his notions of right and justice. In this case, the legal title to the money was in the plaintiff, Hasbrook, Lammers being merely the *cestui que use*. The constable, by appropriating it to pay Lammers' debt, virtually converts this equitable into a legal right, which he had no power to do.

The case of *Reddick* v. *Smith*, 3 Scam. 452, in principle, decides this case. It is there said distinctly, the money while in the officer's hands, is regarded as in the custody of the law. It does not become the property of the judgment creditor until it is paid over to him, and consequently cannot be levied on or attached as his. This settles the question.

The case of *Turner* v. *Fendall*, 1 Cranch, 117, is to the same effect.

We are clearly of opinion that the constable's return contains no apology or excuse for the non-payment of the money according to the exigency of the writ, and we see nothing in the case to protect him against the motion to amerce, in pursuanse of section one hundred and sixteen.

Judgment affirmed.

John H. Howe, Appellant, *v.* F. Porter Thayer, Appellee.

APPEAL FROM SUPERIOR COURT OF THE CITY OF CHICAGO.

A plea to the jurisdiction need not be verified by affidavit.

This was an action of assumpsit. The declaration contains two special counts, and a count for money had and received, and a count for an account stated.

The defendant pleaded in abatement as follows:

STATE OF ILLINOIS, } In the Superior Court of Chicago,
COOK COUNTY, *ss.* } November Term, A. D. 1859.

And now the said defendant, J. H. Howe, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, as to the said supposed causes of action mentioned in said plaintiff's declaration, because he says that before and at the time of the commencement of this suit, the said defendant was, and ever since has been, and still is, a resident of the county of Henry, in the

State of Illinois, and has not resided in said county of Cook, nor been found in, or served with process in said action in said county of Cook.

And the defendant further says, that the said debts, contracts, or causes of action, mentioned in said plaintiff's declaration, (if any such have accrued to said plaintiff,) did not accrue in the said county of Cook, the county of said plaintiff, nor were the said contracts, or any of them, in the said plaintiff's declaration mentioned, specifically made payable in the said county of Cook.

And the said defendant further says, that there is a Circuit Court of said Henry county, within and for the said county of Henry, which has jurisdiction of the person of said defendant, and which may lawfully have and take cognizance of the said supposed causes of action mentioned in said plaintiff's declaration.

And this the said defendant is ready to verify. Wherefore he prays judgment, etc.

Which plea was verified as follows:

STATE OF ILLINOIS, Cook County, ss.

Jerome J. Beardsley, being first duly sworn, says that he verily believes the foregoing plea, and the matters and things therein set forth, to be true, and that he is a retained attorney of said defendant, to defend in his behalf the above entitled suit. J. J. BEARDSLEY.

Sworn to and subscribed before me this 30th day of November, A. D. 1859.

WALTER KIMBALL, Clerk.

Thereupon, the plaintiff filed his motion as follows:

And now comes the said plaintiff, by Evans & Hoyt, his attorneys, and moves the court to strike the said defendant's plea of abatement filed herein, from the files, for want of a sufficient affidavit of the truth thereof.

Thereupon, the court sustained said motion, and struck said defendant's plea of abatement from the files; to which the defendant excepted.

Thereupon, the default of the defendant was taken, and the court proceeded to hear, try and determine said cause, upon assessment of damages.

Court assessed the damages at $80.80, and rendered judgment therefor, and for costs, in favor of the plaintiff.

Defendant prayed an appeal, which was granted.

BEARDSLEY & SMITH, for Appellant.

EVANS & HOYT, for Appellee.

WALKER, J. This record presents the question, whether a plea to the jurisdiction of the court, in the nature of a plea in abatement, must be verified by affidavit. This must depend upon the construction of the first section of chapter one (Scates' Comp. 247), which is this: "No plea in abatement, other than a plea to the jurisdiction of the court, or when the matters relied upon to establish the truth of such plea appear of record, shall be admitted or received, by any court of this State, unless the party offering the same, or some other person for him, file an affidavit of the truth thereof." This provision undeniably requires all pleas in abatement that do not go to the jurisdiction, or the truth of which is not proved by matter of record, to be verified by affidavit. But the statute in terms provides, that it is only pleas in abatement, other than those to the jurisdiction, and such as the truth of which appear of record, that shall be so verified. When that provision was adopted, whatever may have been the common law practice, it exempted the latter class of pleas from its operation, and by embracing one class of pleas and exempting another in the enactment, there is a manifest design that those falling within the exception, shall be exempted from the enactment, and shall be governed by a different rule. When they excepted pleas to the jurisdiction of the court from being verified by affidavit, the effect was precisely the same as if the provision had expressly declared that such pleas need not be so verified.

When the statute has prescribed a rule of practice, it cannot be repealed by rules of court, or by practice, however long or uniform it may have been. The legislature has the right to regulate the mode of proceeding in courts, and when it has done so, parties cannot be deprived of its provisions, whenever they choose to invoke its enactments. The plea in this case, was a plea to the jurisdiction of the court over the person of the defendant, and the statute has made no distinction between pleas to the jurisdiction of the person or of the subject matter. Both classes are equally embraced in its provisions. And whether it was verified by affidavit or not, could make no difference as to its validity. The court below therefore erred in striking it from the files. Wherefore the judgment of that court must be reversed, and the cause remanded.

Judgment reversed.

Asa Dow, and Joseph L. Hurd, impleaded with Duncan Stewart *et al.*, Appellants, *v.* Bezabel W. Phillips *et al.*, Appellees.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

In commercial partnerships, where the profit and loss is to be shared, the law implies authority in the several partners to bind the whole, by executing notes, etc., in the firm name, if in the usual course of its business.

This suit was commenced against Asa Dow and Joseph L. Hurd, the plaintiffs in error, who were served, and Alfred A. Arrick and George W. Anderson, who entered their appearance voluntarily, and were defaulted. Duncan Stewart was not served.

Defendants Dow and Hurd plead, and issue was joined upon the pleas.

Suit was commenced by the plaintiffs, partners, under the name, firm and style of B. W. Phillips, who complained of all the defendants, partners in business and trade, etc., of a plea of trespass on the case upon promises: For that the said defendants, on, etc., at Mendota, etc., by the name, style and description of Arrick & Anderson, and as partners as aforesaid, made their certain bill of exchange in writing of that date, whereby they requested certain persons, by and under the name, style and firm of Dow, Hurd & Co., at sight to pay to the order of one G. M. Price, the sum of five hundred dollars, for value received, and that the same was then and there delivered to said Price, who then and there indorsed and delivered the same to said plaintiffs. It avers due presentation to said Dow, Hurd & Co., at Chicago, and their refusal to accept or pay the same, or any part thereof, and also notice, etc.

Then follow the common counts, in usual form.

Asa Dow and Joseph L. Hurd filed their separate pleas, as follows:

The said Asa Dow denies that he, together with the said Arrick, Anderson, Hurd and Stewart, undertook and promised in form and manner as the said plaintiffs had complained, etc.

And for a further plea, the said defendant, Dow, by leave, etc., prays judgment of the said writ and declaration, because the said several supposed promises and undertakings in said declaration mentioned, were not by the said Dow, as copartner or otherwise with the said defendants, Arrick, Anderson, Hurd and Stewart, or any or either of them, under the name, firm and style of Arrick & Anderson, nor by the said defendant with any other person or persons under the name, style and firm of Arrick &

Anderson, or in any other way or manner; he also denies that he was, at the time, a copartner with his co-defendants, or any other persons under the name, style and firm of Arrick & Anderson; but avers, on the contrary, that the said supposed promises were made by the said Alfred A. Arrick and George W. Anderson alone, and not as copartners with this defendant and his other co-defendants. The usual affidavit of merits was also filed by said Dow.

The said defendant, Joseph L. Hurd, filed his said separate plea, the same as the said Dow, verified in the usual manner, and the usual affidavit of merits.

Issue was joined on these pleas.

A default of said defendants, Arrick & Anderson, impleaded, etc., was entered, and a reference was taken to the court to assess damages.

By agreement of parties, the issues joined between plaintiffs and defendants, Dow and Hurd, were submitted to the court without the intervention of a jury.

The court found the issues joined for plaintiffs, and assessed damages against all the defendants, except Duncan Stewart, not served, at the sum of $896, and thereupon said defendants, Dow and Hurd, submitted their motion for a new trial, which was overruled.

Dow and Hurd prayed an appeal, which was allowed.

The plaintiffs, to prove the issues on their part, produced a witness who testified:

I am book-keeper for the firm of Dow, Hurd & Co.; the members of the firm are Asa Dow, Joseph L. Dow, and J. L. Hurd & Co., of Detroit; said company consists of Duncan Stewart, Ellwood Burks, and J. L. Hurd; know the handwriting of the firm.

Seven letters were here introduced in evidence, which were admitted to be in their handwriting, which letters are as follows:

Chicago, Saturday, August 21*st*, 1858.

We sold the last car load of barley to-day, and it brings a fine profit.

D., H. & CO.

P. S.—Mr. Hurd just in, and says you have not got the corn off yet, and that you have 10,000 bus. there. Do not send any more there till you get it off.

Let everything come in by rail. We shall yet make a bad thing out of the La Salle mine.

There is no mistake, at the present prices, we are running a great risk in not getting purchases forward, and we prefer not touching another bu. till it does come forward. In haste, DOW, H. & CO.

GENTS:—Yours of yesterday received. The boat from La Salle got in last night, and we let it go to-day at 64c. afloat, at which it closes dull. We have not

heard whether the balance was shipped by rail or not. Market still looks down, and everything dull. As stated yesterday, we think it best to stop buying entirely at the south till we get what is already bought forward, and see how we stand.

We have advised your Mr. Arrick to this effect.

Resp'y yours, DOW, HURD & CO.

GENTS:—Yours of yesterday received. We send the list of cars to Mr. Arrick, at Decatur, to-night. The market closes dull at inside quotations.

We sold, last night, 400 bus. of No. 1 red wheat, at 1.08 in store, and will put it into the joint account, unless you prefer to hold longer. If so, please let us know. Resp'y yours, DOW, HURD & CO.

Chicago, Dec'r 14th, 1858.

MESSRS. ARRICK & ANDERSON — GENTLEMEN:—Yours of yesterday is received. We did not expect your draft to-day, for the reason that we had several other parties to supply, besides having about 800 hogs on hand, which we are carrying along a few days, hoping the market may rally a little, 5.00 and 6.00 being the best we can do, dividing on 200.

Mr. Hurd says you mentioned having received on advance ac. some $700 within the past few weeks, and yet you do not lessen your balance any. This is certainly not as it should be. We have a right to expect you to draw down the balance at least to the extent that you receive on advances. Besides, we feel if we continue the business on joint ac., that you should secure us to the extent talked of when your Mr. Arrick was here, if no more, and you certainly cannot think us unreasonable to ask it.

Let us hear from you without delay on this subject. Do not buy any more hogs at over 4½ to 5.00. Car No. 76 in, and sold at 50c. for 70 lbs.

Resp'y yours, DOW, HURD & CO.

Chicago, Thursday, Dec. 16, 1858.

GENTS:—Yours of yesterday received; also dispatch of to-day. We paid your draft to-day. We wrote you day before yesterday giving the reason why it was not paid when first presented. We are delivering the hogs as fast as possible, but having so many we shall not get round to your lot till to-morrow. The eastern news comes in a little better to-night, and possibly prices may stiffen up here a little, and you had better take your share at four-and-a-half to four-and-three-quarters for light, and five to five-and-a-quarter for heavy. We should have held on another day, but the R. R. folks were getting so full that they could not keep them.

Corn and wheat unchanged.

Yours truly, DOW, HURD & CO.

Chicago, Thursday, Dec. 23, '58.

GENTS:—Inclosed we send you account sales of hogs and corn. The cold weather makes corn active and at full prices. You had better take your share at market rates, and same for corn and wheat.

Yours truly, DOW, HURD & CO.

Chicago, Dec. 28, '58.

MESSRS. ARRICK & ANDERSON — GENTS:—Yours of yesterday is received. Two more of your drafts were presented to-day, but for reasons mentioned yesterday, we could not considerately honor them. Nor do we think that you can reasonably feel that we have done very wrong in not doing so, considering all the circumstances, of which you of course, as well as ourselves, are fully advised.

However, we are willing, bad as matters are, to go on and do the best we can to wipe the loss out, if you feel disposed to make up security to the amount of four thousand dollars, and will give you a reasonable time to do it, and until you decide either pro or con, we will furnish to Mr. Thompson what funds may be necessary to carry along the business, and we have written him to draw on us for whatever may be needed for that purpose.

Inclosed we send you a statement of the joint account from the beginning; also account sales of two hogs. Owing to the soft weather and a lower market, we shall hold over the lot of twenty-nine for a few days, for colder weather and better prices. Resp'y yours, DOW, HURD & CO.

The statements of accounts are all in my handwriting, and were sent to Arrick & Anderson, as book-keeper for Dow, Hurd & Co., or else he gave them to Mr. Dow for that purpose; several bills, like the two shown me (the bills sued upon), were presented to Dow, Hurd & Co., and all but one paid; I know that many bills have been presented, an average of one a week since 25th May, 1858, up to December 25th; many of them were made payable to the order of George M. Price, (same as shown me.)

Statements of account were then introduced by plaintiffs, headed, "Mendota, in Joint Account with Dow, Hurd & Co., Dr." This account contains sundry items of charges, amounting to about $80,000, principally for grain, but includes charges for telegraph, clerks' salary, express items, some freight, inspection and insurance, extending from May 3rd, 1858, to December 25th, of the same year.

Also account, "Contra, Cr." Which amounts to about $6,000 less than the previous account. This account consists chiefly of items of credits for net proceeds of sales of grain, extending from May 25th, 1858, to December 25th, 1858.

Statement marked No. "2," is headed, "Sales by Dow, Hurd & Co., in Joint Account with Arrick & Anderson," showing items of each sale, the amount of each sale, price received, and expenses; which shows a profit to Cr. of joint account, of $1,814.79.

I know that Hutton was employed as clerk by Arrick & Anderson, in the grain business; item of —— was in grain; we sent some books to Arrick & Anderson, and paid the express charges; telegraphs were sent to Mendota, or some other place, where they were interested on joint account; item of expenses of $387, is an amount given by A. & A. for joint matter.

Two telegraph dispatches and one receipt were here introduced as evidence. The following are copies of the same:

Mendota, Dec. 17, 1858.

By Telegraph from Chicago, Dec. 17, 1858.

To Arrick & Anderson:—Draw for enough to pay for what you buy.

DOW, HURD & CO.

By Telegraph from Chicago, Dec. 25th, '58.

To Arrick & Anderson:—Please send Warren three hundred (300,) and draw on us.

DOW, HURD & CO.

Merry Christmas.

(Copy Receipt.)

Arlington, Ills., Decr. 27, '57.

$300.—Received of Arrick & Anderson, per Griffiths, three hundred dollars, on acc't of Dow, Hurd & Co. D. C. WARREN.

Drafts, copies of which are attached to declaration, were read in evidence, being admitted to be genuine.

SMITH & DEWEY, for Appellants.

VAN BURENS & GARY, for Appellees.

BREESE, J. From the evidence in the bill of exceptions, it cannot be questioned that there was a grain partnership between Arrick and Anderson, at Mendota, and Dow, Hurd & Co., at Chicago, the firm name of which at Mendota was Arrick & Anderson. It is also very apparent, from the evidence, that the money to carry on this partnership came through these bankers, the defendants in error. In commercial partnerships like this, where the profit and loss was to be shared equally, the law implies authority in the several partners to bind the whole by executing notes, bills of exchange, etc., in the partnership name, if executed for the usual business of the partnership, and within the scope and usage of similar partnerships. *Gray* v. *Ward*, 18 Ill. R. 32.

The evidence shows also, that the course of dealing between these parties was of long continuance, and, in many instances, in the same manner as the bills in question, were drawn and discounted, and it is not now fit and proper that Dow, Hurd & Co. should object that they are not responsible.

We think, also, that the telegraph dispatches from Dow, Hurd & Co., to their copartners, Arrick & Anderson, and which were shown to these bankers before the bills were discounted, amounts to such an express authority to draw the bills, as to forbid the parties from denying it.

The judgment is affirmed.

Judgment affirmed.

Robert S. Brush, Appellant, *v.* Francis Seguin, and James Byrns, Appellees.

APPEAL FROM KANKAKEE.

Where a trial has been had, and a motion for a new trial remains undecided till an ensuing term, but is then granted, leave may be awarded to withdraw pleadings demurred to which had been previously adjudicated—the court being in possession of the record, (no final judgment having been rendered,) has discretion over, and control thereof. Such practice not commendable.

Property levied upon, is not discharged from the power of the execution, because a forthcoming bond has been given.

If the best proof of a fact is not adduced, the party should object on the trial; such an objection comes too late in the Supreme Court.

This was an action of replevin, by Brush against Seguin and Byrns, for a sorrel mare, value $75.

Defendants, Seguin and Byrns, pleaded seven pleas, to wit:

Non cepit et non detinuit.

Property in defendants.

Property in one Robert K. Brush.

A plea stating a judgment for one Wm. Godfrey, against Robert K. Brush and one Ingham, for $346 and costs, at April term, 1858, and an execution to sheriff of Kankakee county, dated April 22, 1858; and that defendant, Seguin, being such sheriff, by his deputy, one Byrns, levied said execution on said property, on May 20, 1858; and that the property was then the property of Robert K. Brush.

A plea like fourth plea, except it omits the judgment and pleads only the writ.

Right of possession in Byrns, as deputy sheriff.

A plea which denies the allegation of property and right of possession in plaintiff.

Issue was joined on all the pleas except fourth and fifth, (called first and second avowries,) and to first and second avowries plaintiff replied:

1st. Property in plaintiff, and not in R. K. Brush.

2nd. A release of defendant's levy, by taking bond from R. K. Brush.

3rd. Release of the levy and delivery of the property to R. K. Brush, and that the property became plaintiff's while it was in possession of said Brush.

4th. The release and discharge of the levy, and delivery of the property to R. K. Brush, who retained possession during life of execution.

Jan. 5, 1859, defendants demurred to second and third above replications, and issue was joined upon the first and fourth.

Jan. 6, 1859, defendants' demurrer overruled by the court, and defendants abided.

A trial of the issues was had by a jury; verdict for defendants, and motion for a new trial, January, 1859.

At the next term, April, 1859, a new trial was granted, and the court allowed the defendants to withdraw the demurrer upon which judgment had been rendered at the former term, and to file rejoinders to said second and third replications to the avowry pleas, and plaintiff excepted.

At September term, 1859, defendants rejoined to said replications, that said levy was not released and discharged as alleged.

At January term, 1860, there was a trial, and a verdict for defendants.

A motion for a new trial overruled, and judgment upon the verdict.

DICKEY, WALLACE & BOAL, for Appellant.

R. N. MURRAY, for Appellees.

WALKER, J. At the January term, 1859, a trial was had, which resulted in a verdict in favor of the defendants below. A motion for a new trial was then entered, which was continued, and at the subsequent April term, was allowed. Leave at that time was granted defendants to withdraw their demurrer to plaintiffs' second and third replications to defendants' fourth and fifth pleas, which had been overruled at the preceding term. The plaintiff rejoined to the replications. At the September term, 1859, a trial was had, a verdict found for defendants, a motion for a new trial was entered and overruled, and judgment rendered for the defendants.

It is now urged, as error, that the court, at a subsequent term, set aside the judgment on the demurrer, and let in the defendants to reply to the pleas. Had the judgment been final, and a term had intervened, it would have been erroneous. But here the case was still pending, the parties were in court, and the case standing for trial. The whole record is under the control of the court until final judgment is rendered and the court adjourns. And while courts seldom if ever change a decision made on demurrer at a former term, and not frequently at the same term, it is discretionary with the court, so long as the record is before them. The practice is not to be commended, and should only be permitted when it is clearly required in the furtherance of justice, otherwise litigation would never terminate, and the time of courts would be consumed in re-try-

ing questions already decided. Such a practice is therefore to be discouraged. But as the power to amend the record until the case is finally disposed of, is recognized, and as a continuance followed the leave to plead, we can perceive no injustice or surprise resulting from setting aside the judgment on the demurrer, and forming an issue of fact upon the pleas, in this case, we are not prepared to say that it was error.

It is also urged that the sheriff, by receiving the forthcoming bond, released the property from the levy and lien of the execution, and that appellant, as mortgagee, took it free from all incumbrance. Whether this is the case, depends upon our statute, authorizing the execution of such instruments.

The eighth section of the act regulating judgments and executions, provides that no execution shall bind the goods and chattels of the defendant, until the delivery of the writ to the sheriff or other officer to be executed. This section creates the lien of the execution upon all the goods and chattels of the defendant, except such as are there exempted. After the delivery of the writ to the officer, the property remains bound for its satisfaction during its life, unless released by the parties, or by operation of law. In this case it is contended that such was the case, by receiving the delivery bond.

The thirtieth section of that act authorizes the officer to take the bond and restore the property to the defendant, until the time agreed upon for its delivery. The thirty-first section provides, that if the defendant or his security shall not return the property named in the bond, the officer having the execution, may proceed to execute the same, in the same manner as if no levy had been made. If no levy had been made, or bond given, no one will doubt that the officer might proceed to levy the writ upon any goods or chattels which were owned by the defendant, after it was delivered to him, within his county, whether they had been sold, mortgaged or transferred by the defendant or not, if they could be found in the county. Then if the officer might proceed as though no levy had been made or bond had been given, he might unquestionably again seize this property, and subject it to sale in satisfaction of the writ. The levy and taking a delivery bond did not in any degree release or affect the lien created by the execution, or the officer could not levy in the same manner, but would have to proceed differently. It then can make no difference whether the forthcoming bond was valid or not, as in either event, the lien on this property was binding, and subsisting at the time the property was a second time seized by the officer. The mortgage was executed on the property when it was subject to this lien, and the mortgagee took it subject to the infirmity, and

could only hold it liable to sale on the execution, if it were not paid.

It was urged that the defendants below failed to prove by the best evidence, that they were the sheriff and deputy sheriff of the county. Even if it were admitted that the proper mode of making that proof was by producing the commission of the sheriff, and the appointment of the deputy, by the record in the clerk's office, still there was no objection interposed to proving the fact by parol evidence. No objection having been made at the time, it is too late to raise the objection for the first time in this court.

The judgment of the court below is affirmed.

Judgment affirmed.

Robert S. Brush, Appellant, *v.* Francis Seguin, and James Byrns, Appellees.

APPEAL FROM KANKAKEE.

Walker, J. The material facts contained in this record, and the questions presented, are the same as those in the case of *Brush* v. *Seguin et al.*, *ante*. The decision of that case therefore disposes of this, and renders the further discussion of these questions unnecessary.

The judgment of the court below is affirmed.

Judgment affirmed.

Henry C. Bowen *et al.*, Plaintiffs in Error, *v.* Asahel R. Parkhurst *et al.*, Defendants in Error.

ERROR TO McHENRY.

Although an execution from the Circuit Court is returnable in ninety days, and the sheriff must make his levy within that time, and it is his general duty to hold the writ for that period, yet he may take the responsibility of returning it sooner, if he has made a demand of property, and if it is unsatisfied; the return will be the foundation for a creditor's bill.

The sheriff will be responsible, if his return is untrue.

A voluntary assignment of a debtor, for the benefit of creditors, will not be upheld, which authorizes a sale of the property assigned, publicly or privately, on a credit.

The opinion of the court states the case.

SMITH & DEWEY, for Plaintiffs in Error.

COON & ROGERS, for Defendants in Error.

BREESE, J. This is a case in chancery. The bill was filed on the 9th day of April, 1858, and was an ordinary creditor's bill, which prayed, among other things, that an assignment made by defendants, Asahel R. Parkhurst and Perry T. Parkhurst, to their co-defendant, Rogers, might be set aside, as being fraudulent and void as to creditors.

The bill was filed upon two judgments against Parkhurst, based upon the return of two executions, returned unsatisfied. The one in favor of complainants, Bowen, McNamee & Co., was issued on the 19th of January, 1858, delivered to the officer 23rd of same month, and after personal demand by the officer, and refusal to turn out property to satisfy the same or to pay it, and after search for property, the officer, on the 10th of March, 1858, returned the same wholly unsatisfied. The other execution, in favor of complainant White, was returned unsatisfied after the expiration of ninety days, and no question arises with regard to the latter execution.

On the 22nd December, 1859, the cause was submitted to the court for argument upon the bill, answers, and replication. On the hearing of the case, the defendants moved to dismiss the bill as to complainants, Bowen, McNamee & Co., on the ground that the execution in their favor had been returned by the sheriff before the expiration of ninety days from its *teste*, which motion the court granted, and dismissed the bill as to said complainants, Bowen, McNamee & Co.; which facts, and the decision thereon, present the first question involved in the case.

The answer of the defendants, which was under oath, called for by the bill, denied all fraud, but set up a general assignment by defendants, Asahel R. Parkhurst and Perry T. Parkhurst, to their co-defendant, Henry O. Rogers, for the benefit of their creditors, consisting of a stock of goods, and notes and accounts, with preferences; which assignment provided, among other things, that the said assignee should take possession of the property, thereby "assigned, or intended so to be, and sell and dispose of the same, either at public or private sale, to such person or persons, for such prices, and on such terms and conditions, and either for cash or on credit, as in his judgment may appear best, and most for the interest of the parties concerned, and convert the same into money," etc.; which assignment the complainants claimed to be fraudulent and void as to themselves, creditors of said assignors, on account of the power therein

contained, to dispose of the property thereby assigned, upon credit.

The court decided the assignment valid, and dismissed the bill as to the remaining complainant, White; which facts, and the decision thereon, present the second question in the case.

The two foregoing issues of law presented in this case, were, in pursuance of the statute, by stipulation of the counsel of the respective parties, filed in the office of the clerk of McHenry Circuit Court, on the 22nd day of December, 1859, agreed to be certified and submitted to the Supreme Court for its decision thereon, and were duly certified thereto by the judge of said court.

We have no doubt upon either of the questions here presented. By section 36 of the chancery code (Scates' Comp. 142), it is provided, "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and any other person, to compel the discovery of any property or thing in action belonging to the defendant."

All executions from the Circuit Court are, by law, returnable in ninety days from and after their date, not to any term of the court, as in some States, and as at the common law, but to the clerk's office whence it issued. The officer having it in charge has that time in which to find property to levy upon. He must make his levy within that time, for after that, the writ is powerless. In general, it is his duty to hold the writ during all that time, but he may take the responsibility of making an earlier return to it of *nulla bona*, especially after he has made a personal demand upon the defendant to turn out property, and he has refused so to do. When the return is made that the execution is unsatisfied in whole or in part, and that the defendant has no property out of which it can be satisfied, a case has arisen for the interposition of a court of chancery. His return becomes a matter of record, and is conclusive as between the parties to the judgment and the officer, only to be questioned in an action for a false return. It shows, *prima facie*, that the creditor has exhausted his legal remedy, and chancery has jurisdiction. A return cannot be compelled before the expiration of ninety days, but the sheriff may take the responsibility of doing so at an earlier day.

In *Ballentine et al.* v. *Beall*, 3 Scam. 206, this court said, a creditor, who has proceeded to judgment against his debtor, and has his execution returned unsatisfied, may file his bill in equity and reach the property and effects of his debtor not subject to

execution. So, also, in *Miller et al.* v. *Davidson*, 3 Gilm. 522–3, *Manchester et al.* v. *McKee*, 4 ib. 515, *Alexander et al.* v. *Tams et al.*, 13 Ill. R. 224, the same principle is decided, and no allusion made, in either case, to the time in which the execution was returned unsatisfied. We think, on this point, the statute has been strictly complied with—that the legal remedy is, *prima facie*, exhausted by a return of *nulla bona*, and the powers of a court of chancery properly invoked.

As to the other question, we had occasion, in the case of *McIntire* v. *Benson et al.*, 20 Ill. R. 500, to examine fully the doctrine applicable to voluntary deeds of assignment. We find some diversity of opinion both on the point we ruled in that case, and the one now presented.

The deed in that case contained a clause that the assignee should be responsible only for his actual receipts and willful defaults. This we held, made the deed fraudulent and void *per se*.

The deed of assignment, in this case, contains this clause, after directing the assignee to take possestion of the assigned property: "the assignee shall sell and dispose of the same, either at public or private sale, to such person or persons, for such prices, and on such terms and considerations, and either for cash or *credit*, as in his judgment may appear best, and most for the interest of the parties concerned, and convert the same into money."

Our statute of frauds and perjuries provides that, "every gift, grant, or conveyance of lands, tenements, hereditaments, goods and chattels, etc., had and made or contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, etc., shall be deemed and taken only as against those who might be in any wise disturbed, hindered, delayed, or defranded, to be clearly and utterly void."

There has been, in the different States, a contrariety of decisions on such a clause in a voluntary assignment. In New York, it was held at one time by Chancellor Walworth, in *Rogers* v. *De Forest*, 7 Paige, 272, that such a clause did not vitiate the assignment. The Court of Appeals, however, took a different view, and held such a clause to avoid the whole assignment, its tendency and effect being to hinder, delay and defraud creditors, within the meaning of the statute. And there is reason in this. The assignment withdraws all the debtor's property from the reach of legal process, and leaves it where the creditors cannot reach it in any other manner than by the exercise of the discretion of the assignees. The assignee has it in his power to place the creditors at defiance, until he shall have converted the property into the means of payment at private

sale on credit, on such terms as he in his judgment may deem best, and most for the interest of the parties concerned. This power to sell at private sale, on the most advantageous terms, involves a right to delay the sale as long as the assignee thinks proper. The sale may be made on any terms of credit he thinks best, and in this way the creditors may be indefinitely hindered and delayed. An insolvent debtor ought not to have the power, under color of providing for his creditors, of placing his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit, without delay. They alone should have the right to determine whether the property shall be sold on credit, and any conveyance which takes away this right, ought not to be upheld; for it is a conveyance to hinder and delay creditors, and within the very teeth of the statute.

These same views were presented and enforced by the Court of Appeals of New York, in the case of *Nicholson* v. *Leavitt*, 2 Selden, 510, and we concur in the reasoning in that case. In Alabama, and perhaps in some other States, the ruling has been different, but we are satisfied, from the reasons we have given, that the clause in question renders the deed inoperative and void.

We have no law in this State expressly authorizing voluntary assignments, but they have been generally upheld for the benefit of creditors—never to their disadvantage. When it is apparent from the provisions of the deed, the assignee is not held to his just accountability, as in the case of *McIntire* v. *Benson*, or unusual clauses are inserted, which are always calculated to throw suspicion upon the transaction, or where some benefit is reserved to the assignor himself, to the injury of his creditors, such deeds are not sustained. These assignments are generally adopted by merchants and traders in almost all the States, as ordinary means of providing for creditors. The debtor, released by a fair assignment from the burden of his debts, his heart is lightened of a weight pressing him to the earth, and he is again at liberty to apply his energies to new pursuits, and in other occupations. Justice Story, in *Helsey* v. *Whitney*, 4 Mason, 206, speaks of them as encouraged by the common law. And Kent, Chancellor, in *Nicoll* v. *Mumford*, 4 Johns. Ch. 522, says, "The assignment is to be referred to an act of duty, attached to his character of debtor, to make the fund available for the whole body of the creditors."

In many of the States, they are regulated by express statute, and in all, have been approved and recognized. The essential requisite to their validity is, that they must be *bona fide*, and

not to delay, hinder, or defraud creditors. This deed does delay and hinder them in the manner we have indicated. It cannot therefore be sustained. The decree of the court below is reversed, and the cause remanded.

Judgment reversed.

Lorenzo Eggleston, Appellant, *v.* Charles T. Buck, who sues for the use of Caroline Gates, Appellee.

APPEAL FROM THE LA SALLE COUNTY COURT.

A., as the agent of B., sold goods to C., telling C. at the time that D. had an interest in the goods; C. agreed with A. to pay D. his share. Held, that D. might recover his share from C., under the common counts for goods sold, etc.

Whenever the terms of a special bargain have been performed, leaving only a simple debt due, or duty to be performed, a party may recover on the common counts.

A bill of particulars is not of itself a part of the record; if to be considered in the Supreme Court, it should be in the bill of exceptions.

This was an action of assumpsit, brought by appellee against appellant in La Salle County Court, at December term, 1858.

The declaration contained only the common counts for goods sold and delivered by defendant to plaintiff, for money had and received, etc.

Copy of account sued, being $1,000 for money loaned, $1,000 for labor performed, $1,000 for goods sold and delivered, and $1,000 due on account stated.

Plea, general issue.

Leave was given plaintiff to file notice of set-off, with bill of particulars.

There was a verdict in favor of plaintiff below, and his damages were assessed at $663.92.

Motion for a new trial by the defendant was overruled. Judgment in favor of plaintiff below, for amount of verdict, and costs, and the defendant appealed.

M. A. Neef was called by plaintiff, and testified, that he was acquainted with parties to suit; that during the month of March, 1858, he sold a stock of hardware to the defendant as the agent of Erastus Corning & Co.; that it was the understanding between witness and plaintiff, that if he, witness, should sell the goods for more than was due from plaintiff to Corning & Co., he should have the excess. That Neef told appellant of Buck's interest in the goods. That goods were invoiced at $8,200, and were sold by Neef to defendant below for $7,200; that

Buck's indebtedness to Corning & Co. was about $6,500, and that appellant agreed with witness to pay the excess of $700 to plaintiff below.

The defendant below then moved the court to exclude the testimony of the witness, Neef, or that portion of the same that tended to show a sale from Corning & Co. to Eggleston, for the reason that the proof did not correspond with the allegations of the declaration. Which motion was, by the court, overruled, and plaintiff excepted.

The following are the errors assigned:

1. The court erred in overruling defendant's motion to exclude the testimony of witness Neef from the consideration of the jury, or that portion thereof which tended to show a sale of goods belonging to Corning & Co. to the defendant, in which the plaintiff had an interest.

2. The court erred in trying said cause before the defendant had filed a bill of particulars under the order of the court as shown on page 16 of records.

3. The bill of particulars was too general, and the testimony of sale from Corning & Co. to defendant was not admissible under the bill of particulars, as shown on page 8 of record, filed with the declaration.

4. The court erred in overruling motion for new trial, and in rendering judgment on verdict.

E. F. Bull, for Appellant.

W. H. L. Wallace, for Appellee.

Breese, J. The first point made by the appellant, Eggleston, is the only one we deem necessary to be noticed in order to a decision of this case. He contends that evidence of a sale made by Corning & Co. to him, in consideration of which he promised to pay a part of the purchase money to the appellee Buck, the plaintiff below, cannot be given in evidence under the common counts for goods bargained and sold generally, by the appellee to the appellant, but he should have declared specially.

The evidence does not make out precisely the point as stated. The proof by Neef is, that when he, as the agent of Corning, sold the goods to appellant, he disclosed to him the fact before the sale, that the appellee had an interest in the goods, and that appellant agreed with the witness to pay to appellee his share, which was about seven hundred dollars.

This, although a special bargain, it being fully performed on the part of the appellee, and nothing remaining to be done by the appellant, but to pay the money, affords a basis, and is

good ground whereon to maintain an action for such money, and it can be recovered on the common counts. The rule is, wherever the terms of a special agreement or bargain have been performed, so as to leave a mere simple debt or duty between the parties, the plaintiff may proceed on the common count.

1 Saunders Pl. and Ev. 180. The money payment may be enforced by an action of indebitatus assumpsit. *Stone* v. *Rogers*, 2 Meeson & Welsby, 448; *Irving* v. *Veitch*, 3 ib. 111; *Alcorne* v. *Westbrook*, 1 Wilson, 117. The authorities are numerous on the point. See *Bank of Columbia* v. *Patterson's Adm'rs*, 7 Cranch, 299; *Canal Co.* v. *Knapp*, 9 Peters, 541; 2 Greenleaf Ev. 104; *Throop* v. *Sherwood*, 4 Gilm. 98.

The case of *Eddy* v. *Roberts*, 17 Ill. R. 509, does not militate against this doctrine. See also *Brown* v. *Strait*, 19 ib. 88; *Bristow* v. *Lane*, 21 ib. 197.

As to the second error assigned, this court cannot know but that a bill of particulars was filed in obedience to the rule. It is no part of the record of itself, and the bill of exceptions has not embraced it. This disposes of the third error assigned also.

There is no error in the record which we can notice, sufficient to reverse the judgment, and we therefore affirm it.

Judgment affirmed.

John Burnett, Plaintiff in Error, *v.* Sarah J. Simpkins, by her next friend, Dean Simpkins, Defendant in Error.

ERROR TO KNOX.

In assessing damages for the breach of a marriage contract, the jury may take into consideration all the injury sustained; and evidence of a seduction, the consequence of the marriage contract, may be given in aggravation of damages. On the other hand, the bad character of the plaintiff may be shown in mitigation of damages, even though the defendant was cognizant of the facts at the time of making the contract.

If the lack of virtue is relied on, to absolve the defendant from the fulfillment of his contract, his knowledge of that fact must have been acquired after entering into the agreement, and the defendant must have terminated the engagement immediately upon being apprised of the truth.

This was an action of assumpsit, brought to the Knox Circuit Court by defendant in error, against plaintiff in error, for a breach of marriage contract. The case was tried before Thompson, Judge, and a jury.

Verdict and judgment for plaintiff below.

The plaintiff introduced evidence to prove an agreement to marry.

A portion of the defendant's proof went to show the general bad character, immorality, and lewdness of plaintiff, all of which was withdrawn from the consideration of the jury by the court.

The defendant's instructions, referred to in the opinion as having been refused, are as follows:

1st. If the jury believe, from the evidence, that the plaintiff, at the time of the supposed courtship, was a loose, lewd and profane woman, or a woman of bad character, they will find for the defendant, unless a positive agreement to marry has been proved.

5th. If the evidence shows that the plaintiff was a lewd woman, it is not necessary for the defendant to show that such facts did not come to his knowledge until after the supposed promise of marriage, unless a positive promise of marriage has been established.

6th. If the evidence shows that the plaintiff was a profane and lewd woman, of loose character and habits, it makes no difference whether the defendant knew that fact before or after the supposed promise of marriage, unless a positive agreement to marry has been proved.

7th. If no express promise of marriage has been proved, then it can only be inferred from circumstances; and if the jury believe, from the evidence, that the plaintiff was a lewd woman, of loose and bad habits, and accustomed to the use of profane language, it makes no difference whether the defendant knew these facts or not when he commenced courting her, and the jury must take all these things into consideration, and judge from a review of all the evidence, whether the defendant visited the plaintiff for the purpose of marrying her or for some other purpose; and if they believe he visited her for some other purpose than that of marrying her, they will find for the defendant in this action.

8th. If the defendant knew and believed the plaintiff was a lewd, lascivious and immoral woman, when he went to see her, and while he continued to visit her, the jury ought not to infer any agreement to marry her from any attentions he may have paid her under such circumstances.

14th. In estimating the damages, the jury will take into consideration the character and habits of the plaintiff, and if they believe, from the evidence, that she was addicted to lewdness and the use of profane language, or either of them, these circumstances should be considered; and no person guilty of such practices ought to recover as much damage as a pure, moral and virtuous person.

H. M. AND J. J. WEAD, for Plaintiff in Error.

TYLER & SANFORD, for Defendant in Error.

WALKER, J. In actions for libel, slander, and the breach of marriage contract, the jury may, in assessing the damages, take into consideration the injury sustained by the plaintiff, as well to the reputation and standing in society, as the situation of the parties. And no rule appeals more strongly to our sense of justice, or is more consonant to the principles of right, than that an injury to the reputation of the good and virtuous, should be compensated in damages. And the proposition is too plain to be denied by any, that an injury to the character of a virtuous and good woman, is greater than to that of one who is depraved and abandoned. To place the character of the two upon the same level, and to hold that an injury to the one is no greater wrong than to the other, is to confound all distinction between virtue and vice, the good and the depraved. That there ever has been and will continue to be a difference, is as obvious as that virtue is preferable to vice.

No court has ever announced as a rule, in the assessment of damages, that a slander to the character of the low and depraved, is to be compensated by the same measure as if it had been inflicted upon the character of the good and upright. Such a rule can never prevail while any distinction is made in character. When all distinction is lost, then, and not till then, will the same rule, in measuring the damages, be applied. In assessing damages for the breach of a marriage contract, the doctrine is well settled, that the jury may take into consideration all the injury sustained, whether it be from anguish of mind, from blighted affections, or disappointed hopes, as well as injury to character, immediately resulting from the breach of the promise. And this court has repeatedly held, that evidence of a seduction, the consequence of the marriage contract, may be given in aggravation of the damages. It will not be insisted that the breach of promise will occasion the same anguish of mind, or produce the same injury to the reputation of a prostitute, as to a pure and virtuous woman. Nor can a seduction result in the same injury to her character, as to that of a virtuous female. And these are proper considerations for the jury in estimating damages. If injury to the feelings and character of the party injured, could not be considered by the jury, there would be more plausibility in the position that evidence of bad character of the plaintiff could not be received in mitigation. But if the plaintiff may go outside of a mere pecuniary loss, and enhance the damages by showing mental suffering, loss of position and character, it would seem to follow that the defendant may show in mitigation the want of character, or one that is not above suspicion.

If the previous bad character for virtue were not known to

defendant when he entered into the engagement, and it came to his knowledge subsequently, it would absolve him from its performance, upon the grounds that it was a fraud upon the contract. But while this is true, if the want of virtue on the part of the plaintiff was known to defendant at the time, it forms no grounds of defense to the action, but it may be shown in mitigation, for the reason that its breach does not result in the same injury as if the character had been good. And we regard this as especially true, when the plaintiff seeks to enhance the damages by giving evidence of a seduction resulting from the contract. If she may thus aggravate the damages, the defendant must be permitted to show that she was, previous to the engagement, and without any act of his, wanting in virtue, in order to avoid such increased damages. If, at the time of making the contract, she was virtuous, and it was by the act of the defendant she ceased to be so, then he cannot be heard to prove the want of virtue in mitigation. But if she has previously, or during the continuance of the engagement, prostituted her person to another, and the defendant has, with a knowledge of the fact, entered into the contract, or continued it, he may show the fact in mitigation. The evidence of a want of virtue on the part of defendant in error in this case, was therefore admissible in mitigation of damages, although the plaintiff in error may have been informed of the fact at the time he entered into the contract, and it should not have been excluded from the jury. And the court erred in not giving defendant's fourteenth instruction, which announces this rule.

The contract to marry, may be proved by either positive or circumstantial evidence, precisely as any other agreement. It is, in fact, less capable of positive proof, in most cases, than any other description of agreement. And when it is proved by the one or the other mode, the parties must be held liable for its breach precisely as in that of any other contract, unless the evidence discloses facts absolving the party from its observance. If the want of virtue is relied on for that purpose, the knowledge of that fact must have been acquired after entering into the engagement, and defendant must have terminated it immediately upon being apprised of the fact, otherwise that will be considered as forming, on the part of the defendant, no objection.

The refusal of the court below to give the first, fifth, sixth, seventh and eighth of defendant's instructions, was proper. When the contract is proved, the consequences are the same, whatever the mode by which it is established. If the contract was entered into by the parties, it was that agreement, and its breach, which created the liability, and the object of the defend-

ant in entering into it, or in visiting the plaintiff, can make no difference. To have avoided liability, he should not have entered into the agreement, or, having done so, he should have performed his contract. As the cause will be remanded for further proceedings, we deem it proper to abstain from expressing any opinion of the sufficiency of the evidence to prove the contract, that being a question for the jury.

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

Judgment reversed.

Breese, J., not having heard the argument in this case, gave no opinion.

Henry Nibbe, Appellant, *v.* Frederick Brauhn, Appellee.

APPEAL FROM COOK.

Under a contract to build a house by a fixed date, it will be held, that suffering the contractor to proceed after the day fixed for its completion, and the acceptance of the work at a future day, amounts to a waiver of performance at the time specified in the contract. But the mere extension of time does not affect the other stipulations of the agreement.

A decree giving a mechanics' lien from a day previous to the date of the contract, is erroneous if the rights of third persons are affected by it, but where this is not the case, the decree will not be reversed on that ground alone.

Brauhn filed his petition in the Cook Circuit Court, to enforce a mechanics' lien against said Nibbe.

The petition alleges that on the 18th day of March, 1857, the parties entered into a contract in writing, by which Brauhn was to build a house for Nibbe, and have the same completed on or before first of June, 1857.

The petition also alleges, that on or about the said 18th of March, 1857, Brauhn did, in accordance with the provisions of the contract, enter upon the erection of the house; and that while laying the foundation, Nibbe stated to Brauhn that "he wanted to have certain alterations made in the structure of said house, materially different from the specifications and plans above referred to, and that he wished to have the size of the house increased;" and that Brauhn "did then and there agree to finish and construct a house upon said premises in accordance with the wishes of said Nibbe, and to make it so far different from the original plan as was then by said Nibbe desired. In consideration whereof, said Nibbe did then and there agree to pay unto Brauhn one hundred dollars over and above the price

mentioned in said contract, payable upon the completion of said house and the acceptance thereof by said Nibbe. That at the time of the above mentioned alteration of the original contract, nothing was said about the time in which said house was to be finished, nor was anything said about any alteration of the terms of payment; but said Nibbe was to pay your petitioner one hundred dollars additional on the completion of the work." That Brauhn "did thereupon build the house in all respects in conformity with the wishes and requirements of said Nibbe in the premises, and under the immediate direction of said Nibbe, and that on or about the first day of September, A. D. 1857, said Brauhn had the said house fully completed and finished, and made delivery thereof to said Nibbe, who then and there accepted the same, and declared himself in all respects and fully satisfied with the same." That Brauhn has received $1,200, and that there remains unpaid $835, and that he has a lien therefor on the premises, which he prays may be enforced, etc.

The answer of Nibbe admits the making of the agreement of 18th March, and also the subsequent agreement mentioned in the petition, but denies performance on the part of Brauhn.

A replication was filed, and on the 7th May, 1859, cause was tried, and the jury found for the petitioner, damages, $898. Defendant moved for a new trial, and the court decided to grant new trial unless petitioner took judgment for only $725, to which he consented, and judgment was entered accordingly. And it was also decreed, that all right, title, claim and demand which the said defendant, on the eighth day of March, 1857, had in and to the premises, and the buildings thereon described in the petition, should be sold by the master in chancery, to pay the debt and costs. From which judgment and decree, Nibbe took an appeal to this court.

Farwell, Smith & Thomas, for Appellants.

McKindley & Nicholes, for Appellee.

Breese, J. The petition in this case sets out a contract to complete the building by a day certain—the first day of June, 1857. It then avers, that whilst the building was in progress, an alteration in the plan was insisted upon by the appellant, involving an additional expenditure of one hundred dollars, and enlarging the building to some extent, in regard to which there was no stipulation as to the time when the whole work, including the enlargement, should be completed. Still, the original contract provided that the building should be completed

by the first day of June. The answer alleges, that though nothing was said in the agreement about the alterations, when the work was to be completed, yet it was understood by the parties, that it was to be finished at the time agreed upon in the original contract, that is, by the first day of June.

This, then, must be considered an admission, that the building was to be completed by the first of June. A precise time, then, is shown, within which the contract was to be completed. That parties, while work is in progress, may extend the time for its completion, cannot be questioned. Owing to the alterations demanded by appellant, further time became necessary for the completion of the building, and it was extended by agreement, to the first day of September, 1857, at which time it was completed and accepted by the appellant, and therefore, the contract was as fully performed as though it had been finished on the first day of June. We would hold, that appellant having permitted the contractors to proceed on the work after the first day of June, and accepting the work at a future day, has waived the performance on the day fixed, and that a mere extension of time of performance, does away with none of the stipulations—an agreement to extend the time waives nothing more than the time of performance.

The appellant makes the point, that the petition is defective, in not averring that the work was completed within the time required by the contract. But this is not assigned for error, and therefore cannot be noticed.

The decree gives a lien from the eighth day of March, 1857, ten days prior to the time of making the contract. This would vitiate the decree if there were other parties interested in this proceeding, who might be affected by it; but there are no other parties on the record, than the material man or contractor, and the owner of the lot, and of course no person can be injured by the error. It is not sufficient to reverse the decree, and it must be affirmed.

Decree affirmed.

Marcellus B. Smith *et al.*, Plaintiffs in Error, *v.* John Hughes, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

A levy upon personal property, of sufficient value to discharge the execution, is a satisfaction of the judgment.

An officer making a levy, is bound for the property, unless the defendant shall give a satisfactory delivery bond.

A plaintiff, after he has made a levy, cannot change it, except with the consent of the defendant—nor can the officer making the levy, change it of his own accord.

Should a defendant prevent the sale of property levied on, then the officer might make another levy.

The court may remove a levy; otherwise it can only be removed by sale.

Where a levy has been changed, the plaintiff must show by a preponderance of evidence, that the defendant consented.

It was agreed that a case between the said plaintiffs and Stephen T. Napper, should be decided, by the court, on the same state of facts.

The record shows the recovery of a judgment in favor of plaintiffs in error, against the above-named John Hughes, and one S. S. Hughes, on the 9th day of July, A. D. 1858, for damages and costs, $151.71; that on the 2nd day of July, A. D. 1859, they issued execution thereon, directed to the sheriff of Jo Daviess county.

That said execution has the following indorsements thereon:

This execution came to hand for collection this 5th day of July, A. D. 1859, at 8 o'clock A. M. J. H. CONLEE, Sheriff.

By virtue of the within execution, I have levied on one black horse, one two-horse wagon, 20 acres more or less of corn, 5 acres of wheat more or less, one acre of potatoes more or less, as the property of John Hughes, defendant in said execution. J. H. CONLEE, Sheriff.

July 6th, 1859. Per J. M. Conlee, Deputy.

This above property is ordered to be released by order of plaintiffs' attorney, this 18th day of August, 1859. J. H. CONLEE, Sheriff.

By virtue of the within execution, I have, this 18th day of August, 1859, levied upon the following described lands described as follows, to wit: The east half of the south-east quarter of Section number twenty-six, in Township number twenty-nine north, Range two east of the fourth principal meridian, in the county of Jo Daviess, and State of Illinois.

E. S. Smith, attorney for plaintiffs, paid to me the necessary amount of money to redeem the said property, before sold upon another execution.

J. H. CONLEE, Sheriff.

Galena, Nov. 4th, 1859.—By order of Walter Kimball, clerk of the Superior Court of Chicago, all proceedings are stayed on the within execution, and the same is returned to said court.

At the September term of said court, said John Hughes made his motion to quash and set aside said last-mentioned levy upon said real estate, for following reasons:

1st. That said first named execution was levied upon the growing crops upon said lands, and upon a certain horse and two-horse wagon, a copy of which said levy is as follows, viz.:

By virtue of the within execution, I have levied upon one black horse, one two-horse wagon, 20 acres more or less of corn, 5 acres of wheat more or less, one acre of potatoes more or less, as the property of John Hughes, defendant in said execution.

J. H. CONLEE, Sheriff.

July 6th, 1859.

Per J. M. CONLEE, Deputy.

The above property is ordered to be released by order of plaintiffs' attorney, and which chattels were surrendered to the same by the defendant, John Hughes, and which said property was and is of value sufficient fully to pay and satisfy the debt, interest, and costs due.

2nd. Said levy has never been released by said defendants, nor has the same been done with their approbation and consent, but the same remains in full force, and binding until the sale of said property to satisfy the said execution.

3rd. Said second named execution was paid and satisfied in full by said sale of said lands.

One Stephen T. Napper, as purchaser under a previous sheriff's sale, appeared and made a motion to set aside redemption of and levy upon said real estate, upon same grounds and affidavits. To maintain their motion, the said defendants introduced first, the affidavit of John H. Conlee, sheriff of Jo Daviess county, dated 2nd day of September, A. D. 1859, which states that he is the sheriff of Jo Daviess county; that he made the various returns and levies upon the execution in favor of plaintiffs in error, against the said Hughes, and that they are all correct, a copy of which execution and return is attached to said affidavit; that the levies and release were made as therein set forth; that the personal property levied upon first, and released by order of plaintiffs' attorney, would have sold at public sale for enough, in his opinion, to have satisfied the said execution. He also states that on the same day, the 18th of August, 1859, he received for collection, an execution in favor of Samuel S. Strecter, against the said John Hughes, for the sum of $618.92; that said execution was issued from the Circuit Court of Cook county, upon a judgment rendered on the 5th day of October, A. D. 1859, by virtue of which he levied upon the same lands of said Hughes, a copy of which executions and indorsements and levy are attached to said affidavit; that E. S. Smith, as attorney for said plaintiff in last-mentioned execution, paid him, said sheriff, a sum of money sufficient to redeem said land from a previous sale.

Also, the affidavit of said John Hughes, of date September 2nd, 1859, who swears that he is one of the defendants in execution in favor of plaintiffs in error; that the levy upon the personal property was made as mentioned in return of sheriff, and that the said personal property was his own; that he

turned it out to the sheriff, and that he, said affiant, did not at the time, nor does he now consent that said levy upon said personal property be released.

Also, the affidavit of said Stephen T. Napper, which states that affiant is well acquainted with the said Hughes, and with the personal property levied upon by virtue of said execution in favor of plaintiffs in error, and that the same, in his opinion, would sell at public sale for sufficient to satisfy said execution in full.

Also, the affidavit of J. M. Conlee, that he was well acquainted with the personal property levied on by virtue of the execution in question, and that, in his opinion, it would sell for enough, at public sale, to satisfy the same in full.

Also, the joint affidavit of J. H. Vaughn, H. S. Dering, F. C. Manpin, of date September 2nd, 1859, which states that each knows both of the Hughes, and the personal property levied upon by virtue of said execution in favor of plaintiffs in error, and that, in their opinion, said property, at public sale, would satisfy said execution in full.

Also, the further affidavit of Stephen T. Napper, of date September 10th, 1859, which states that the real estate levied upon by the sheriff of Jo Daviess county, was, on the 18th day of May, A. D. 1858, sold by Simeon K. Miner, then sheriff of Jo Daviess county, upon a special writ of execution from the Circuit Court of said county, upon a decree of foreclosure against the said premises, and that said Napper, being the highest bidder therefor, upon such sale, became the purchaser thereof for the sum of $1,370.66, and refers to the records of said county for the judgment; that he received from said sheriff a certificate of purchase in due form, a copy whereof is attached to said affidavit, by virtue of which sale, purchase and certificate, he would be entitled to a deed on the 18th day of August, unless said premises should be redeemed according to law.

And also, the further affidavit of James M. Conlee, sheriff, of of date September 10th, 1859, which repeats the facts of the levy upon said personal property of said John Hughes, upon the said execution in favor of plaintiffs in error; that said levy was made on the 6th day of July, 1859, and the said property was left by deponent with the said John Hughes, for the reason that the crops levied on were still growing and standing at the date of the levy, and that the horse and wagon were for the removal and harvesting of said crops, and that he, deponent, had sufficient confidence in said Hughes to justify him in leaving said property in said Hughes' charge until time of sale, it being understood at the time of levy, that a reasonable compensation

should be paid said Hughes for the removal and harvesting said crops, but that the subsequent release of said crops prevented any definite arrangement with regard to the exact compensation to be made to said Hughes for the removal of said crops.

Also the further affidavit of John Hughes, of date September 10th, 1859, which states that at the time of the aforesaid levy upon said personal property by said sheriff, mentioned in the foregoing affidavit, he asked the said sheriff to leave said horse and wagon in his possession, and for the use of the same, he, said Hughes, promised to harvest and remove the crops levied upon at a very reasonable compensation ; that said sheriff agreed to leave, and did leave the same in deponent's charge, to be delivered on demand on day of sale ; that subsequently the levy was withdrawn, for cause unknown to deponent and without his consent, and that he has been paid nothing,—but his services for tillage, harvesting, and removal would be reasonably worth fifty dollars.

The plaintiffs in error, to oppose the said motion, introduced the following affidavits :

The further affidavit of deputy sheriff Conlee, of date October 8th, 1859, which states, that he made the levy upon the execution in favor of plaintiffs in error, upon said personal property ; that no delivery bond was taken for the same ; that affiant resides at Scales Mound, in sight of the residence of said Hughes ; that when he levied thereon, he asked said Hughes for a delivery bond ; that said Hughes replied, that he would not ask any one to go on a bond for him, and said deponent might leave it or not, but that it would be forthcoming, if left with him, on day of sale ; that a portion of said property was of such a nature that it could not be taken possession of at that time ; that said wheat was afterwards harvested by said Hughes, but whether before or after the release of levy, deponent cannot state, nor what has become of the same ; that deponent has no knowledge in regard to said property since release of levy, except having seen the same in Hughes' possession, and hearing Hughes say he was in possession, and using said property ; that he does not know whether the other crops than the wheat are harvested or not, but that said Hughes is in possession of the land upon which crops were growing, and exercises acts of control and ownership over the same, as before the levy.

Also the affidavit of Ezekiel S. Smith, under date of September 21st, which states, that on the 14th day of August preceding, he had a conversation with said Hughes, at Scales Mound, where Hughes told him that the execution had been levied on the crops on the place in which he lived, and that if the officer should sell them, it would very much distress his family ; that

some other property levied upon belonged to his son, who had signed the note with him as security; that the property was in their possession, and had not been taken away by the officer; that on the next day he met said Hughes at Galena, who requested him to make some arrangement, if possible, so the property levied on by the sheriff might be released; deponent further told Hughes that he would see plaintiffs, and if no one else had purchased it for Mr. Streeter, would put the same upon the farm and release the personal property; Hughes requested the deponent to do so, as it would distress his family to lose the crops, and as he could not work much, his family would suffer; deponent returned to Chicago, purchased the judgment for Mr. Streeter, pursuant to the request, and notified Hughes, and on the 18th day of August then next, deponent directed the sheriff to release personal property as Hughes desired, and levy upon the real estate, which was then done.

Upon this affidavit was indorsed the following stipulation:

The said plaintiffs hereby stipulate and agree to bid for the land levied upon in this cause, the full amount of the judgment and costs, in favor of Smith, Pollard & Co., above the redemption money.

SMITH & DEWEY,
September 21*st*, 1859. Plaintiffs' Attorneys.

The defendant, to maintain further his issue, read in evidence a further affidavit of John Hughes, under date of October 15th, 1859, who testified that his attorneys have furnished him with a copy of an affidavit filed in said suit by E. S. Smith, attorney for plaintiffs; that he has carefully examined the same, and says that it is true that said Smith was at Scales Mound on or about the 14th day of August; that it is also true, as he believes, that said Smith directed the sheriff to release the levy upon the personal property and to levy upon the real estate, but that the said affidavit, with the exception of the above facts, is unqualifiedly and absolutely false; that he had but few moments conversation with said Smith, who inquired what judgments were against him, and deponent told him of the one in favor of Smith, Pollard & Co., upon which he had turned out his crops to satisfy the same; that he never said the sale of said crops would distress him, or any other remark which by any means could be so understood by said Smith; that said Smith represented to deponent that if he would confess judgment in his favor upon two notes of this deponent, which had been long before paid and settled by deponent, and which said Smith had unlawfully detained, that he, said Smith, would give him three years to redeem the said real estate from said fictitious judgment. Deponent then denies, specifically, each statement of conversation between himself and said Smith, as detailed in Smith's affidavit;

deponent further states, that all the last foregoing alleged conversation could not have taken place, as he purposely avoided said Smith after his dishonest propositions in regard to said fictitious judgment.

Also the affidavit of William R. Rowley, of same date, who testified that he is clerk of the Circuit Court; been a resident of the county fifteen years; is well acquainted with said John Hughes; that to his knowledge said Hughes' character for truth and veracity has never been questioned, and deponent would believe his statement under oath or otherwise.

Also the further affidavit of Thomas J. Manpin, of same date, who testified: is well acquainted with said John Hughes; has known him about ten years; has entire confidence in his veracity, and firmly believes said Hughes could not be induced to make any misstatement; that his character as a man of his word has never been questioned in the community where he resides; that deponent has resided at Scales Mound more than ten years.

Also the affidavit of Richard Seal, of same date, who testifies that he is clerk of the Circuit Court of Jo Daviess county; has been a resident of the county for twenty-two years; is well acquainted with said Hughes; that the character of said Hughes for truth and veracity has never been questioned to his, deponent's, knowledge, and that deponent would give full credit to what he said under oath or otherwise.

The court, after hearing counsel, set aside said levy upon said real estate, and said plaintiffs excepted, and appealed to this court.

Smith & Dewey, for Plaintiffs in Error.

W. B. Scates, for Defendant in Error.

Walker, J. No rule is better settled, or more uniformly acquiesced in, than that a levy of personal property, sufficient in value to discharge the execution, is a satisfaction of the judgment. When the officer has seized property of the defendant, on execution, it is thereby appropriated by the law to its payment, and the officer is bound for its custody, and that it shall answer for the debt. To accomplish this, he has the power to remove the property and retain the possession, or place it in the hands of a custodian, unless the defendant shall execute a satisfactory delivery bond. And when the plaintiff has elected and made his levy, he has no power to release the levy and to have other property seized, unless it be with the consent of the defendant in execution. The law will not permit the creditor to use his judgment for purposes of annoyance, and the oppres-

sion of his debtor; and to permit him at his option, and as frequently as he may choose, to release one levy and make another, would confer a power which might be greatly abused. Nor has the officer making the levy, any power, on his own mere motion, to release a levy and seize other property. It is true, if such a release were made by agreement with the debtor, he would be estopped to complain, and would have no right to repudiate the agreement. Or if he were to possess himself of the property after the levy was made, and prevent the officer from applying it to the satisfaction of the execution, the officer would have the right to release the levy, and seize other property in its stead. Where a levy has been made, unless released by agreement of defendant, it can only be removed by a sale, or by an order of the court issuing the execution.

In this case, it is urged, that as the property was not removed from the defendant's custody by the officer, the levy was incomplete. The officer indorsed the levy on the execution, and nothing appears in the record to show that the levy was not legal and binding in every particular; and the evidence abundantly shows that it would have sold at public auction for enough to satisfy the execution. The sheriff does not intimate that he left any act, necessary to a complete levy, unperformed. He had the undoubted right, as the defendant in execution refused to give a delivery bond, to select the custodian of the property, and his having entrusted it to the defendant for safe custody, could in nowise affect the validity of the levy. The sheriff was liable for its production to answer the debt, or its return to the defendant, and he had, for that purpose, the right to entrust it to the defendant, or any one he might choose. If he saw proper to place it in the hands of the defendant, instead of any other bailee, the plaintiff had no right to complain. If it was not forthcoming, the sheriff would be liable to him for its loss, to the extent of its value, not exceeding the amount of his judgment.

The question is then presented, whether the evidence shows that this levy was released with the consent of the defendant. Smith, the attorney, testifies, that Hughes requested him to have the personal property released from this levy, which he did. On the other hand, Hughes positively denies that he ever made such a request, or ever at any time consented that the levy should be released. In this direct contradiction in the evidence, we may conclude that the fact is left in such doubt, that it is equally balanced; and as the plaintiff is required to establish the fact of consent, by a preponderance of evidence, he has failed to maintain his issue. This is clearly the rule, when there is not a preponderance of evidence to establish a fact.

And when two witnesses, of equal credit, make contradictory, positive statements, with equal opportunity of knowing the facts about which they testify, in the absence of a knowledge of their manner of testifying on the stand, we may well say there is no preponderance, and that the fact is not proved.

But in this case, three witnesses testify to an acquaintance with Hughes' character for many years, and that they would not hesitate to believe him under oath, or otherwise. In view of all these circumstances, we are unable to say that the preponderance of the evidence establishes the consent of Hughes to the release of the levy. And failing in this proof, the presumption is that the release was unauthorized, and the subsequent levy was irregular, and was properly set aside and vacated by the court.

The judgment of the court below is affirmed.

Judgment affirmed.

Moses C. Hatfield, Appellant, *v.* Alexander Fullerton, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

To authorize a distress, the rent must be certain and specific; a landlord cannot apportion rent, so as to recover by distress, for the value of part of premises occupied, where the rent has not been fixed.

This was a proceeding by distraint for rent, commenced by appellee.

Distress warrant issued to collect the sum of $196.85, rent for the use of lot 5, in block 60, of Russell, Mather and Roberts' addition to Chicago, dated March 17th, 1859.

On the 12th day of November, 1859, the cause was tried, and issue found for the plaintiff, and damages assessed at $175, and motion entered for a new trial was overruled.

The evidence consists in a stipulation and a lease. Stipulation sets forth that the action is brought by the plaintiff, against the defendant, for rent claimed to be due upon a lease, dated May 1st, 1857, for lot 5, in block 60, in Russell, Mather & Roberts' addition to Chicago. That the distress was made March 17th, 1859, for a balance claimed to be due, of $196.85.

That at the time Hatfield leased the lot of Fullerton, a portion of the lot was occupied by William Burns, under Fullerton, and that Fullerton, at the time of the leasing of it, agreed to give possession of that portion of the premises occupied by

this party, and the party agreed with Fullerton that he would leave; that Fullerton afterwards tore down the fence put up by this party, and tried to get possession, but failed; that Hatfield paid the first and second quarter's rent, under protest, and that at the time he paid the second quarter's rent, he gave Fullerton notice that he would pay no further rent, except said premises were cleared so that he might have possession of the entire lot.

That Hatfield hired said lot, and intended to use the rear portion that was occupied by this party under Fullerton, and a portion adjoining it, as a wood yard; that by reason of the party continuing in the possession and refusing to give it up, under any circumstances whatever, Hatfield was deprived, to a great extent, of the use of the lot, and entirely of the use of the portion so occupied by the party before referred to, also shutting Hatfield off from the alley.

The lease is dated May 1st, 1857, between the parties, and for said lot 5, and to continue until the 1st day of May, 1860, Hatfield to pay to Fullerton, as rent for the same, the sum of $100 for the first year, $125 for the second and third years each, to be paid in quarterly payments, each in advance, and the further payment of all city taxes and assessments. Further covenanting that he had received possession, and would, at the expiration of the time, yield the same, etc.

The point made by the defendant was, that no distress would lie in any case, except the party renting the premises obtain possession of the entire premises leased.

That the defendant is only liable for use and occupation, and that *pro rata*, or in proportion to the amount he occupied.

The errors assigned are:

1. The court erred in entering a judgment in the cause against the defendant.

2. The court erred in entering a judgment in the cause against the defendant for the amount that appeared to be due upon the face of the lease.

3. The court erred in not sustaining the objection of the defendant to the action, and dismissing the cause, because distress would not lie where the party, plaintiff, had not given possession of the entire premises to the defendant.

4. The court erred in not granting a new trial, as prayed for by the defendant, and in overruling his motion for a new trial.

E. F. Runyan, for Appellant.

W. T. Burgess, for Appellee.

BREESE, J. We are satisfied a distress cannot be maintained in a case like this, for the reason, that the landlord has no right to determine for himself what proportion the rent of the premises actually occupied, bears to the rent of the entire premises. His remedy is by an action for use and occupation, in which a recovery can be had on a *quantum meruit*. It is true, the lessee might bring his action to eject the intruder, or tenant holding over a portion of the demised premises, and recover the possession of such portion, but until that is done, the rent cannot be apportioned by the landlord himself, and he permitted to distrain for it. This would be making him the judge in his own cause, of the *pro rata* compensation to which he was entitled. Whether the amount distrained for, was a fair price for the use of that portion of the demised premises actually occupied by him, is not for him to determine. There is no mode provided, by which the proportionate value to the tenant of the different parts of the premises can be ascertained. To authorize a distress, the rent must be certain and specific.

In *Sudwell* v. *Newman*, 6 Term Rep. 458, it was decided that a lessee is not bound to test his right of entry by suit, as the only legal evidence of a breach of the covenant. So in this case, the lessee, Hatfield, was not bound to test his right to that portion of the premises demised, which were in the occupancy of Burns.

The failure of the landlord to give possession of the whole premises leased, as he had agreed to do, deprives him of the right which the law conceded to him of distraining for the rent of that portion of the premises actually occupied, and the only remedy the landlord has, is by an action for use and occupation of such portion. The landlord himself has put it out of the power of the tenant to tender the amount due.

The case of *Lawrence* v. *French*, 25 Wendell, 443, is to this effect.

We are referred by the counsel for appellee to the case of *Gardner* v. *Ketellas and Mc Carthy*, 3 Hill, 330, as a case in point. That case does not conflict with the case cited from Wendell. The opinion in both these cases was delivered by Chief Justice Nelson, and in the case from third Hill, he refers to the case of *Lawrence* v. *French*. The case in third Hill was an action on the case, for the neglect of the defendants to put plaintiff in possession of the demised premises, then occupied by a tenant under a prior lease, and holding over. The court said very correctly, if the party holding over is the wrong doer, the remedy of the lessee is as perfect and effectual to dispossess him after, as that of the lessor was before, the execution of the lease.

This case is a very different one. Here the lessee was put in possession, but not of the whole of the premises demised, and the question is, as to the remedy of the landlord under such a state of facts. The case from twenty-fifth Wendell, establishes the proposition, that it is not by distress, and for the plain reason, that the landlord has no authority to apportion the rent, and proceed for it, in this summary way.

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

Judgment reversed.

Alonzo Watson *et al.*, Plaintiffs in Error, *v.* Charles Reissig, Defendant in Error.

ERROR TO COOK.

A court of law may exercise an equitable jurisdiction over the execution of its own judgments and process; but it will refrain from doing so, when, from any circumstance, it cannot do as complete justice as could a court of equity.

An affidavit should be entitled of the cause in which it is to be used, otherwise it should not be considered, either by the court below or this court.

The right of redemption of a judgment debtor is not subject to be levied on and sold by virtue of another execution. And where such right of redemption has been sold, and satisfaction entered, it is the right and duty of the court to vacate the entry of satisfaction, and issue another execution.

This was a motion, on the part of defendant in error, to set aside and vacate an entry of satisfaction of two judgments in favor of Reissig.

The bill of exceptions in the cause of Charles Reissig against Alonzo Watson and Peter Northrop, in the Circuit Court of Cook county, states, that a judgment by confession was entered on a note and warrant of attorney, on the 29th September, 1857, for $758.81 damages, besides costs, in the above entitled cause, A. C. Coventry, attorney for the plaintiff, on the record, L. B. Taft, attorney for defendants, on the record.

The first execution, a writ of *fieri facias*, was issued to the sheriff of Du Page county; tested 26th Feb., 1858; received by sheriff, March 25th, 1858; and levied by him, May 22nd, 1858, on lots numbers two and three, in block number one, in W. L. Wheaton's addition to the town of Wheaton, in Du Page county. To which the sheriff returned, August 20, 1858, that he was presented with a copy of affidavit of defendant and certificate of judge, staying proceedings. Execution returned and filed Aug. 20, 1858.

A second execution was issued to the same sheriff on the same judgment. This was received November 13, 1858, tested the 12th of the same month, and on the 14th of same month was levied on lots one and two, in block number three, in W. L. Wheaton's addition to Wheaton Village, Du Page county, and the same were thereupon sold by said sheriff, and bid in by Charles Reissig, the plaintiff in above cause, for $810.08, the amount of debt and costs; and a certificate of sale was duly made and filed by the sheriff in the proper office. The sale was on December 11, 1858, and said execution was thereupon, on 20th December, 1858, returned by said sheriff and filed in the clerk's office of this court, as satisfied in full by sale of real estate to the plaintiff.

Another execution or writ of *fieri facias* on a second judgment of said Charles Reissig against the same defendants, for $278.50 damages, besides costs, (in a suit commenced by summons) entered 22nd October, 1858, was received by the sheriff of Du Page county, October 29, 1858, and was levied November 2nd, 1858, on same lots numbers one and two, block number three, in W. L. Wheaton's addition to the village of Wheaton, which, on 11th of December, 1858, were also sold to Charles Reissig, the plaintiff, for the amount of execution and costs, $309.72, and certificate filed for record, and on Dec. 17, 1858, sheriff returned the same satisfied in full by sale of property to plaintiff.

On the judge's docket of October term, 1858, of this cause last named, DeWolf & Daniels' names are entered by the judge as attorneys for defendants. They then (Oct. 13, 1858,) obtained an order to extend the time to plead, and filed an affidavit of merits.

On the 18th of October, 1858, defendants caused to be filed an affidavit intended as a ground for a motion to set aside the judgment in the first above entitled cause, entered by confession, for $758.81 and costs, and to let in the defendants to defend upon the merits. Upon this the judge had granted an order, dated August 7, 1858, staying execution until the further order of the court.

This order was subsequently set aside, and the plaintiff allowed to proceed with execution.

The affidavit and order on file, has the name of no attorney indorsed upon it, or attached, but was prepared and filed by L. E. DeWolf, an attorney employed by Watson & Northrop to make said motion, and said motion was made and attended to by him.

On Tuesday, March 1, 1859, a motion was made by Messrs. Coventry, Rountree & Vaughan, attorneys for Reissig in above

cause, to set aside the sales made on the executions as above recited, and declare the same for naught, and that the judgments rendered therein be ordered to stand wholly undischarged and unsatisfied. Said motion was grounded on two affidavits on file, to which is annexed a notice of the motion, with a certificate at the foot of the notice signed by Harry E. Haydon.

Copy of the motion and certificate above referred to:

CIRCUIT COURT, COOK COUNTY.

CHARLES REISSIG, *vs.* ALANSON WATSON *et al.* } *Two Cases.*

DEWOLF, Sir: You will please take notice, that on the opening of the court, Tuesday, the 1st day of March, or as soon thereafter as counsel can be heard, we will move the court upon affidavit, with copies of which you are herewith served, to set aside the sale made in the above cases, and declare the same for naught, and that the judgments rendered therein be ordered to stand wholly undischarged and unsatisfied. Yours, very truly,

COVENTRY, ROUNTREE & VAUGHAN,
Chicago, Feb. 25, '59. Plaintiff's Attorneys.

Served by leaving a copy of within, at the office of J. DeWolf, Friday, Feb. 25, 1859. HARRY E. HAYDON.

The affidavits above referred to, are both entitled as follows:

CIRCUIT COURT, COOK COUNTY.

CHARLES REISSIG, *vs.* ALANSON WATSON *et al.*

But as this court has decided that they should not have been considered, they are not inserted.

The foregoing motion was submitted to the court by the plaintiff's attorneys, with affidavits aforesaid, with notice of motion attached, and the certificate of said Haydon.

The court, after consideration, made the following order, which was entered on the records of the court:

March 9, 1859.

CHARLES REISSIG *vs.* ALONZO WATSON & PETER NORTHROP: } ASSUMPSIT. *Mo. to set aside Sheriff's Sale.*

This day again comes the said plaintiff, by Coventry, Rountree & Vaughan, his attorneys, and moves the court, on affidavits filed, to set aside the sale of property heretofore made on the execution issued out of this court on the judgment in said cause. And the court, after hearing said affidavits and the allegations set forth by said plaintiff, and being fully advised in the premises, now sustains said motion, and orders that the levy and sale of the following described real estate, to wit: lots number one and two in W. L. Wheaton's addition to the town of Wheaton,

in the county of Du Page and State of Illinois, made by the sheriff of said Du Page county on an execution issued out of this court on the judgment heretofore rendered by this court in said cause, be and the same is hereby set aside, vacated, and held for naught, and said judgment is hereby declared to stand wholly unsatisfied and undischarged.

Afterwards, Mather, Taft & King, as attorneys for defendants Watson and Northrop, moved said court for an order to set aside and disannul the aforesaid order.

The affidavits on which (besides papers on file and records in notice referred to) the latter motion was based, are entitled,

CHARLES REISSIG
vs.
ALONZO WATSON & PETER NORTHROP.
} *In the Circuit Court for Cook County.*

STATE OF ILLINOIS, COOK COUNTY, ss.

And state the facts as they are given in the bill of exceptions, besides a great deal of other matter which is not conceived to be necessary to a clear understanding of the opinion. Affidavits were also filed on the part of defendant in error, in opposition to the last mentioned motion.

The court, MANNIERE, Judge, presiding, after argument, refused to allow the motion, and the order of March 9th, 1859, remained in force.

The plaintiffs in error now bring the case to this court for a revision of the decision of the court below.

MATHER, TAFT & KING, for Plaintiffs in Error.

COVENTRY & ROUNTREE, for Defendant in Error.

CATON, C. J. The law is too well settled to admit of discussion, that a court of law may exercise an equitable jurisdiction over the execution of its own judgments and process, but it does not follow that it will always exercise such jurisdiction, and indeed it will refrain from doing so, when, from any circumstance, it cannot do as complete justice as could a court of equity, but will leave the parties to seek relief in that court. We shall see whether this record presented such a case as justified the court of law in exercising such an equitable jurisdiction.

The objection which is urged to the consideration of the affidavits which were read upon the first motion, is well taken. Those affidavits were not properly entitled, and for that reason should not have been considered by the court below, and cannot be considered by this court.

An objection is also taken to the sufficiency of the notice to

Freer to appear and resist that motion to set aside the sale and satisfaction of the judgment. If that notice was insufficient, and for that reason, as well as for the defect in entitling the affidavit, the court improperly and erroneously granted the order, the whole merits of the case come up on the motion to vacate that order, and we may address ourselves at once to the inquiry, whether such facts appeared on the hearing of this last motion as were sufficient to sustain and justify the order which had been made, and which was then sought to be set aside. The facts may be stated in a very few words. The property had been previously sold on the Savage execution, and there only remained in the judgment debtor a right of redemption. This was levied upon and sold by virtue of this execution, and bid in by, or for, the judgment creditor, and upon that bid and for that consideration, satisfaction of the judgment and execution was entered. And whether this sale and satisfaction should be set aside, was the real question to be determined.

In the case of *Merry* v. *Bostwick*, 13 Ill. R. 398, it was decided by this court, for reasons which we think entirely satisfactory, that the right of redemption which is by our statute vested in the judgment debtor for twelve months after a sale of real estate under a decree or an execution, is not subject to be levied upon and sold, by virtue of another execution against the judgment debtor. Hence this levy and sale conferred no right or title to the purchaser. It was entirely void, and the satisfaction was entered without any shadow of consideration whatever. In such a case it was not only proper, but it was the duty of the court to set aside, or vacate the entry of satisfaction, and to issue another execution under which the judgment creditor might redeem from any sale where the law would permit it, or otherwise seek a real satisfaction of his judgment.

The order of the court below is affirmed.

Order affirmed.

George Mason *et al.*, Plaintiffs in Error, *v.* William Thomas, Defendant in Error.

ERROR TO McLEAN.

A court of law may exercise equitable jurisdiction over the execution of its own process, so as to set aside a sale of land, which was never advertised as required by law.

This was a proceeding, by motion, in the McLean Circuit Court, to set aside a sheriff's sale of real estate, Davis, Judge, presiding.

The motion was filed at the September term, 1859. Notice of the motion was given to plaintiffs in error.

The proceedings were continued to the December term, 1859, by a general order of continuance; when the motion was heard, and the court ordered that the sheriff's sale of real estate of William Thomas, made on the 12th day of October, 1858, under an execution in favor of George Mason, and against Ezekiel Thomas and William Thomas, be set aside, etc., on Thomas' bringing into the court, by the 13th January, all costs, etc.

The order was made absolute—Thomas paying into court, $32.76 costs, etc.

The defendants in the motion, on the rendering of said judgment, excepted thereto.

The bill of exception shows:

By the affidavit of William Thomas, defendant in error, setting forth, "that as appears of record in the proper office in said county, certain real estate described," etc., [here follows description,] "was, on the 12th day of October, 1858, sold by the sheriff, on execution issued out of McLean Circuit Court, in favor of George Mason against E. Thomas and the affiant. Said land appears to have been sold to William W. Orme, attorney for said Mason, for $454.52. Affiant states that, according to the best of his knowledge and belief, said sale of real estate was not advertised as by law required, therefore he prays," etc.

And by the affidavit of George Parke, setting forth, "that on the 12th day of October, 1858, he was deputy sheriff for McLean county, and as such deputy sold the land described in William Thomas' affidavit, in manner and form as therein set forth. That the land sold was never advertised, but, by mistake, a certain tract of land, two miles distant from the land sold aforesaid, was advertised."

And thereupon defendants in the motion, (the plaintiffs in error,) introduced the said George Parke as a witness, who testified that the applicant, William Thomas, told witness of the irregularity in the sale; that he (Thomas) knew of the irregularity at the time of and before the sale. Witness further testified that the irregularity was a mistake in the description of the land in the newspaper advertisement; that when witness' attention was called to the newspaper advertisement, he looked for the posted notices, but could not find them, and could not say whether they were right or wrong. That the right tract of land was levied on, and the right tract of land was sold, but the advertisement in the newspaper described the tract as in section "24," when in fact the land levied upon and sold was in section "34."

SWETT & ORME, for Plaintiffs in Error.

T. L. DICKEY, for Defendant in Error.

CATON, C. J. In the case of *Watson et al.* v. *Reissig*, at the present term, *ante*, p. 278, we have decided that the court of law may exercise an equitable jurisdiction over the execution of its own process, and it is its duty to do so whenever the circumstances require it, and it may be done without injustice to any party. In that case, the sale was set aside on the application of the judgment creditor, who was the purchaser, and another execution was issued. In this case, the application is made by the judgment creditors, who are the owners of the land sold, for the reason that the sale was never advertised as required by law. The question of jurisdiction is the same in both cases, and it requires no further consideration at the present time.

Was such a case made as authorized the court to set aside the sale? The proof is clear and uncontradicted that the premises in question were never advertised as by law required, but that another lot in another section was advertised, by mistake, instead of the lot levied upon and sold. This no more authorized the sale of this lot, than as if no advertisement whatever had been made. That it was the duty of the court to set aside the sale, we have no doubt. The attorney of the plaintiff was the purchaser, and was chargeable with notice of the irregularity.

It is not necessary now, to say whether this irregularity would have rendered the sale absolutely void, so that the owners could have taken advantage of it on a contest of the title acquired under the sheriff's sale.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM F. KEELER *et al.*, Plaintiffs in Error, *v.* GEORGE C. CAMPBELL, Defendant in Error.

ERROR TO LA SALLE COUNTY COURT.

It is erroneous to render a judgment by *nil dicit*, on a declaration having a special count and the common counts, upon the overruling of a demurrer to the special count, when there is a general issue filed to the common counts.

A declaration upon an assigned note is obnoxious to a demurrer, which only avers that the note was "assigned and delivered;" it should aver an indorsement.

Upon overruling a demurrer to a special count, the defendant not answering further, a judgment *nil dicit* should be rendered on that count; and when the jury passes upon the common counts, the special count should also be passed upon, so that there may be but one judgment.

THE facts of this case are stated in the opinion of the court.

D. L. HOUGH, for Plaintiffs in Error.

GLOVER, COOK & CAMPBELL, for Defendant in Error.

WALKER, J. This was an action of assumpsit, instituted in the court below, on an assigned note. The declaration contained a special count on the note, and the common counts. To the special count a demurrer was interposed, and the general issue was pleaded to the common counts. The court overruled the demurrer and defaulted the defendants, and assessed the damages, and rendered judgment therefor, without in any way disposing of the issue on the common counts. To reverse this judgment, defendant prosecutes this writ of error.

The objection urged upon demurrer to the special count, is that it only contains the simple averment that the note described in that count, was assigned and delivered to the plaintiff. It is only by force of the statute that the legal title to promissory notes can be assigned, and in doing so, it is essential that its substantial requirements should be complied with, to have that effect. The statute provides, that such instruments shall be assignable by indorsement thereon, under the hand or hands of the payee, and of his assignee or assignees in the same manner that bills of exchange are, so as absolutely to transfer the property thereof, in each and every assignee successively. By the provisions of this enactment, the legal title to such an instrument, can only be transferred to the assignee, by an indorsement on the note itself, under the hand of the person having the legal title. There is in this count no such averment. If the assignment had been made in writing on a separate piece of paper, or even orally with its delivery, this averment would have been proved. Such a transfer would have passed the equitable title, and yet the holder would have had no right to maintain an action in his own name. The declaration should have contained an averment that the indorsement was made on the note in accordance with the requirements of the statute, and failing in this, the demurrer was well taken, and the court below erred in overruling it.

It was also erroneous to assess the damages while the issue upon the common counts was undetermined. The correct practice required the court, when the defendant below abided by his demurrer to the special count, to enter a judgment *nil dicit* on that count, and then empannel a jury to try the issues of fact under the common counts, and on that trial to submit the assessment of damages under the judgment *nil dicit* to the

same jury. The court, or the clerk under its direction, had no power to assess the damages while there was an issue of fact pending in the cause. The practice does not warrant the splitting up causes of action, and the recovery of several judgments in chief, in the same case. We cannot judicially know that the common counts were on this note, and from aught that appears, the issue under the common counts is still pending, and subject to be at any time called for trial. Such a practice has never obtained, and would tend to increased expense, and a multiplication of judgments, contrary to plain, simple and well established practice. We neither have the right nor inclination to change it, simply because it may work hardship in a single case.

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

Judgment reversed.

James P. Van Dusen, impleaded, etc., Plaintiff in Error, *v.* Frederick H. Pomeroy, Defendant in Error.

ERROR TO GRUNDY COUNTY COURT.

The general issue goes to the entire declaration; it presents an issue of fact which must go to a jury unless otherwise agreed; and although a plea of payment to a part is also filed, the plaintiff cannot take judgment by default for the residue.

When a judgment is to be rendered *nil dicit* as to part of a sum claimed, that judgment should be deferred until the trial of the issues in the case, so that there shall be but one judgment and one recovery.

Where errors are shown by the record of a cause, a bill of exceptions is unnecessary; and the costs of it will be charged to the appellant or plaintiff in error.

This was an action on a note, dated the 26th day of February, 1858, for one hundred and fifty dollars, with use, payable by the first day of November, then next, to Timothy McKanna, and signed by defendants, and indorsed to plaintiff.

Common counts, money paid, had and received, etc., work and labor, and for an account stated, were added.

First plea—Non-assumpsit.

Second plea—Payment, with the exception of twenty-five dollars, with interest on the same from the date of the note.

There was a motion by plaintiff, on the plea of payment, for judgment *pro confesso*, for twenty-five dollars, with interest from date of the note; which was rendered by the court.

A jury was called and sworn to try the issues made, on the two pleas. There was a verdict for plaintiff for one hundred and thirty-four dollars and sixty-four cents, and a judgment for

plaintiff for one hundred and sixty-one dollars and fifty-seven cents.

There was a motion in arrest of judgment, for the following reasons:

1st. Because the plaintiff took judgment by confession, when there was a plea on file denying the whole cause of action.

2nd. Because the order for judgment is more than the verdict of the jury.

Motion overruled, and defendant, Van Dusen, excepted.

SEELEY & SANFORD, for Plaintiff in Error.

J. W. NEWPORT, for Defendant in Error.

WALKER, J. When the general issue was filed to the entire declaration, it traversed every material allegation contained in every count, and put the plaintiff upon the proof of his cause of action. That plea also formed an issue of fact that could only be tried by a jury, unless, by consent of the parties, it was submitted to the court. These are the first and plainest principles of the law of pleadings and practice. They have never been questioned, and they must continue to be acted upon until altered by legislative enactment and constitutional provision, as to the mode of trial. This being the case, the failure of the defendant to plead payment to the whole of the demand claimed in the declaration, gave the plaintiff no right to have a judgment by default for that portion unanswered by that plea, as the general issue had put him upon proof of his whole claim. Nor could the court try the general issue as to that portion, and leave the balance of the issue untried.

Nor was this error cured by the final judgment in the case. When a judgment of *nil dicit* is rendered for a part of the demand, the practice requires the jury to take that into consideration in assessing the damages, or upon the trial of the issues in the cause. Their verdict should embrace the amount admitted by *nil dicit*, as well as any other sum they may find on the trial of the issues. This is the uniform practice of our courts, and we cannot indulge the presumption that it was departed from on the trial of this cause. And if the verdict embraced that portion for which a default was entered, then the plaintiff below has twice recovered that sum, and such a recovery would be a palpable error. Thus we see that even had there been no plea of the general issue filed, it was erroneous to split up the cause of action into several judgments, and thereby harrass the defendant with unnecessary costs.

All the errors in this case are apparent from the orders of

the court appearing upon the record, and the bill of exceptions only presents these orders, and introduces nothing else into it. It was therefore unnecessary and unauthorized by the practice. It served no beneficial purpose, and, on the contrary, unnecessarily encumbered the record, and increased the expense. The plaintiff in error must, therefore, pay the costs occasioned by the filing and embodying it in the transcript.

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

Judgment reversed.

William Church, Plaintiff in Error, *v.* George W. Noble, Defendant in Error.

ERROR TO COOK.

A bond conditioned for the payment of the sum of ——, with a blank for the amount, is void; nothing having been agreed upon as a payment.

This was an action of covenant, brought by the plaintiff in error against the defendant in error, to recover damages for the breach of a covenant, contained amongst others in a lease, dated March 22nd, 1858, made by defendant in error to plaintiff in error, for certain premises in the city of Chicago, known as the "American House." The declaration, after stating the execution of the lease, sets forth the covenant sued on, the breach thereof, and the claim for damages, in substance, as follows:

"And it is further expressly understood and agreed by and between the parties hereto, that said party of the first part (the defendant herein) may, at any time during the term hereby created, take down or cause to be taken down the west wall of said premises for the purpose of rebuilding the same: *provided*, that he shall cause the same to be rebuilt as speedily as possible, and that in rebuilding said wall he may construct the same of such dimensions and thickness as he shall deem expedient, and either in whole or in part, upon said demised premises, as he shall judge most for his interest. The defendant further covenanted and agreed, that he should repair any damage that he might do said premises in taking down said walls, as speedily as possible, and should in addition pay the said party of the second part (the said plaintiff) the sum of ———."

"And said plaintiff avers, that he took possession of said premises under said indenture of lease, and held the same for a long space of time, to wit, for the space of six months, then next ensuing the date of said lease."

"And the plaintiff further avers, that after the making of the said indenture of lease, by the said defendant, and after the said plaintiff so took possession thereof under the said indenture, to wit, on the first day of April, 1858, the defendant, by his servants and employees, entered and took possession of so much of said premises as was necessary to the taking down and rebuilding of the said west wall of the said demised premises, and the defendant did then and there commence taking down said wall, and took down the same for the purpose of rebuilding the same in connection with the owners of the adjoining lot. That the defendant was engaged for a long time in taking down and rebuilding the same, to wit, the space of six months then next following. That during all the said time the plaintiff was thereby deprived of the use of divers rooms, etc. That the use of said rooms during the said time, etc., was worth the said sum of $1,500, and that the plaintiff deserves to have of and from said defendant said sum of $1,500, under the provisions of the said covenant in this behalf, as hereinbefore alleged; of all which the defendant then and there had notice."

The declaration then alleges performance of the said indenture of lease on the part of the said plaintiff, and avers non-payment of the said sum of $1,500.

The defendant craved oyer of the instrument, mentioned in the declaration, and oyer being given, said instrument appears in substance, as hereinbefore stated.

On oyer, defendant demurred to the declaration, and upon the hearing of said demurrer, the court below sustained the same, and gave judgment for the defendant in error, MANNIERE, Judge, presiding.

The plaintiff below, brings the cause into this court, and assigns for error, the decision of the court below, in sustaining the demurrer to his declaration.

W. B. SCATES, for Plaintiff in Error.

SCAMMON, MCCAGG & FULLER, for Defendant in Error.

BREESE, J. Taking the appellant's law, as cited from Comyn on Contracts, 32, 33, and 2nd Parsons on Contracts, 18, 22, to be law, which we do not question, this case must be decided against him, and the decision of the court below affirmed. The quotation is this: "Where there is so great uncertainty that it cannot be known what is contracted for, the contract is void for uncertainty." It was on this ground, the judgment below was placed. What can be more uncertain, in one sense, than the contract here made: "and shall in addition pay the said

party of the second part, the sum of" ——— dollars; and yet, what can be more certain, that the party did not contract to pay anything. The party of the first part did not contract to pay anything in addition, for blank dollars are no dollars. We cannot make contracts for parties; we can only interpret them to enforce them. We interpret this to mean, that ——— dollars are the measure of damages agreed upon by these parties, and they are no dollars, and therefore nothing was to be paid. The judgment is affirmed.

Judgment affirmed.

Edward B. Chumasero, Appellant, *v.* Horatio G. Gilbert, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

The *lex fori* governs the remedy, and, in the absence of pleadings and proofs, regulates the rights of parties under a contract.

To recover or defend under a foreign law, such law must be pleaded and proven.

A note bearing interest, without proof to the contrary, will be presumed to bear the interest allowed by our laws.

This was an action of assumpsit, commenced in the La Salle County Court, by the appellee, against the appellant, and was tried at June term, 1859, before Champlin, Judge, a jury having been waived by agreement of the parties, and a judgment found for appellee.

The declaration contained a special count upon a promissory note, which is in the words and figures following:

$397.69. *La Salle, October 11th,* 1858.

Eighty days from date, I promise to pay to Wm. Chumasero and R. G. Parks, or order, three hundred and ninety-seven and 69-100 dollars, without defalcation, for value received, at the Broadway Bank of New York City.

E. B. CHUMASERO.

The declaration also contained the common counts, but no bill of particulars was filed.

The appellant filed a plea of the general issue.

Appellee applied for leave to file a copy of the note sued on, which was granted, and the cause continued.

The appellee offered in evidence the note, of which a copy is above set out. To the reading of which note in evidence the appellant objected, which objection was overruled by the court, and the appellant excepted. The note was read in evidence.

The appellant then offered in evidence a book, purporting to be a statute book of the State of New York, the purport of which was, that seven per cent. per annum was the lawful interest of the State of New York. To the reading of which book in evidence the appellant objected. The court overruled the objection, and said book was read in evidence; to which ruling and the reading of said book in evidence, the appellant excepted.

The appellee called as a witness, *George Campbell*, who testified, that he had computed the interest on said note at seven per cent., and found it to be twelve 37-100 dollars, and the amount of the note and said interest to be $410.06.

This was all the evidence introduced.

The court then and there rendered a judgment for the appellee for $410.06, besides costs.

The appellant made a motion for a new trial, which was overruled by the court, to the overruling of which motion the appellant excepted.

CHUMASERO & ELDREDGE, for Appellant.

GLOVER, COOK & CAMPBELL, for Appellee.

WALKER, J. It is a rule of uniform application, wherever the common law obtains, that the *lex fori* governs the remedy. And in the absence of pleadings and proof, it regulates the rights of the parties under the contract. If this is not strictly true, it is so with but few exceptions.

When a foreign law is relied upon, either for the recovery of a right, or as a defense, the law must be pleaded and proved. This rule has been repeatedly held by this court, and is regarded as the settled law. Nor are we aware that there is any different rule when the effort is made to recover on a written contract, under the common counts; nor have we been referred to any adjudged case which announces such a doctrine. On the contrary, this and other courts have laid down the rule without any limitation, that to recover or defend under a foreign law, it must be pleaded and proved, as any other fact. And it is for the reason that courts cannot judicially know the laws which obtain in other jurisdictions, and to have effect given to them, they must be brought to the knowledge of the court by pleading and proof.

The note read in evidence in this case, specified no rate of interest, and in the absence of any specific rate, the presumption is, that the rate is the same at the place of its execution, as it is within the jurisdiction of the court. Where no rate is specified, our statute has authorized the recovery of only six

per cent., and the party, to recover more, should have shown by averment in his declaration, that the laws of New York authorized a recovery of a greater rate of interest, and should have sustained the averment by proof. In this case there was no such averment, and there was, consequently, error in permitting proof of that fact.

The judgment of the court must therefore be reversed, and the cause remanded.

Judgment reversed.

Isaac Cook, Plaintiff in Error, *v.* Daniel T. Wood *et al.*, Defendants in Error.*

ERROR TO COOK.

After a term has expired, a court has not discretion or authority at a subsequent term to set aside a judgment, but may amend it in mere matter of form, after notice has been given to the opposite party.

Application to change a judgment, after a term has closed, should be made to a court of equity; or resort must be had to a writ of error.

This action was commenced by Cook, against Wood and his sureties, the latter having been a deputy under the former as sheriff of Cook county.

A demurrer was sustained to the declaration at November term, 1856. The plaintiff had leave to amend his declaration, and the defendants leave to plead by Wednesday morning following.

At April term, 1857, a default was entered against the defendants, and reference was had to the court to assess the damages. The action was in debt on a bond. At the same term at which the default was taken, but forty-seven days afterwards, a judgment was rendered, and damages assessed on the breaches at $5,382.17.

At October term following, to wit, on the ninth day of November, a motion was made by the defendants to open the default, on affidavits, which the court, Manniere, Judge, presiding, allowed. The affidavits were to the effect, that it was supposed that the suit had been dismissed. The cause was again submitted to the same judge, who assessed the damages at $137.07.

The plaintiff below brought the cause to this court, and assigns for error:

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* This case was heard at April Term, 1859.

1. That the court allowed the defendants to file additional affidavits in support of their motion to set aside the judgment.
2. That the court set aside the judgment by default, and subsequent proceedings thereon had.
3. That the court sustained the demurrer of the defendants to the second and third breaches assigned in the narr.
4. That the judgment of the court below was for the defendants in error upon said demurrer.

W. T. Burgess, for Plaintiff in Error.

E. C. Larned, for Defendants in Error.

Breese, J. It is unnecessary to consider but one question presented by this record, as the determination of that, decides the case. The question is, had the Circuit Court power to set aside a judgment regularly entered by default against the defendants, on motion made for such purpose, at a term subsequent to the term at which the default was entered? We are free to admit, the rulings of the courts in the different States, upon this point, are by no means uniform, and no well considered decision of this court has been cited on the point. In *Kerr and Bell* v. *Whiteside*, Breese, Appendix, 6, the defendant's default was entered at March term, 1824, and the motion to set it aside at March term, 1825, which was allowed. After several continuances, at a subsequent term, July term, 1827, the plaintiff failed to appear and was nonsuited, and judgment rendered against him for the costs. On error brought, he assigned as the principal error, the setting aside the previous judgment by default against the defendant. The court being equally divided in opinion, the judgment of the court below, setting aside the default, was affirmed.

In a subsequent case, *Garner and Aydelott* v. *Crenshaw*, 1 Scam. 143, it was held, that after one full term had elapsed, it was too late to apply to set aside a default. It was also ruled in this case, that such application is addressed to the sound legal discretion of the court, and that no writ of error will lie to correct the erroneous exercise of this power.

In the case of *O'Conner* v. *Mullen*, 11 Ill. R. 57, this court held, that Circuit Courts can allow amendments of their records during the term at which a judgment is rendered, without notice; and may allow amendments in matters of *form* at a subsequent term, if notice, actual or constructive, has been given to the opposite party.

This is the extent to which the decisions have gone in this court, and they do not settle the question now presented. In

the case of *Garner* v. *Crenshaw*, the motion was made after a term had intervened. Here it was made at the term next after the default was taken, and the judgment entered up. There it was held, that setting aside a default was an exercise of the discretionary power of the court, which could not be inquired into on appeal or writ of error. We have a right to suppose in that case, a default only, which is interlocutory merely, had been taken, and no formal judgment entered upon it. The court say, the entering the default was an interlocutory order. In this case, a formal and regular judgment on the default was entered, and the term had expired. We admit, that the power to set aside a default is a discretionary power, but hold, that it must be exercised during the term at which the default was taken, and whilst the record, in legal contemplation, is still in the breast of the court. The judgments are, then, *in fieri*, and are amendable at common law. When the judgment is perfected by the solemn consideration of the court, and duly entered on the records of the court, and the term closed, and the court adjourned, the same court which rendered the judgment, cannot have, and ought not to have, any supervisory power over it, at a subsequent term, except to amend it in mere matters of form, on notice to the opposite party, as in *O' Conner* v. *Mullen*, and as allowed by our statute of Amendments and Jeofails.

The case was not regularly on the docket at the term at which the motion was made to set the judgment aside. The power of the court over the case had been previously exhausted, and was at an end, and no power existed to decide on it again, or to change opinions once given, or make new decisions. Errors of law, of any kind, which may be supposed to have crept into the judgment at a previous term, cannot be considered a sufficient justification for revising and annulling it at a subsequent term, in a summary way, on motion. The authorities are full to this point. In *Cameron* v. *McRoberts*, 3 Wheat. 591, the court say, the Circuit Court of the United States for the district of Kentucky, had not power over its decree, so as to set the same aside, on motion, after the expiration of the term in which it was rendered. *Assessors of Medford* v. *Dorsey*, 2 Wash. C. C. R. 433; *The Avery*, 2 Gallison, 386; *Jackson* v. *Ashton*, 10 Peters, 480; *Washington Bridge Co.* v. *Stewart*, 3 Howard, 413; *Jenkins* v. *Eldridge*, 1 Woodbury & Minot, 61; *Catlin* v. *Robinson*, 2 Watts, 373; *Stephens* v. *Cowan*, 6 ib. 511, are to the same effect.

The same general rule obtains in England. 2 Tidd's Prac. 975; 2 Arch. Prac. 243.

It is hardly correct to say, as was said in *Garner and Aydelotte* v. *Crenshaw*, that it is the exercise of a discretionary power not subject to a revision here. After the term has expired, it would seem that the day of discretion had passed, and for any relief against the judgment, as obtained by fraud or otherwise, involving no *laches* on the part of the defendant, application should be made to a court of equity, or if error has intervened, to this court, by writ of error. There would be much danger likely to ensue if the security of titles, founded on judicial proceedings, could be invaded by the exercise of an arbitrary and uncontrollable discretion of the courts over their own records. The limitations imposed by law on writs of error might also become of little worth.

These views do not deprive courts, at a subsequent term, of the power to set right, matters of mere form in their judgments, or to correct misprisions of their clerks, or of the right to correct any mere clerical errors, so as to conform the record to the truth. Irregularities in notices and similar proceedings can also be amended; in short, any amendments permissible under the statute of Amendments and Jeofails, may be proper at subsequent terms, and even after writ of error brought.

But for relief for errors in law, there can be no other appropriate proceedings, than by new trial, bill in chancery, writ of error, or appeal, as either may be found most appropriate and allowable by law. Judgments entered up by fraud might, perhaps, on due notice by *scire facias*, or otherwise, be vacated at a subsequent term by the same court. Untainted with fraud, they must stand until set aside by this court.

The judgment of the Circuit Court, setting aside the default and the judgment thereon, and opening the case, must be reversed, and the original judgment in favor of the plaintiff must stand.

Judgment reversed.

Henry Foreman, and Benjamin Foreman *et al.*, Appellants, *v.* Frederick M. Baldwin, Appellee.

APPEAL FROM SUPERIOR COURT OF CHICAGO.

The right of a court to propound questions to a witness is undoubted, and it is discretionary with the court, whether further questions, as by way of cross-examination, shall be allowed.

The pardon of the Governor does not restore a person convicted of larceny, to his previous position as a citizen, or to his competency as a witness.

THIS was a special action on the case, for fraud and deceit by the Foreman Brothers, defendants in the court below, concerning an agreement with Baldwin, plaintiff below, by which they agreed to sell and deliver to him, clothing and dry goods amounting, at New York or eastern manufacturers' prices, with fifteen per cent. added, to the sum of $7,500, in exchange for a house and lot in the city of Chicago. The declaration contains four special counts, and one count in trover. The fraud and deceit, as alleged, consist in the falsely and fraudulently naming and giving of prices to clothing and goods, as New York or eastern manufacturers' prices, with only fifteen per cent. added, which were at least fifty per cent. above such prices; in falsely and fraudulently representing, that the prices so named and given were the same as those upon the New York invoices or bills of purchase; in false and fraudulent assurances and promises that they, the Foreman Brothers, stood ready to and would produce and exhibit to Baldwin such bills of purchase, and thus satisfy him that the prices so named and given by them were correct; in false and fraudulent promises and assurances that the goods selected should be marked at the correct prices, according to such bills, and properly packed in boxes, and delivered so packed; in fraudulently substituting and packing in boxes, in part, other inferior and different kinds and qualities of clothing, from the kinds selected upon which prices had been so by them named and given; in marking clothing and goods much higher even than the prices so fraudulently named and given, above New York or eastern manufacturers' prices; and in fraudulently stating, after the clothing and goods had been by them packed in the boxes, that the boxes contained the kinds, quality and quantity at the prices agreed, to make up the requisite amount, thus deceiving and defrauding Baldwin, and inducing him to accept and receive the boxes of clothing and goods so packed, as and for a fulfillment of the agreement by the Foreman Brothers, and to procure and deliver a deed of the house and lot, executed by Moss and wife, in whom was the legal title.

It appears from the testimony of witnesses, competent to judge of prices, that the Foreman Brothers, in fact, succeeded in putting off upon Baldwin goods at over one hundred per cent. above New York or eastern manufacturers' prices, from two and a half to three times as high as such manufacturers' prices.

One witness states that the articles he examined ranged from one hundred to two hundred per cent. above New York or eastern manufacturers' prices, and the evidence was abundant to show that this result was brought about by a cunningly

devised and skillfully executed scheme on the part of the Foreman Brothers, the defendants below.

It was proved, that by the agreement goods were to be delivered at New York or eastern manufaturers' prices, with only fifteen per cent. added, of sufficient quantity to amount to $7,500, in payment of the purchase price of the house and lot.

Baldwin was from the country. His principal business was farming, and his knowledge of merchandise and its value was very limited. This the Foremans understood, as Scanlan, one of the witnesses, informed them that "Baldwin was not much acquainted with goods, and very likely they could get a good price out of him, probably two thousand dollars more than they were worth;" and when Baldwin was inclined to be off about the trade, they were anxious to complete it; told him, "they wanted to make a fair, upright trade—let him have the goods at New York manufacturers' prices; that they wanted to keep him as a customer;" they told him so several times. And when Hale, another witness, went to examine their goods and prices, they were at first shy of him; refused to talk with him; said they were dealing with Baldwin, and when he told them he was only there to examine the goods and prices, with reference to Tripp, trading for a portion of them with Baldwin, if Baldwin completed his trade with them, they professed to be willing to trade fair with Mr. Baldwin—"that he should have the goods at fifteen per cent. above New York or eastern manufacturers' prices, and said that if all he wanted was to look through the goods, he might do so." He looked over the clothing, and picked out or indicated to them the kinds Tripp wanted, and sufficient in quantity, as near as he could judge, to amount to $5,000. As they named over prices to him, Hale complained that they were too high, but that if they were to produce the bills of purchase, that was all he wanted. They said they would produce their bills, and he should have a fair and honest thing; "that they would bill off and box them up, and put the eastern manufacturers' prices to them what they were worth, and add fifteen per cent. to them, and make the bill out the next morning." This was Friday or Saturday. Hale was to come the next Monday and look the matter over.

Hale went to store again the next Monday, in the forenoon; found Baldwin and the Foreman brothers there. He asked them what they had done; they told him that they had gone on and selected a few of each kind that he (Hale) had selected, enough to make up the bill (that Tripp was to have of Baldwin.) They said that what he (Hale) had picked out came to about $3,000, and that they had selected a few of each kind that he had selected, enough to make up the complement. He asked

them if they had them billed off; they said that they would make out the bills, and would have it done pretty soon.

He went there in the afternoon with Tripp—asked them about the bill; they said it was not made out—they would have it done as soon as they could—that their book-keeper was out; they said they would make out a bill that day and produce the New York bill, and add the per centage, and everything should be done all right and straight; that they would attend to it all right—that they need not be alarmed—that they could get the goods the next day. Hale says Baldwin finished picking out his goods that day; that Monday afternoon, when he was there, the Foremans were boxing up the clothing and goods; several boxes were packed, and they were nailing them up.

During the interviews Hale had with the Foremans, they told him they manufactured their own clothing East. He asked them how their goods were bought. They said they bought their clothes low at cash, and manufactured as low as anybody could.

Hale testified, that when he went there Monday, in the forenoon, they were boxing up the goods, and nailing up the boxes; that when he left there in the afternoon, pretty much all the clothing and goods were boxed up. Hale also testified that on this Monday they said they had examined the title to the house and lot, and were satisfied with it, and Baldwin gave them the deed.

The next day, Hale went to Minnesota on business.

Some four or five days after Hale went to Minnesota, Tripp went to Foremans' store alone, with an order from Baldwin for that part of the goods that he was to have for Baldwin, and called for the goods. One of the Foremans said they were all right; they were put in boxes, and the boxes were all ready for him. Tripp asked for the bill of the goods, and was told that it was not made out, but that they would have it very soon—that they had been very busy, and had n't had time to make it out; he was requested to call again, and they would have the bill in a short time; he told them he wished to have it made as soon as they could. This was in the fore part of the day.

He went again the next morning, and called for the bill; was told by the clerk that it was not quite finished; he requested them to send the goods over to his store; they said they would, and sent them that day, and shortly after sent the bill.

Hale testified, that the goods were not as bought—not as he had picked them out; that they put in things he did not buy. Baldwin told them he was dissatisfied with the bargain, with the goods; he said they had not billed them to him as they

agreed to; that the goods were not as contracted for; that they should let him have them at New York manufacturers' prices, with fifteen per cent. added, but they had not done so. They said the trade was made, and that was all right; they had nothing to do with him further. He (Baldwin) said that he thought they ought to make it right, or do something in the matter. They said they had nothing to do with him, and would n't do anything with him, and that he could go away.

Hale told them the goods were not as contracted; that they had not billed them as they told him the prices; that they agreed to show him the bills, and had not done so. They said they had nothing to do with him, and that he might go away; and they went into their office and shut the door, and told him to leave the house. Hale wished to see the bills. They said they had nothing to do with him. Baldwin also inquired for the bills. No bills were produced. Baldwin told them his house and lot was worth all he asked for it in money, and he sold it to them cheap, and expected to have the goods in the same way. They said they had made the trade with him, and that was all they had to do with him; that they did not make two trades.

The appellants insist that the evidence in this case tends to show, that while negotiations were pending between Baldwin and Foreman, for the exchange of a house and lot, which Baldwin was to have of Moss, with Foreman for goods, and before any trade was completed, Tripp entered into an arrangement with Baldwin, by which Tripp was to take a portion of said goods, amounting to some $5,000, to be selected by Tripp's agent. That this arrangement was communicated by the parties thereto to Foreman, and it was assented to by him at the same time of assenting to the trade with Baldwin. That Tripp thereby became interested in the contract at the time of its inception as a contract.

In the progress of the trial, the defendants' counsel called as a witness on the part of the defendants, Adolph Katz, to whom the plaintiff's counsel objected as incompetent, giving in evidence the record of the Recorder's Court of the city of Chicago, showing that he was convicted in that court at the February term, A. D. 1859, for petit larceny. The defendants' counsel read in evidence a pardon, dated the 24th day of March, A. D. 1859, by Governor Bissell, of said Adolph Katz, fully pardoning and acquitting him of the said offense, and restoring him to all he had forfeited by reason of such conviction, which pardon was duly issued and under the great seal of the State of Illinois.

Defendants' counsel proposed to prove, by said Adolph Katz, that he was a porter in defendants' store at the time the goods were selected—that the same goods which plaintiff selected were put into the boxes, nailed up, marked and delivered according to the plaintiff's directions. The counsel for the plaintiff objected to the competency of the witness, which objection the court sustained, and refused to permit the witness to be sworn; to which decision the defendants' counsel excepted.

The release relied upon by the defendants below, is as follows:

"Whereas, I have sold to Rudolph Foreman the south thirty-one feet of lot number 4, in block thirteen, in Bushnell's addition to Chicago, the title of which was in John D. Moss, and John D. Moss having conveyed the same to said Rudolph Foreman: Now, I hereby acknowledge the receipt of the consideration of said premises of said Foreman in full for the same, and release and discharge from any further claim therefor. F. M. BALDWIN. [SEAL.]

September 13*th*, 1858.

The court below permitted Hale to testify to his estimate, that the goods were one hundred per cent. and over, higher than they should be. Hale had not been examined upon either side as to his knowledge of the cost of material and manufacture. In answer to questions by the court, he specified the cost of material and manufacture, and said he made his estimate upon that calculation. Yet the court denied defendants' counsel the right of cross-examining him.

The court instructed the jury on the part of the plaintiff—

1. If the jury believe, from the evidence, that with respect to the goods which Tripp was to have, Tripp dealt with the plaintiff and not with the defendants, and that Hale selected goods merely for the accommodation of Tripp and the plaintiff, then the goods which were sent to Tripp are to be deemed sold by the defendants to plaintiff and not to Tripp.

2. If the jury believe, from the evidence, that the release, introduced in evidence by the defendants, was fraudulently obtained by them from the plaintiff, then such release is void.

To the giving of each of which instructions the said defendants' counsel excepted.

The defendants' counsel asked the following instructions:

1. If the jury believe, from the evidence, that while negotiations for the contract in question between the plaintiff and defendants were pending for the goods in question, and before such contract was completed, the plaintiff made a contract with Tripp to the effect, that if said contract with defendants was completed, said Tripp should take a portion of said goods at the store of the defendants, and pay plaintiff in other goods therefor; that Tripp should select the said portion at defend-

ants' store for himself; that said arrangement between plaintiff and Tripp was communicated by them to defendants, and they agreed to the same before the goods were selected, and the goods were selected in pursuance thereof by Tripp or his agent, then the plaintiff is not entitled to recover in this action in respect to the said portion of the said goods so selected by said Tripp.

2. That the recital in the release given in evidence by the defendants, is binding and conclusive upon the plaintiff—that he made the contract in question with Rudolph Foreman, and that he received the consideration for the real estate in question from him, and he is now estopped by the release from denying that the contract was made by Rudolph, and from claiming that the other defendants were parties to it.

Which instructions the court refused, and the defendants' counsel excepted.

5. If the jury believe, from the evidence, that before the goods in question were selected at defendants' store, the plaintiff made an arrangement with Tripp, by which he or his agent were to select a portion of said goods; that the plaintiff was present when his part of said goods were selected, and a portion of those which Tripp was to have; that he, plaintiff, assisted in selecting the same; that the same identical prices which the defendants charged for said goods, were then and there declared to him, and he knew what they were; that if Hale was the agent of said Tripp, and was present at the time of selecting the residue of the goods which were to go to Tripp, and assisted in selecting the same; that the same identical prices which the defendants charged for said goods, were then and there stated, and declared off in the hearing of said Hale; that after all of said goods were selected as aforesaid, the said plaintiff executed and delivered to defendant, Rudolph Foreman, the release dated the 13th September, 1858, read in evidence; such release is a bar to any recovery in this action on account of the manner of selecting, or the prices charged for said goods.

Which instruction the court refused to give in that shape; but having added thereto as follows: "This is the law, if the defendants delivered to the plaintiff and Tripp the same goods which had been selected, and used no fraudulent devices to mislead the plaintiff into an acquiescence, or into an acceptance of the goods," the court gave the instruction as qualified; to which qualification, defendants' counsel excepted.

6. That if the jury believe, from the evidence, that a portion of the goods in question were selected at defendants' store, under an arrangement made between plaintiff and Tripp, that the plaintiff should sell, and said Tripp should buy the same of

plaintiff for certain other goods, or the payment by Tripp of certain money for plaintiff; that such portions were in fact selected by Tripp or his agent, and set apart by Tripp or his agent, and the defendants for him, said Tripp; yet the plaintiff is not entitled to recover anything in respect of said portion so selected and set apart, although the jury believe, from the evidence, that the defendants, after such selection, interfered with said goods, by taking out a part, and substituting others in their place, or by changing the prices charged at the time of such selection.

Which instruction the court refused, and the defendants' counsel excepted.

7. If the jury believe, from the evidence, that the release, read in evidence, was executed by the plaintiff, and delivered to the defendant, Rudolph Foreman, after the goods in question were all selected, and the prices thereof fixed, such release is a complete bar to the plaintiff recovering anything in this action on account of the manner of selecting or affixing the prices of said goods.

Which instruction the court refused to give in that shape; but having added thereto as follows: "Unless fraud or circumvention were used in obtaining the release," the court gave the instruction as qualified; to which qualification, the defendants' counsel excepted.

8. If the jury believe, from the evidence, that the goods in question were the consideration for the premises and house and lot described in plaintiff's declaration; that after said goods were selected and put up in the condition in which the plaintiff or said Tripp received them, and the prices charged by defendants were affixed thereto, the said plaintiff executed and delivered to Rudolph Foreman the release read in evidence, such release is a complete bar to the plaintiff recovering for anything in reference to said goods, which occurred prior to the delivery of such release.

10. If the jury believe, from the evidence, that Hale was the agent of Tripp in respect to the selection of a portion of the goods, and that he, before the goods were selected, informed Tripp that the price was too high, there can be no recovery in this suit, by reason of said portion of the goods in question being charged too high.

Which last two aforesaid instructions the court refused, and the defendants' counsel excepted.

The jury found a verdict for plaintiff, with $2,500 damages, and defendants' counsel moved for a new trial, which motion the court overruled.

The court rendered judgment for the plaintiff on the verdict, and the defendants appealed to this court, and assign for error, the following:

1. Admission of improper testimony.
2. Exclusion of proper and competent testimony.
3. Refusing to defendants' counsel the right to cross-examine the witness, Hale.
4. Excluding the witness, Katz.
5. The giving the several instructions on the part of the plaintiff.
6. The refusing instructions on the part of defendants, and qualifying those given on the part of defendants.
7. The overruling the motion for new trial.

VAN BUREN & GARY, and W. K. MCALLISTER, for Appellants.

FARWELL, SMITH & THOMAS, for Appellee.

BREESE, J. The evidence in this case, conclusively shows, in our judgment, that Tripp dealt with the plaintiff, and not with the defendants. The instructions given on behalf of the plaintiff were, therefore, right. The defendants were responsible to the plaintiff alone for the fraud they endeavored to commit, and which was fully proved. There was no contract or privity whatever between Tripp and the defendants, and he could not have a meritorious cause of action against them, but against the plaintiff only.

The instructions asked by the defendants were properly refused, and those given modified as they should have been. The defendants' theory, that Tripp was interested in the contract at the time of its inception as a contract, has nothing to stand on. He was a purchaser from the plaintiff, Baldwin.

The right of the court to examine a witness, after he has been examined by the parties, cannot be questioned, and it was a matter of discretion to permit a cross-examination. It cannot be assigned for error.

Upon the remaining point, the rejection of Katz as a witness, we are satisfied the governor's pardon did not restore his competency. It could not override that express provision of the statute which declares, most emphatically, that each and every person convicted of larceny, shall be deemed infamous, and shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, of voting at any election, of serving as a juror, and of giving testimony. (Crim. Code, Scates' Comp. 405, § 174.)

The rule contended for by the defendants' counsel, that a pardon restores the competency, is limited to cases where the disability is a consequence of the judgment. But where the disability is annexed, by the express words of the statute, to the conviction, the pardon will not, in such case, restore the competency. It can only be done by act of the legislature. At every session, there are applications of this character.

We see no error in the record, and therefore affirm the judgment.

Judgment affirmed.

John M. Loomis, Appellant, *v.* George Riley, Appellee.

APPEAL FROM COOK.

Where the plaintiff waives the right to take a default, or to rule the other party to file a plea, and proceeds to trial, he is estopped to urge the want of a plea, and must be held to have consented to try the case as though the general issue had been pleaded.

A misrecital of the date of the execution, in a sheriff's deed, does not destroy the validity of the deed, if the judgment and execution are so described therein that they may be fully identified.

A purchaser from one of the parties to a pending suit for partition, acquires his interest in the property, subject to such decree as may be rendered on the hearing. By such purchase, *pendente lite*, he becomes a party to the suit, whether he is a party to the record or not, and if any portion is set off in severalty to his grantor, it enures to his benefit.

So, a mortgage, made on an undivided interest of a tenant in common, *pendente lite*, is only an incident to that interest, and, after partition, is limited to the portion allotted to the tenant in common executing it.

A mortgagee is a necessary party to a proceeding for partition.

A party to the record in a partition suit, should make known his rights, and have his interests protected; and having the opportunity to do so, he is bound by the decree of the court, and cannot collaterally attack it. The same is true of the assignee of such party.

A decree being a matter of public record, a purchaser from one of the parties to the record, is presumed to have bought with full knowledge of the decree.

This was an action of ejectment, brought by appellant against appellee, who was the tenant of A. J. Higgins, to recover possession of a portion of the south-west quarter of Section 22, Township 39 north, Range 14.

The evidence on which the decision of the court is based, is fully stated in the opinion.

H. F. Waite, and J. W. Chickering, for Appellant.

J. B. Thomas, for Appellee.

WALKER, J. It is agreed that Harmon was previously invested with the title to a tract of land which embraced the premises in controversy, and that both parties derive their titles mediately from him. The plaintiff on the trial below, read in evidence a deed from him to John Peck and three other persons in common, for $49\frac{99}{100}$ acres, of which the premises in controversy were a part. A deed from Peck to Lyman, a deed from him to Sayer, and a deed from him to Bronson, each for an undivided fourth of the premises. He likewise introduced the record of a proceeding in chancery, instituted by a tenant in common of this land, against Peck and others, for a partition according to the respective interests of the parties. An amended bill was afterwards filed, alleging that Sayer had become the owner of Peck's fourth of the premises, and making him a defendant. The bill was again amended, alleging that Bronson had become the purchaser of that interest in the tract of land, and he was made a defendant.

On a final hearing of the cause, the court found and decreed, that Bronson was the owner in fee, unincumbered, of one-fourth part of the premises. The court further found and decreed that Peck, Sayer and Lyman, with other defendants, were entitled to no right in the land. The court also decreed a partition of the premises according to their respective interests. This decree was rendered on the 22nd November, 1851, and was executed and carried into effect, and partition deeds were executed in conformity with the partition, on the 26th day of the same month. By the partition, the premises in controversy with other portions of the tract, were assigned and conveyed to Bronson. The plaintiff also read in evidence the record of a judgment in favor of plaintiff and against Bronson and S. A. Lowe, recovered at the June term, 1855, of the Cook Circuit Court, for $1,511.50, and an execution issued on this judgment, dated June 29th, 1855, with a levy on the premises in controversy, dated the 24th of September following. Also a sheriff's deed for the premises, reciting the judgment correctly, but reciting the execution as bearing date on the 23rd day of June, 1855, to John C. Miller, executed on 21st of May, 1856. Likewise, a deed from Miller to plaintiff, dated on 23rd of May, 1857.

The defendant then introduced a mortgage on the undivided one-fourth part of the whole tract, of $49\frac{99}{100}$ acres, executed by Bronson to Sayer, on the 26th day of July, 1851, with the entry of satisfaction of the same by S. P. Tracy, on the 9th day of February, 1858. Also, an assignment of this mortgage by Sayer to David Magie, on the 10th of September, 1852, and an assignment of the same on 31st of October, 1855, by David

Magie to Sherman P. Tracy. Likewise, a deed from Tracy to A. J. Higgins, dated on the 18th day of December, 1855, conveying the tract in controversy with other portions of the mortgaged premises. It was admitted that the defendant was in possession, holding under Higgins, at the commencement of this suit. On this evidence, the judge who tried the case by agreement, without the intervention of a jury, found the issues for the defendant, and the plaintiff thereupon entered a motion for a new trial, which the court overruled, and rendered a judgment against the plaintiff. To reverse which, he prosecutes this appeal.

It is first urged, that the court below erred in trying the cause without any plea having been filed to the second count of plaintiff's declaration. While this is not strictly formal, this court has repeatedly held, that it is not such an error as will justify a reversal of the judgment. When the plaintiff waives the right to take a default, or to rule the other party to file a plea, and proceeds to trial, he is estopped to urge the want of a plea, and must be held to have consented to try the case as though the general issue had been filed. There is no force in this objection.

On the trial below, no objection was interposed to any portion of the appellant's evidence, except to the sheriff's deed. It is urged that as it misrecited the date of the execution upon which the sale was made, no title passed to the purchaser. The deed, in all other respects, accurately described the parties, the judgment and execution. The object of the statute in requiring a recital of the judgment and execution, is only to identify them, and when that is done so that they cannot be mistaken, the requirements of the law have been satisfied. It has been repeatedly held by the courts in New York, that the misrecital of the judgment in the deed will not vitiate or destroy the title. The same doctrine is fully recognized by this court in the case of *Phillips* v. *Coffey*, 17 Ill. R. 154. There can be no difference in the principle, whether the misrecital relate to the judgment or the execution, and the authority of that case is conclusive on this question, as the reference in this deed to the execution is such as to clearly and unmistakably refer to the execution read in evidence. No one can hesitate to believe it is the same. This, then, entitled the appellant to recover, unless the appellee destroyed the *prima facie* case made by his evidence.

It is insisted that this was done, by showing the mortgage to Sayer, and its assignment to Magie, and by him to Tracy, and his deed to Higgins, the landlord of the defendant in this suit. Sayer was a purchaser *pendente lite*, and also sold to Bronson in the same manner. Having purchased of one of the parties

to the record, while the suit was pending, he acquired his interest in the property, subject to such a decree as might be rendered on the hearing. This is true, whether he became a party to the record or not, as he became a party to the suit when he purchased *pendente lite*. This rule is too familiar to require illustration or the support of authority. He purchased an undivided fourth of the tract of land, and when he sold it, he took a mortgage of Bronson on that interest. Had he retained the title to a fourth of the land, he would, when partition was made, have held one-fourth of the premises in severalty, whether a party to the record or not, as the interest of his grantor would have enured to his benefit; and so with Bronson, his grantee, who had allotted to him his fourth of the premises, in severalty, including the premises in controversy. Had Sayer set up and relied upon his mortgage as a subsisting lien, it would have been protected, by limiting it to the fourth decreed to Bronson. A mortgage thus made, on an undivided interest of a tenant in common *pendente lite*, is only an incident to that interest, and must follow it, to the portion allotted to the tenant in common executing it. When the interest of the tenant in common has been ascertained and limited by partition, to a specific portion of the premises, mortgagees of his interest must be limited to the specific portion thus allotted to the mortgagor. Otherwise, any tenant in common would have the power of defeating an effectual partition, by executing a mortgage at any time before the execution of the decree making partition. But such cannot be the law, as the mortgagee or purchaser takes, subject to have his interest limited, by the decree, to the specific portion of the mortgagor or grantor.

The court, on the hearing, found and decreed that Bronson held his undivided fourth, derived through Peck in fee, and free from incumbrance. And that Sayer had no interest in the premises. But it is urged that a mortgagee is not a necessary or even a proper party to a proceeding in partition. Our statute regulating partitions requires that the petition shall particularly describe the premises, and set forth and make exhibits of the rights and titles of all parties interested therein, so far as known, including tenants for years, for life, by the courtesy or in dower, and of persons entitled to the reversion, remainder or inheritance, and of every person, who upon any contingency, may be or become entitled to any beneficial interest in the premises, so far as the same are known to the petitioner. The third section requires all persons having such an interest to be made parties to the proceeding. The eighth section requires the court to ascertain from evidence in case of default, or from the confession by plea or by the verdict, and declare the rights,

titles and interests of all the parties to such proceedings, petitioners as well as defendants, and give such judgment as may be required by the rights of the parties. This statute is certainly comprehensive enough to embrace a mortgagee within the rights and interests required to be made parties. He has such an interest in the premises, that he may become entitled to a beneficial interest upon default in the payment of the money. Upon a report of commissioners in such a proceeding that the property is not susceptible of a division, and a sale is decreed, the amount of the mortgage should be ascertained, so that the rights of the mortgagor and mortgagee might be adjusted. He has by conveyance a present interest in the land, and not a mere lien, that may ripen into an interest. He and the mortgagor represent the whole title of the portion of the land, mortgaged. And whatever may be the decisions of courts, we think that the statute is broad enough to, and does require mortgagees as well as mortgagors to be made parties to a proceeding for partition.

We have been referred to decisions of the courts in New York, where it is held that a mortgagee is not a proper party, and cannot be, so as to affect his interest. This is true in that State, and it is for the reason, if for no other, that the statute in that State regulating partitions, has declared that he shall not be made a party. Their courts have also held, that whether the proceeding be by bill in equity, or by petition under the statute, the court must conform to the requirements of the statute, and hence in equity they have held that a mortgagee is not a proper party. Had our statute dispensed with him as a party, there can be no doubt that we should hold him to be not only an unnecessary, but an improper party.

Again, the court had jurisdiction of the subject matter, whether the proceeding was in equity, or a petition at law; and whether it was the one or the other, the publication of the notice of the pendency of the suit, was authorized, and by that means the court acquired jurisdiction of Sayer, and if he felt that he was not a proper party, he should have raised that question by plea or answer, and having failed to do so, he must be bound by the decree. He was claiming to be the mortgagee of this interest, at the time the decree was rendered, and being a party to the record, if his mortgage was *bona fide* and subsisting, he should have set it up and had his interest protected on the final hearing. Having had the opportunity of doing so, and the court having found and decreed that he had no interest in the premises, he was by the decree barred from asserting it, so long as the decree remained in force. It could not be by him attacked collaterally. And his assignee could only be substituted to his rights and

interests, as declared by the court. He purchased the mortgage almost a year after the decree was rendered, and consequently acquired no right under it, against the mortgaged property. The decree being a matter of public record, and Magie having purchased of one of the parties to the record, the presumption is, that he did so with full knowledge of the decree, and must have relied alone on Bronson's responsibility, and not upon the mortgage. But whether or not he supposed he was acquiring any lien on the property, as his vendor had been barred by the decree from asserting it, he acquired no other or better right. By that decree, the property became fully discharged from this mortgage, and Sayer and his assignee lost all right to assert it, against any portion of the land, whether as against an undivided fourth or a specific portion.

When Miller became the purchaser, under the execution against Bronson, he acquired the title, freed from any lien, of this mortgage. The plaintiff having adduced a sufficient legal title to authorize a recovery, and the defendant having failed to defeat that right of recovery, by showing a better title, either in himself or outstanding, the court errred in finding for the defendant, and rendering a judgment in his favor. Wherefore the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

John Taylor *et al.*, Plaintiffs in Error, *v.* James Pettijohn, Defendant in Error.

ERROR TO TAZEWELL.

The act of 1845, for the condemnation of the right of way, is in force, where its provisions are not repugnant to the act of 1852, passed for the same purposes, the latter being amendatory of the former. And where a corporation is authorized to acquire right of way, under the act of 1852, or as authorized by any other act, such authority embraces the act of 1845; and trespass will not lie against those who enter upon land, under a condemnation, by force of that law, where it has been acquiesced in.

This was an action of trespass *quare clausum fregit*, commenced before a justice of the peace, of the county of Tazewell, by the defendant in error, against the plaintiffs in error, and verdict and judgment in favor of plaintiff. Defendants below then filed their appeal bond, and prayed an appeal to the Circuit Court. And on the trial of said cause, the court (a jury having been waived,) found the issues for the plaintiff below,

and assessed his damages at ten dollars, and for that sum rendered judgment against the defendants below. To reverse which judgment the plaintiffs in error bring this case to this court.

On the trial of this cause, plaintiff below, to maintain the issues on his part, called a witness, who testified to the entry of defendants on plaintiff's land, for the purpose of doing work on the Tonica and Petersburg Railroad. But he thought plaintiff's land was damaged twelve or fifteen dollars by means of the entry thereon by defendants.

Defendants then offered in evidence the charter and amendments thereto of the Tonica and Petersburg Railroad Company. In the original charter there was a section relative to acquiring a title to the land for the right of way for said railroad, which is as follows, to wit:

"SECTION 4. The said company are hereby authorized by their engineers, agents and surveyors, to enter upon any lands for the purpose of making the necessary survey and examination of said road, and to enter upon and take and hold all lands necessary for the construction of said road, and all such lands as may be required in the construction of bridges, dams, embankments, excavations, spoil-banks, turn-outs, depots, engine-houses, shops, turn-tables, and other necessary improvements or buildings, first making just compensation to the owners or occupiers of said lands, for damages that may arise to them from the appropriation thereof to the uses aforesaid; and in case said company shall not be able to obtain the title to the lands required for said uses by purchase or voluntary cession, the said company are hereby authorized to proceed to ascertain and determine the damages sustained by such owners or occupiers, and obtain right and title to said lands in the manner and upon the principles provided in 'An act to amend the law concerning the right of way for purposes of internal improvements,' approved June 22nd, 1852, or in the manner and upon the principles provided by any other act, that may have been or may hereafter be passed by the General Assembly of the State of Illinois, to enable railroad companies to appropriate lands for the purposes aforesaid."

Defendant then offered in evidence the certificate of secretary of the company, that the company was duly and regularly organized under the provisions of its charter.

Defendant then proved the execution of, and offered in evidence the following papers, to wit:

The appointment, by a justice of the peace, of three commissioners to appraise and assess the damages done to the land of

James Pettijohn, by reason of the construction of the Tonica and Petersburg Railroad over said land.

Notice, and proof of the service thereof, to James Pettijohn, that on the 20th day of October, 1858, the persons appointed to assess the damages that might accrue to him, by reason of the construction of said Tonica and Petersburg Railroad over his land, would proceed to view said land and assess the damages that might accrue to him, the said Pettijohn, by reason of the construction of said railroad across said land, and that he, the said Pettijohn, might appear on said land at that time, if he saw proper.

A certificate, that the said persons appointed to assess said damages, had been severally sworn to discharge their duties according to law, and that they were not interested, directly or indirectly, in said land, and were neither of them of kin to the said James Pettijohn.

The report of the commissioners appointed to assess said damages, that, after having viewed said land, they are of the opinion that the construction of said railroad would greatly enhance the value thereof, and that the damage done to the owner thereof, over and above the benefit derived from the construction of said railroad, is one dollar, which sum they assess to said Pettijohn, as damages.

To the introduction of all which, plaintiff objected, and the court sustained the objection, and excluded said evidence.

Defendants then called *Josiah Sawyer*, who testified that he was a director of the Tonica and Petersburg Railroad, and had been such since its organization. That he endeavored to procure of plaintiff the right of way for said railroad over plaintiff's land, but that they could not agree, and he procured the damages to be assessed. That defendants, Cantwell and Evans, were contractors on said railroad, and they went on plaintiff's land for the purpose of constructing said railroad, and that defendant, Taylor, was the agent of Cantwell and Evans.

H. M. & J. J. Wead, for Plaintiffs in Error.

C. C. Bonney, for Defendant in Error.

Walker, J. The question presented by this record is, whether the plaintiffs in error could justify their entry upon the land of defendant, under the proceedings had to condemn the right of way by the railroad, and to assess the damages for the same. The proceedings were had under, and in conformity to, the provisions of the act of 1845 (R. S. 477), entitled, "Right of way." It is urged that the company were bound to proceed

under the act of June 22, 1852, (Scates' Comp. 481), which is entitled "An act to amend the law concerning the right of way, for purposes of internal improvements." This latter act is entitled as an amendatory law, and in terms repeals no portion of the former act. This being the case, only such portions were repealed as were repugnant to the provisions of the latter statute. Every portion of the first act, which is not in conflict with the latter, is still in force. In the case of *Austin* v. *Belleville and Illinoistown Railroad*, 19 Ill. R. 310, this court recognized the act of 1845 as being in force and unrepealed.

Although we might hesitate to hold that the road might proceed to condemn the right of way, and assess damages under the act of 1845, independent of their charter, yet it, we think, confers that right. The charter of the company, under which plaintiffs in error seek to justify, authorizes the company, in acquiring the right of way, to proceed under the act of June 22, 1852, or in the manner and upon the principles provided by any other act that may have been, or may thereafter be passed by the General Assembly, to enable railroad companies to appropriate lands for the use of such roads. This provision is broad and comprehensive in its terms, and undoubtedly embraces the act of 1845, it being the only general act adopted for that purpose, prior to the act of 1852, and no other previously passed, could have been referred to by the General Assembly.

Their charter authorizes them to proceed in the manner, and upon the principles of this act, and it is not objected that there was any failure in respect to either. The commissioners were appointed by the proper officer, took the required oath, the owner had notice of the proceeding, the commissioners assessed the damages, and they were tendered to and refused by the owner. He acquiesced in the proceeding, took no appeal, and did no act to avoid its effect. This proceeding must therefore be held to justify the entry of the employees of the company, for the purpose of constructing the road.

The court below therefore erred in rendering judgment against plaintiffs in error, and it must be reversed, and the cause remanded.

Judgment reversed.

Henry M. Clark, Plaintiff in Error, *v.* Alfred J. Groom, Defendant in Error.

ERROR TO KANE.

The verdict of a jury, as to the good faith of an assignment, will not be disturbed, unless the proof shows clearly that the assignment was fraudulent.

The lack of pecuniary responsibility on the part of an assignee, is not conclusive evidence of fraud.

This was an action of replevin, brought by defendant in error against plaintiff in error, to recover certain property which the defendant, as sheriff, had seized on execution, under a judgment against one Stephen March. Plaintiff claimed the property as the assignee of March, under a voluntary assignment.

The defense was, that the assignment was void. That the assignee was not responsible pecuniarily, and that his habits were such as to show fraud in the assignment.

The jury found the issues for the plaintiff, and judgment was rendered in accordance with the verdict.

Eastman & Botsford, and J. L. Beveridge, for Plaintiff in Error.

W. D. Barry, for Defendant in Error.

Caton, C. J. We do not think the evidence in this case requires us to disturb this verdict. The principal evidence of fraud relied upon, is the habits of the assignee, and his pecuniary irresponsibility. The proof shows that he is in the habit of frequenting saloons evenings, where he sometimes drinks to excess, and sometimes gambles for very small amounts. The evidence also shows that he is a very industrious mechanic, and of unquestioned integrity. His pecuniary responsibility is nothing. Unquestionably, this was an injudicious selection of an assignee, but it is not conclusive evidence of fraud in the assignment. The other circumstances of fraud relied upon, are very slight. Upon a proper application, by the creditors, no doubt the court of chancery would remove him from the trust, and appoint a receiver to perform the duties devolving upon the assignee, but we do not think the assignment itself should be disturbed. The facts established do not show that the assignment was fraudulent and void, as a matter of law, and the jury have found that it was not fraudulent as a matter of fact.

The judgment must be affirmed.

Judgment affirmed.

JONATHAN BLINN *et al.*, Appellants, *v.* ALBERT S. EVANS, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

A person who advances money, at the request of one of the members of a copartnership, to take up an indebtedness which is apparently binding on the firm, will, if he acts in good faith, be protected, and may recover his advances from the firm.

Aliter, if he knows that the indebtedness is the individual debt of the partner requesting the advance, or that the money is to be used by such partner in his individual capacity.

Each partner is the agent of the firm, and it is bound by the acts of each individual member within the scope of its business.

THIS was an action of assumpsit, brought by appellee against appellants, together with one Cyrus Adams, as partners, to recover a sum of money which he had paid, at the request of Adams, to take up a note signed "Adams, Blinn & Co.," held by Bailey and Mead.

Appellants and Adams comprised the firm of Adams, Blinn & Co.

The declaration contains the common counts for goods, wares and merchandise; money lent; and money had and received; for interest; and upon account stated.

The defendants plead the general issue.

The defendants, Eddy and Blinn, file an affidavit that they have a good defense.

A jury is waived and the cause submitted to the court for trial, and judgment for the plaintiff.

Defendants Eddy and Blinn entered a motion for a new trial, which motion was overruled by the court, and exception taken.

Judgment for the plaintiff for the sum of $1,060.81 and costs.

From this judgment the defendants Eddy and Blinn appeal to the Supreme Court.

J. W. CHICKERING, for Appellants.

WALKER, VAN ARMAN & DEXTER, for Appellee.

WALKER, J. The evidence shows that the appellee paid the money on the note, to the firm of Bailey & Mead, at the request of Adams, a member of the firm of Adams, Blinn & Co. The note purports on its face to have been given by the latter firm, and the record contains no evidence that appellant had any notice that it was not given by that firm, or was not given for copartnership purposes, and in the usual course of busi-

ness. For aught that appears he may have acted in perfect good faith in advancing the money for, and in paying the note. We perceive nothing in the record to charge him with knowledge that the note was given for Adams' individual debt, or to put him upon inquiry. The question is then presented, whether a person who, at the request of one of the members of a copartnership, advances money and takes up an indebtedness which is apparently binding on the firm, does so at his peril, and to protect himself, is bound to ascertain and know that the indebtedness was incurred for partnership purposes, and if a note, that it was given by authority of all of the individuals composing the copartnership.

If the person advancing the money is aware of the fact that the note was given or the indebtedness was incurred by one of the partners, without authority and for his individual indebtedness, or that the note was a forgery, he would thereby render himself chargeable with an attempt to defraud the partnership. Were he under such circumstances to make the payment, he could have no claim on the firm to have it refunded. But when he acts in good faith, and at the instance and request of one of the partners, and makes a payment on what appears to be a valid demand against the firm, he must be protected. If the partner at whose instance he acted had borrowed the money of him for firm purposes, and had afterwards misapplied the money by appropriating it to his own use, no man would doubt his right to recover for the money thus loaned. It forms no part of the duty of a person loaning money to a firm to see to its application, if it was loaned for the purposes of the firm. But the law will protect the other members of the partnership against the fraudulent acts of one of its members, when a knowledge of the fraud can be traced to the person giving the credit. Yet the law will never permit a firm to perpetrate a fraud upon others by the use of the firm name in the transaction of the business of the partnership, or that which appears to be for that purpose. When the partnership is formed, each member becomes and is thereby created an agent of the firm, and it must be bound by all of the acts of each individual member within the scope of its business, unless bad faith is chargeable upon those dealing with the partner. Were it otherwise, it would enable partnerships to perpetrate frauds, without remedy. The appellant having paid this money at the request of one of the partners, on a note which appeared to have been given by the firm, and without any notice that it had been given for Adams' debt, or that it was claimed to have been a forgery, is entitled to recover, and the judgment of the court below is affirmed.

Judgment affirmed.

The Illinois and Mississippi Telegraph Company, Plaintiff in Error, *v.* William Kennedy, Defendant in Error.

ERROR TO GRUNDY.

Where a corporation is sued, the service should be upon the president of it, if he resides in the county in which the suit is brought.

The return must be positive as to the service on the proper officer; the sheriff must take the responsibility of determining the fact.

A service on A. B., *as* president, is not good.

This was an action of assumpsit against the Mississippi Telegraph Company, for an injury sustained by a horse of the defendant in error, by running against the telegraph wire, which, it is alleged, was left too near the earth.

The return to the process issued in this case, was, "Executed this writ, by reading the same to J. D. C., as president of the Illinois and Mississippi Telegraph Company, and by leaving a copy of this writ with him, Sept. 15th, 1855."

There was a judgment by default in the Grundy Circuit Court, on the verdict of a jury, for one hundred and sixty dollars.

The case was brought to this court by writ of error.

B. C. Cook, for Plaintiff in Error.

T. L. Dickey, for Defendant in Error.

Breese, J. We hold the service insufficient in this case, for the reason that the writ is against the Illinois and Mississippi Telegraph Company, and the service authorized by the act (Scates' Comp. 243,) shall be on the president of the company, if he resides in the county in which the suit is brought.

The return must be positive that the writ was served upon the president, and the officer must take the responsibility of determining the fact. To serve it upon A. B. "as president," is not a compliance with the statute. The judgment is reversed.

Judgment reversed.

Caton, C. J., did not sit in this case.

Balthaser Born, Plaintiff in Error, *v.* Nicholas Staaden, Garnishee of Michael Hambrecht, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

A person upon whom garnishee process has been served, cannot protect himself by answering, that whatever debt he owed, or might owe, the defendant, in the garnishee process, had been assigned. The good faith of the assignment must be made to appear.

The garnishee may take a rule upon the party for whose benefit an assignment is made, to make him show the genuineness of the transaction; which, if he fails to do, will defeat his recovery of the assigned debt.

There was an affidavit of plaintiff for garnishee process, sworn to and filed in the Superior Court of Chicago, on the 1st day of July, A. D. 1859, which sets forth that the plaintiff lately recovered a judgment in the Cook County Court of Common Pleas, against Michael Hambrecht, for the sum of $558.82, and $17.32 costs of suit.

That an execution had been issued on said judgment, and returned by the sheriff of Cook county, "no property found."

That said Michael Hambrecht has no property within deponent's knowledge, in his possession, liable to execution; that the deponent hath just reason to believe, and does believe, that one Nicholas Staaden is indebted to said Hambrecht, and hath effects in his hands belonging to said Hambrecht, and praying writ of garnishment against said Staaden.

That in pursuance of said affidavit, a garnishee summons was issued July 1st, 1859, which was forthwith served on said Staaden.

That plaintiff caused interrogatories to be filed for said Staaden to answer as garnishee aforesaid.

To which Staaden answered, substantially, as follows:

That garnishee did, on the 11th day of April, 1859, enter into a contract with said Hambrecht, to build him a house or store in the city of Chicago, whereby garnishee was to pay him $400 when roof on house, $345 when work entirely completed and accepted by architect, $300 three months after work accepted, and $300 six months after completion and acceptance of work; that Hambrecht was to do all the carpenter work of house, roofing and painting, and was to furnish lumber, glass, locks, etc.; that in fact, he was to do all the work on house, except mason work, plastering, and furnishing gas and water pipes, and iron posts for front of house; that building was to be completed by the 15th day of July; that for every day after that period that building remained uncompleted, Hambrecht was to forfeit two dollars.

That at time of service, said building was partially completed, the roof was on, some painting done; some, but not all, the windows were in; that he had then paid Hambrecht at least $600; that after service of process Hambrecht continued to work, with frequent intermissions, till date of answer; that house was not then completed, nor was it accepted by the architect; that it was impossible to state amount due on contract at time of service, or then, by reason of unfinished state of building, but garnishee was of opinion that the amount would be between $400 and $500.

Said garnishee also says, that he cannot state whether at the time of the service of garnishee process he had any moneys, credits, lands, tenements, goods, chattels, or effects, or property in his hands, or whether he was in any wise indebted to said Hambrecht or not.

He also says, that on the 13th day of September, 1859, he was served with notice of what purported to be an assignment of said contract by Hambrecht, to one August Lupsch; that said assignment purported to be acknowledged May 25th, 1859, before a justice of the peace.

That said garnishee did further answer—

1. That garnishee and said Hambrecht did enter into a contract in writing for building house mentioned in first answer herein—that it is dated April 11th, 1859, and that, exclusive of specifications and plans, it is in following words, (setting it out), which is substantially as stated in first answer, except that the contract does not, in fact, provide that Hambrecht shall forfeit $2 for every day house remains unfinished after July 15.

2. That at the time of service of garnishee process, he had paid Hambrecht $450 for lumber to put in building, and $126 in liquor, making, in the aggregate, $576; that at said time roof was on house, and most of the joists were up—but that he cannot state with certainty, or approximate to what was then done, or the relative portion done.

That since filing of first answer, he has, with his architect, made calculation of amount due on the 27th day of September, 1859. That amount then found to be due, by garnishee and architect, to Hambrecht on contract, and which is still due, is $613, from which he claims a deduction for delay in house not being completed by the time agreed on in contract. That after deducting amount of damage which he claims, there is still a balance due on contract, of $467, payable as by terms of contract.

Garnishee further states, that he owes Hambrecht in addition, and on a separate trade, $8, to be paid in liquor on demand, and $11 for extra work.

Also, that on the 4th day of October, 1859, suit was commenced in Superior Court of Chicago, in the name of said Hambrecht, for the use of August Lupsch, against said garnishee, for the recovery of money due on said contract.

That it was decided by architect that there was only $13.66 due October 14th, 1859, on contract, to Hambrecht—that another payment would become due December 23rd, 1859, and the last payment, March 23rd, 1860.

That afterwards, to wit, on the 22nd day of February, 1860, the said cause was submitted to the said court on answers, without intervention of jury, by agreement of parties, and the said court, upon consideration thereof, discharged garnishee, and judgment was rendered against plaintiff for costs.

S. A. Irvin, for Plaintiff in Error.

Monroe & Spencer, for Defendant in Error.

Caton, C. J. The garnishee admitted an indebtedness to the judgment debtor, of four hundred and sixty-seven dollars on the building contract, over and above his claim for damages for delay, and nineteen dollars on account of extra work and another transaction. A part of this was due at the time, and a part was to become due. We find nothing in the record, in the face of these admissions, to justify a judgment in favor of the garnishee. Indeed, it is admitted that as to nineteen dollars, judgment should have been entered against the garnishee. As to the balance due upon the building contract, the garnishee answered, that on the 13th September, 1859, he was served with what purported to be an assignment of the amount due on the building contract, from the judgment debtor to one Lupsch, which purported to have been dated on the 25th May, 1859. It must be borne in mind that the garnishee process was served on the 1st of July, 1859. Should we say that the statement or answer by the garnishee, that he had been served with notice of what purported to be an assignment of a debt, without any evidence, or even the expression of an opinion, that it was genuine, should be held sufficient to discharge the garnishee, we lay down a principle which will, or may, at least, defeat the purposes of the law in all cases. We appreciate that the subject is not without its embarrassments, as the statute now stands. We are not now prepared to say that a *bona fide* assignment of a debt, before the service of the garnishee process, may not defeat it, but it must be shown to be a *bona fide* assignment, upon a consideration passed. We can easily perceive the difficulty in which a garnishee may be placed, who is obliged to prove a *bona fide* assignment, in order to save himself from a

judgment in the garnishee proceeding, while he may not know or have the means of showing whether the assignment is genuine or not. We think we should be doing no violence to the spirit of the attachment law, to require the assignee to appear, upon notice by the garnishee, and establish the genuineness of the assignment; and if he will not do this, he should not be allowed subsequently to recover against the garnishee. We are prepared to say that it would be a good defense by the garnishee to an action in the name of his creditor for the use of the assignee, to show the judgment against the garnishee in the attachment proceeding, and that the assignee, upon reasonable notice, had neglected to appear and vindicate the *bona fides* of the assignment, and his sworn statement filed with it as a part of the garnishee's answer, would serve for the issue upon which that question could be tried. Such would be a convenient practice, and tend to promote and protect the rights of all parties. Without this, we must hold the assignment void as to the garnishee proceeding.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Judgment reversed.

The Illinois Central Railroad Company, Appellant, *v.* Cornelius Taylor, Appellee.

APPEAL FROM JO DAVIESS.

A wife can be a witness in all cases, where her husband may.

A party may prove by himself or wife the contents of lost baggage, but not its value.

This was an action, brought by Taylor, against the railroad company, to recover the value of a trunk and its contents, lost between Chicago and Galena, the wife of the plaintiff being a passenger, between those places, over the road of appellant.

There was a motion to suppress the deposition of Catherine Taylor, because she was the wife of the plaintiff; because she was interested in the suit; and because it did not appear that there was no disinterested witness by whom the value of the trunk and contents could be shown.

The motion was overruled, and exception taken. The deposition proved the articles lost, and their value.

The jury found a verdict for plaintiff, for $244.93. Defendant moved for a new trial. Plaintiff remitted $31.50. Motion for a new trial overruled, and exception taken.

The errors assigned are, the overruling the motion to suppress the deposition of Catherine Taylor; in admitting improper evidence on the part of the plaintiff below; and in overruling motion for a new trial.

B. C. Cook, for Appellant.

Leland & Leland, and M. Y. Johnson, for Appellee.

Breese, J. We think the general rule is, that a wife can be a witness in all cases in which her husband could be a witness. In this case, the husband would have been a proper witness to prove the contents of the lost trunk, but not, as we have said in *Davis* v. *Michigan Southern and Northern Indiana R. R. Co.*, 22 Ill. R. 278, to prove the value of the articles, if that could be proved by other testimony, or the value of the trunk. The rule, that the owner of a lost trunk or any such article, shall be allowed to prove its contents, results from the necessity of the case, but must not be carried beyond that necessity.

As we said in the case in 22 Ill. R., where the value of the articles can be proved by other evidence, that of the party interested cannot be received for such purpose. Articles can be described, their quality, style, and all particulars pertaining to them, and when described, dealers in such articles can, from the description, place the value upon them, so that there is no necessity for the testimony on this point of the interested party. For this reason, because the testimony of the interested party was received on the question of value, it not being shown there were no witnesses capable of proving the value, the judgment is reversed, and the cause remanded.

Judgment reversed.

The People, etc., who sue for the use of Reuben Burgstresser *et al.*, Plaintiffs in Error, *v.* John O. Randolph *et al.*, Defendants in Error.

ERROR TO TAZEWELL.

The statute of Wills authorizes several actions on an executor's bond.

This is a suit of The People, for the use of Burgstresser & Co., against Randolph and others, on an administrator's bond, in an action of debt, assigning as breaches the wasting and misapplying of the estate of Jonathan B. Wildey, deceased.

Declaration alleges an allowance of claim in favor of Burgstresser & Co., and assigning numerous breaches of bond.

The plea of defendants avers, that the defendants are impleaded in a plea of debt, of and upon the same identical writing obligatory in the said declaration in this suit mentioned, and by the said plaintiffs, which suit is still pending.

Demurrer to plea. Demurrer overruled.

The plaintiffs then filed replication to said plea, as follows:

And the said plaintiffs, by S. D. Puterbaugh, their attorney, come and say that, by anything in said plea of said defendants above pleaded, the plaintiffs' writ and declaration ought not to be quashed, because they say that the said action in said plea mentioned, in which plaintiffs impleaded the said defendants in a plea of debt, of and upon the same writing obligatory in the declaration in this cause mentioned, is brought by plaintiffs for the use of Margaret Hagerty, who claims also to be injured by reason of the neglect and improper conduct of said administrator, and not by plaintiffs, for the use of Burgstresser & Co., as in this action alleged against defendants. Wherefore, etc.

There was a demurrer to plaintiffs' replication, assigning as special causes, that the replication sets up new matter; that it does not traverse the facts as set forth in the plea, and concludes with a verification, when it should conclude to the country; and that it is otherwise uncertain and insufficient.

Leave was given to withdraw demurrer to defendants' plea, and to file replication. Defendants' demurrer to replication was sustained. Plaintiffs stood by their replication. Judgment for defendants.

The error assigned is, that the court below erred in sustaining demurrer to replication.

S. D. Puterbaugh, for Plaintiffs in Error.

C. C. Bonney, and B. S. Prettyman, for Defendants in Error.

Walker, J. The record in this case presents the question, whether one recovery on an executor's bond may be pleaded as a bar to another recovery on the same instrument, in an action instituted for the benefit of another person. It is insisted that after a recovery, all persons who desire to recover damages for a breach of duty by the executor, must make themselves parties to the former recovery, by suing out a *sci. fa.* against him and his securities, and on its return, assign breaches on the record, and have their damages assessed. As a general rule, it is true that one recovery on an official bond bars the maintenance of further suits on it, but the party injured must resort to

a *sci. fa.*, and assign breaches on the record of the former recovery. But recoveries upon executors' bonds are regulated by the statute of Wills. The sixty-ninth section of that chapter has provided, that such bonds shall not become void on the first recovery thereon, but may be sued upon from time to time, until the whole penalty shall be recovered. The language of that section is so plain and explicit that other persons may again sue upon the bond after a recovery has already been had, that no room is left for construction. With this provision in force, we are at a loss to perceive how it could ever be doubted that subsequent suits might be brought until the entire penalty is exhausted. It would be hard to conceive how language could be employed which could more clearly confer the right. Where the legislature has, in so clear and unmistakable a manner, authorized such a proceeding, we have no right to say it was not designed to change the practice affecting suits on these bonds. The statute authorizes this suit, notwithstanding a former recovery upon this bond, and it must be obeyed.

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

Judgment reversed.

JOHN YOURT *et al.*, Appellants, *v.* MORDECAI L. HOPKINS *et al.*, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

A verbal authority to an auctioneer to sell lands, is sufficient.

An attachment of sufficient property to satisfy the claim is, like an execution levied, satisfaction of the debt, and may be so pleaded.

The collection, by execution, of a debt secured by deed of trust, must be held to be an election by the creditor to relinquish his rights under the trust deed. Where a party has an election of remedies, he will be bound by any acts which indicate that his choice is made.

Silas C. Hopkins and Mordecai L. Hopkins, under the firm name of S. C. Hopkins & Co., in August, 1850, borrowed of John Yourt the sum of three thousand dollars.

In April, 1851, Yourt surrendered the note and mortgage, and on the 28th day of April, 1851, said firm made to him a new note for the same debt, payable on the 12th of August, 1851, secured by Silas C. Hopkins' deed of trust, dated April 28th, 1851, to Benjamin W. Raymond, upon lots numbered four, five, seven, and ten, in block thirty-four, Carpenter's addition to Chicago.

Said deed, from Silas C. Hopkins to Raymond, recites the note of $3,000 to Yourt, conveys said lots in trust, in case of default in the payment of the note, "and having first given ten days' notice, by publishing the same in the nearest newspaper printed in the State of Illinois aforesaid, or by posting up handbill notices in four public places in the county where said premises are situated, then it shall and may be lawful for the said party of the second part, his personal representatives, or his attorney duly authorized by virtue hereof, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same, or any part, share or portion thereof, and all right, benefit and equity of redemption of the said party of the first part, his heirs and assigns therein, at public sale, at such hour and place as said party of the second part, his legal representatives or attorney may appoint, and to adjourn said sale from time to time, as said party of the second part, his legal representatives or attorney may think proper, and as the attorney of the said party of the first part for such purpose duly constituted, irrevocable, or in the name of said party of the second part, his executors or administrators, or in such manner as the said party of the second part, his legal representatives or attorney may think proper, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale" to pay the debt and expenses. Then follows a covenant of warranty, and the execution and acknowledgment.

Notices of the sale signed by Benjamin W. Raymond, trustee, were duly posted in four public places in the county of Cook. Notices of a postponement of the sale were also posted in the same places.

In pursuance of these notices, E. S. Williams, as the agent of Raymond, but without any written authority, sold the lots to Yourt for $1,000. Yourt paid no money and made no indorsement of the amount bid on his note.

Appellees filed their bill, praying that the deed of trust and the note may be given up and canceled, and the sale set aside, and that an injunction may issue restraining Raymond from executing any deed under said sale. The injunction was granted.

No answer was filed to the original bill. After filing the original bill, Yourt prosecuted an attachment suit to judgment. The amount of the judgment was $3,427.50. No credit was given on said note or in said suit for the $1,000 bid by Yourt on the trustee's sale, but the said note was prosecuted to judgment for the whole amount.

Execution issued on this judgment, which the sheriff, "on or about the 23rd day of January, 1854, indorsed satisfied." Yourt receipted for that sum, after deducting the $1,000 bid for the lots, and the interest thereon, leaving the balance in the sheriff's hands, Williams, as he testifies, having directed the sheriff to collect only that sum. A bill of revivor and supplement was filed by Mordecai L. Hopkins and John V. Hopkins, alleging that Silas C. Hopkins had died intestate, and that letters of administration had been granted to "your orator," and that "he is advised that, as the personal representative of said Silas C. Hopkins, deceased, he is entitled to have the suit revived as to him, and prosecute the same in his name as the representative of said Silas C. Hopkins, in connection with said Mordecai L. Hopkins."

Answers of Benjamin W. Raymond and John Yourt were filed to this supplemental bill. The evidence on the trial showed the above state of facts.

Walter B. Scates, for Appellant.

Goodrich & Farwell, for Appellees.

Breese, J. Several points are made in this case, but two of which we deem important to notice.

The first is as to the validity of the sale under the deed of trust by Williams, acting for Raymond, the trustee.

The deed provides in case of default, "it shall then be lawful for the said party of the second part, (Raymond,) his personal representatives or his attorney duly authorized by virtue hereof, to enter upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, or any part, share or portion thereof, and all right, benefit and equity of redemption of the said party of the first part, his heirs, etc., at public sale, etc.," "and as the attorney of the said party of the first part, for such purpose duly constituted, irrevocable, or in the name of the said party of the second part, his executors, etc., or in such manner as the said party of the second part, his legal representatives or attorney may think proper, to make and deliver to the purchaser or purchasers a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale, to pay the debt and expenses, etc."

The notice of this sale was signed by Raymond, as trustee, and in his answer he says, that he appointed Williams to make the sale, and was ready himself to make a deed to the purchaser, and he would have made a deed, had he not been stopped by

injunction. Williams under a parol appointment could not make the deed, that is admitted, but we do not see why he could not act as auctioneer, and cry the sale and strike off the property to the highest bidder. For such purpose, it is nowhere held that an appointment must be in writing; on the contrary, a verbal appointment is sufficient. *Doty* v. *Wilder*, 15 Ill. R. 407; *Johnson* v. *Dodge*, 17 ib. 433. The auctioneer is the agent of both parties, and his memorandum binds both. Raymond, under this sale by Williams, could have been compelled to make a deed to the purchaser. Raymond could not, without pleading the statute of frauds and perjuries, set up the want of a note or memorandum in writing of the sale. This statute is not relied on here, it is not pleaded. We think that the sale was properly made through the agency or attorneyship of Williams.

Upon the other point, we have no doubt that the attachment of sufficient property is, like an execution levied, satisfaction of the debt, and may be so pleaded; but whether or not the recovery of a judgment upon the attachment proceeding, levying an execution and the payment of the same to prevent a sale of the property, is such satisfaction, it may be conceded, that the proceedings under the deed of trust, and by attachment on other property, were concurrent remedies, and could proceed *pari passu*. The action was brought to the October term, 1851, of the Cook County Court of Common Pleas, in aid of which, an attachment was sued out and levied upon property sufficient to pay the whole debt. The sale under the trust deed took place on the last day of that month, and the property was sold to Yourt, the *cestui que trust*, but not consummated by the execution of a deed, by reason of an injunction awarded to prevent it. No money was paid by Yourt on the purchase, and no indorsement of his bid on the note. There was no answer to the original bill for injunction. To the supplemental bill, Raymond and Yourt answered separately, insisting upon the validity of the sale as made by Williams, and his, Raymond's, readiness to make a deed to the purchaser, Yourt, and he, Yourt, alleging that he was ready and willing, and always had been, to indorse the amount of his bid on the note, on receipt of a deed. No action was taken by him, of any kind, to obtain a deed, nor was anything done in the premises, for two years, when, on the 26th of October, 1853, Yourt caused an alias execution to be issued on his judgment, in the Common Pleas, for its full amount, and placed it in the hands of the sheriff, who levied it upon personal property of the defendants, sufficient to satisfy it, whereupon the defendants paid to the sheriff the whole amount of the execution, being three thousand seven hundred

and thirty-one dollars and twenty-one cents, "in full of the damages and costs within named." Yourt receipted for a part of this sum—for twenty-three hundred and ninety-four dollars, only. The sheriff states, he received no instructions in regard to enforcing or not enforcing the payment of the whole amount, to his knowledge. Williams, the attorney of Yourt, however, says he told the officer who had the execution, not to receive from the defendant the amount for which these lots had been bid off, and interest from the day of sale. We will not reconcile this contradiction, remarking, merely, if such were the directions of the officer, how easy was it for the attorney to place it beyond controversy, by indorsing on the execution, which he knew the officer had in his hands, the amount of this bid. That was not done, and the officer, who was, *pro hac vice*, the agent of the plaintiff, was commanded to make the full amount of the debt, by a forced sale of the personal property on which he had levied the writ.

We cannot but think the collection of the whole amount of this debt, secured by this trust deed, by execution, was an election by the plaintiff to repudiate his action under the deed of trust. He certainly had the election, and when that right exists, and any act is done by the party entitled to make the election, inconsistent with a contrary intention, he must be held to his election.

We regard these proceedings in the suits, as such election. They are inconsistent with a claim to any right as growing out of the sale under the deed of trust. He proceeded as though there had been no sale under that deed, and by his acts repudiated it. He cannot be permitted to "blow hot and cold" with the same breath. If he relied on his purchase under the trust sale, and if he deemed it a valid and binding sale, he could have compelled a deed from the trustee. He did not do so. For two years he was passive, and then prosecutes his suit—issues an execution, and whilst it was in the hands of his agent for collection, the defendant pays the full amount of it, and satisfies it. This extinguished all his rights under the trust deed and sale thereon. It was his own election, and he must be bound by it.

The case of *Fay* v. *Valentine*, 5 Pickering, 418, is in point.

The decree of the court below is affirmed.

Decree affirmed.

Jabez E. Walcott, impleaded with Otis Buzzell, Plaintiff in Error, *v.* Leander P. Holcomb, Defendant in Error.

ERROR TO COOK.

Where a greater sum is recovered than that stated in the *ad damnum*, it is erroneous. It might be otherwise, if no specific sum is stated in the *ad damnum*.

This was an action of assumpsit, commenced agianst the plaintiff below by writ of attachment, returnable at the March term, 1857, of the Circuit Court of Cook county.

The declaration contains two special counts, one upon each note sued on, besides the common, consolidated money count, and concludes by averring the common breach and *ad damnum*, in the words following, viz.: "Yet the said defendants have not paid the said several sums of money, or any or either of them, or any part thereof, but to pay the same have hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of four dollars, therefore he sues;" which is the only averment of breach or damages in the declaration.

At the November term, 1857, the cause was submitted to a jury on this issue, and they found a verdict for the plaintiff below, and assessed his damages at three hundred and twenty dollars and forty cents, whereupon defendants below moved for a new trial, which motion the court overruled, and entered judgment for the plaintiff below, for three hundred and twenty dollars and forty cents, the damages assessed by the jury, with costs of suit, and awarded execution therefor.

One of the errors assigned is, that the assessment of damages by the jury aforesaid, is irregular, excessive, and void.

Parsons & Goodwin, for Plaintiff in Error.

C. S. Cameron, for Defendant in Error.

Caton, C. J. The *ad damnum* in this declaration is for four dollars, and the verdict and judgment are for three hundred and twenty dollars and forty cents. When a sum is stated in the *ad damnum*, the judgment cannot exceed that, no matter what amount the stating part of the declaration may show to be due. It might be otherwise, if no specific sum was stated in the *ad damnum*.

The judgment is reversed, and the cause remanded, with leave to the plaintiff to amend his declaration.

Judgment reversed.

The Illinois Central Railroad Company, Appellant, *v.* Henry C. Copeland, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

Interested parties suing for the value of lost baggage, may prove the contents and loss of such baggage, but not the value of the articles; and the jurors, when the property is described, may have a proper measure of damages in their own knowledge of values.

The declaration need not aver that the plaintiff was a passenger, this fact can be proved without an averment, by the possession of a baggage check and ticket; and by the check alone, if it appears that such checks are not given until the passenger tickets are shown.

A reasonable amount of bank bills may be carried in a trunk, and their value recovered as lost baggage.

A railroad corporation selling through tickets over its own and other roads, is liable for the safety of passengers and baggage to the point of destination; especially is this the case with the Illinois Central Railroad Company.

It would seem that a like liability for not delivering goods over connecting roads also exists, when they are marked for a particular place.

This declaration avers the defendant to be a common carrier of goods and chattels for hire, in and by a certain railroad or railroads from the city of Chicago to the city of St. Louis. That at defendant's request, plaintiff below caused to be delivered to it certain goods and chattels, (enumerated in the declaration, and as they are described in the deposition of the plaintiff and his wife,) the property of the plaintiff, and of the value of $500, to be carried by the said railroad or railroads from Chicago to St. Louis; that defendant, in consideration of a reward, etc., undertook and promised to carry and deliver as aforesaid, etc.; that although the defendant had and received the goods, for the purpose aforesaid, yet not regarding, etc., it did not deliver, etc., but by mere carelessness, negligence and improper conduct of the defendant, the goods were lost to the plaintiff, etc.

The list of articles, alleged to have been contained in the trunk, is indorsed as the "account sued on."

General issue and affidavit of merits by defendant.

There was a trial by jury, Dec. 5, 1857, before Higgins, Judge, and verdict for plaintiff, $410 and costs.

Motion for new trial made, and overruled.

Defendant prayed an appeal, Dec. 22, 1859.

Appeal bond approved and filed, Jan. 14, 1860.

On the trial, plaintiff introduced in evidence a brass "check," admitted by defendant to be a "baggage check," which was marked, "Chicago & St. Louis."

It was further admitted that such checks were never given out except to passengers, who are required to exhibit their

tickets for the place to which the check is given, before they can get a check for their baggage to such place.

The plaintiff's counsel then offered in evidence the depositions of the plaintiff and his wife. To the admission of which the defendant objected, because,

1st. It is not averred in the declaration that the plaintiff or his wife was a passenger on the defendant's cars.

2nd. There was no sufficient evidence of the delivery of the trunk by the plaintiff to the defendant.

3rd. It is not proved that the plaintiff could not show the value of the contents of the trunk by other evidence.

The objection was overruled.

The deposition was allowed to be read in evidence, and in substance states, that on the 21st day of October, 1857, the plaintiff and his wife paid their fare and took passage on the train of the Illinois Central Railroad for St. Louis. That the plaintiff owned a large leather trunk, containing a large number of valuable articles ; that the trunk was worth ten dollars, and contained the following articles, to wit: (naming them, and affixing a value to each.)

That the trunk and articles were worth in the aggregate the sum of $420, and that they were delivered to said railroad company on the 21st of October, 1857, by the plaintiff, and that he received a brass check, of the description as above.

That said check was in possession of his attorneys, who brought the suit. That said trunk and articles, nor any of them, have ever been delivered to the plaintiff, and that he never received any pay for them.

" And they further say that they know of no witness by whom they could prove said trunk and the contents, and the value thereof, and the facts herein stated."

The plaintiff, by his counsel, then admitted on the trial, that the trunk in question was carried by the defendant on the cars to Mattoon, at the point of intersection of the defendant's road by the Terre Haute and Alton Railroad, and there safely delivered to and placed upon the cars of the said Terre Haute and Alton Railroad Company, which was the proper route, and the one over which it was intended by the plaintiff, when he took passage in the defendant's cars, that the baggage should be conveyed to St. Louis.

The plaintiff then withdrew any claim to recover for the value of the trunk, and insisted only on his right to recover the value of its contents.

The defendant, by its counsel, then offered in evidence passenger tickets, which were admitted by the plaintiff's counsel to be of the same kind or description as were on the 21st of Oct.,

1859, and have been since, sold and furnished to passengers from Chicago to St. Louis, over this route. These are commonly called coupon tickets.

The foregoing was all the evidence.

The defendant, by its counsel, requested the judge to give to the jury the following instructions in writing:

1. The averment in the plaintiff's declaration, that the defendant was a common carrier of goods and chattels, does not import that said defendant was a common carrier of bank bills. The plaintiff cannot, therefore, recover in this action for the loss of any bank bills, even if any such loss were shown.

2. The acceptance of the plaintiff's trunk by the defendant, consigned to a point beyond the terminus of its route, and the giving of a check for the same as so consigned, does not imply a contract on its part to act as common carrier beyond its line, but simply a contract to carry it to its terminus, and then forward, by the usual conveyance, towards its ultimate destination.

3. It being conceded that, in this case, the plaintiff's baggage was safely conveyed to the end of its line, and was there delivered to the proper carriers to be forwarded to St. Louis, the jury are instructed that the defendant performed its full legal duty, and cannot be held liable for a loss that happened on any railroad besides its own.

4. A railroad company is not responsible for the loss of articles in a passenger's trunk, which are not properly included within the designation of baggage, and it is incumbent upon passengers to use ordinary care and diligence in relation to such matters. If, therefore, the jury are satisfied that the plaintiff is chargeable with a want of ordinary care, in depositing money or jewelry in his trunk, to be so transported to St. Louis, or if the plaintiff had an unreasonable [and unusual] amount of property in his trunk, he is not entitled to recover for such money or jewelry, or for such unreasonable [and unusual] amount of property, the rule being that the passenger is entitled to a reasonable amount of baggage, and to include in it such articles as are necessary and convenient for personal use, and as it is usual for persons traveling to take with them.

The first, second and third of the foregoing instructions were refused by the said judge; and the defendant excepted.

The fourth instruction was amended by the judge, by striking out the words "and unusual," where they occur in two places in said instruction, and which are included in brackets, and by adding to said instruction the following, to wit: "A passenger may recover for articles of jewelry carried in his trunk, when traveling with his wife; so a watch carried in one's trunk is proper baggage, and a reasonable amount of money for trav-

eling expenses." And the instruction, as thus amended, was given to the jury.

The defendant excepted to the said amendments, and the refusal of the judge to give the instruction as asked by the defendant.

The judge, with the instruction aforesaid, left the issue and the evidence so given on the trial, to the jury, who returned their verdict for the plaintiff for $410, damages.

The counsel for the defendant moved for a new trial, because,

1. The deposition of the plaintiff and his wife was improperly admitted on the trial.

2. There was no legal or sufficient evidence as to the value of the contents of said trunk.

3. Proper and legal instructions asked for by the counsel for the defendant, were refused by said judge.

4. The verdict was against the law and the evidence.

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

Judgment was rendered on the verdict for $410, and costs of suit.

Stuart & Ayer, for Appellant.

Scates, McAllister & Jewett, for Appellee.

Breese, J. The appellant makes the following points on this record:

"First. The deposition of the plaintiff and his wife was improperly admitted on the trial.

"Second. The testimony of the plaintiff and his wife was improperly admitted as evidence of the delivery of the trunk alleged to have been lost, and of the value of its contents.

"Third. Bank bills carried in a passenger's trunk are not 'baggage,'—and without notice to the carrier, and in the absence of fraud, the carrier will not be liable, in case of loss, for their value.

"Fourth. The liability of the defendant as a common carrier, did not extend beyond its own route, and the safe delivery of the baggage to the next carrier, unless the plaintiff proves a special contract, extending its general liability.

"Fifth. The defendant, as a common carrier, is restricted to the powers defined in its charter, and is incompetent to contract for the transportation of goods beyond the terminus of its route."

This court has said, in *Parmelee* v. *McNulty*, 19 Ill. R. 558, and in *Davis* v. *Mich. South. and North. Ind. R. R. Co.*,

22 Ill. R. 278, and in the case of the *Ill. Cent. R. R. Co.* v. *Taylor*, *ante*, 323, that the owner of the trunk containing baggage can, from the necessity of the case, prove the contents of the trunk, but not their value, and so can the wife, in all cases where her husband can be such witness. This rule is repudiated in some of the States, and it can only be defended on the alleged necessity of the case. We have always endeavored to restrain the rule within the narrowest possible limits, and to caution juries when they receive such testimony.

We have allowed the interested parties to go so far as to prove the contents and loss, but not the value of the articles. As we said in *Davis* v. *Mich. South. and North. Ind. R. R. Co.*, by a description of the articles, any dealer in such articles can establish their value, so that there is no necessity for the evidence of the owner on that point. There is other evidence in every town and city in the State quite accessible to the party; and the jurors themselves, when the property is described, may have a proper measure of damages in their own knowledge of values. Such portion of the deposition, as went to prove the value of the articles should have been rejected by the court. But it is contended the whole deposition should have been rejected, because the rule is confined to the baggage of a passenger traveling on the road, and there is no averment in the declaration that the plaintiff was such passenger. We do not consider this a valid objection. That these parties were passengers on the road, can be proved if there be no averment of that fact, and is proved by the check and ticket.

In declaring for lost baggage, it is not indispensable, that it should be alleged the owner was a passenger on the road with the baggage. A check is not only *prima facie* evidence that the baggage was delivered to the company, and so intended, but it is also evidence that the party holding it has purchased the rights of a passenger. This fact, though not alleged in the declaration, could be proved by the check and tickets. The fact that it is the usage of the company to give out no check for a passenger's baggage, until a regular ticket for the trip is exhibited by the owners or custodian of the baggage, makes the check evidence of his being a passenger. The check itself proves that the baggage was to go from Chicago to St. Louis *via* the Terra Haute, Alton and St. Louis Railroad, running in connection with the Illinois Central Railroad, and this would be implied from the check and ticket; and it will be presumed as the plaintiff held them, that he owned them.

This disposes of the first two points. In *Davis* v. *Michigan Southern and Northern Indiana R. R. Co.*, *supra*, this court said that a trunk was no place to carry so large an amount of

money in it, as was claimed by the plaintiff, unless it was in gold or silver, and that the sum was unreasonable ($439) for traveling purposes. It has been held by some courts, that a sum necessary for traveling purposes may be properly carried in a baggage trunk, and the company need not be informed of it. The court properly instructed the jury in this case that the bank bills might be considered baggage.

Upon the remaining points, we are satisfied, under the tickets issued by this company, their liability as common carriers extended from Chicago to St. Louis, no matter how many intervening routes there may have been. The presumption, from the check and ticket, is, they were running in connection with such routes.

Redfield, in his treatise on the law of railways, says, where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of baggage. Page 242.

The English rule on this subject is well settled. The courts of that country regard parties who receive goods, and book them for a certain destination, as carriers throughout the entire route. The first case in which this position was assumed, was the case of *Muschamp* v. *The Lancaster and Preston Junction Railway Co.*, decided in the Court of Exchequer, in 1841, and reported in 8 Meeson and Welsby, 421. The rule established in that case, as we have stated it, has never been departed from, but reinforced whenever a fit occasion presented, and has, in fact, been extended to goods received, and booked for points beyond the limits of England; *Crouch* v. *The London and North-Western Railway Co.*, 25 Eng. L. & E. 287; and has been recognized by every court in Westminster Hall. *Watson* v. *The Ambergate, Nottingham and Boston Railway Co.*, 3 Eng. L. & E. 497.

The courts of this country have, some of them, doubted this rule, preferring to hold, when goods are delivered to a carrier, marked for a particular place, but unaccompanied by any other directions for their transportation and delivery, except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether that usage was known to the party from whom they were received, or not, and that no implication arises of any further liability. To this effect are *Van Santvoord* v. *St. John*, 6 Hill N. Y. R. 157; *Farmers' and Mechanics' Bank* v. *Champlain Transportation Co.*, 18 Vermont, 140; and same case, 23 ib. 186; *Hood*

v. *New York and New Haven Railway Co.*, 22 Conn. 1, 502; *Nutting* v. *Connecticut River Railway*, 1 Gray, (Mass.) 502.

It is not necessary, perhaps, for this court to express any opinion on this point, as it does not arise in this case, but we may say, we are inclined to yield to the force of the reasoning of the English courts, on principles of public convenience, if no other, and to hold, when a carrier receives goods to carry, marked for a particular place, he is bound to carry to, and deliver at that place. By accepting the goods, so marked, he impliedly agrees so to do, and he ought to be answerable for the loss.

In this case, we hold, the ticket and the check given by this company and produced in evidence, imply a special undertaking to carry the passenger by Mattoon to St. Louis, *via* the Terre Haute and Alton Railroad, and his baggage also. The ticket is what is known as a through ticket, and the check denotes that the baggage is checked through from Chicago to St. Louis, and both inform the passenger that the Illinois Central Railroad Company has running connections with the Terre Haute and Alton Road, and that they can and will deliver the passenger and baggage, by means of this connection, at St. Louis. The ticket and check are both issued by the Illinois Central, they are the evidences of the contract made with them, and in effect speak this language: if you will buy this ticket we will carry you safely to St. Louis, and your baggage also—the terminus of our road, by means of our connections with the Terre Haute and Alton Road, is at St. Louis, and we guarantee to you, your safe arrival there with your baggage, you having no further care or concern about it, whether we run our own cars through, or take those of the other road at the point of intersection—you pay through, and you and your baggage shall be carried through. This is the contract, evidenced, as we think, by the ticket and check. There are three tickets on a small sheet of paper, all connected together, and all headed "Illinois Central Railroad," thereby implying that they are issued by that Company.

The first informs the purchaser that this company carries passengers through to St. Louis, by the words, "From Chicago to St. Louis." The second ticket informs him that he has paid his passage to the Illinois Central Company, to Mattoon; and the third, that he has paid to the same company his passage from Mattoon to St. Louis, *via* the Terre Haute and Alton Railroad. The last ticket is preserved by the Terre Haute and Alton Railroad Company, as evidence, in their settlement with the Illinois Central, that the former company has carried a passenger for the latter company on their road, from Mattoon to St. Louis. So it is with the baggage check. It is a through

check, and the Illinois Central, by issuing it, make themselves responsible for the loss of the baggage indicated by the check.

It can make no difference, we apprehend, whether the passengers and baggage changed cars at Mattoon, or not. The passengers can rely on their tickets and checks, and hold the Illinois Central accountable for loss or damage. We think the evidence is strong enough to imply a special undertaking by the defendant, to carry this passenger and his baggage through from Chicago to St. Louis, and, *pro hac vice* the Terre Haute and Alton Road was the defendant's road.

But the appellants insist that the company has no chartered power to enter into such arrangements, and make such contracts, and the case of *Hood* v. *The New York and New Haven Railroad*, 22 Conn. 510, S. C. 24, ib. 482, is cited.

We have not examined to see if that case has not been overruled by the court deciding it, in some subsequent case, but be that as it may, the court seemed to have overlooked the consideration, that in all legislative grants many things must of necessity be taken by implication, as necessary to the enjoyment of the grant itself. The grant to the Illinois Central, was to construct and operate a railroad from Chicago to Cairo, and to cross and intersect other roads, not for the benefit of the company alone, or its stockholders, but for the benefit of the public, and for the accommodation of the immense traffic and commerce, of which this State might reasonably be expected to become a most important theatre. Hence, by confining the road to a simple traffic betwen the *termini* and points directly on its route, the country remote from its direct line would be benefited in a very trifling degree, or not at all, if these *quasi* partnerships with other roads were not allowed. The great object of their charters could not be accomplished if they were so restricted, and it may well be deemed an indispensable incident to the powers expressly granted. The object to be attained is within the general objects of their incorporation. They are instrumentalities of commerce, and of trade, in which the entire public are interested, and which are essential to their prosperity. But be this as it may, the legislature of this State passed an act entitled, "An act to enable railroad companies to enter into operative contracts, and to borrow money," (Private Laws, 1855, p. 304,) by the provisions of which, such running connections are expressly authorized. Even without this act, we should feel no disposition to deny the power.

For the reasons, however, which we have given, the judgment is reversed, and the cause remanded.

Judgment reversed.

William Monoughan, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO LAKE.

A party who is under eighteen years of age at the time an offense is committed, should be punished by imprisonment in the county jail.

A jury cannot aggregate the value of property stolen at different times, so as to send a prisoner to the penitentiary.

This defendant in error was indicted with three other persons, and convicted in the Lake Circuit Court, of sheep stealing.

The proof showed that on the 11th of December, 1858, two sheep were taken from the yard of one Clark Gale, worth two dollars per head. One Walden Easton lost one sheep the same night. Allen Lanphiere also lost a sheep the same night, worth three dollars. There was proof tending to show that these sheep were traced to the premises where the plaintiff in error resided.

Upon the coming in of the verdict of the jury, the defendant moved the court, Manniere, Judge, presiding, for a new trial, on the ground and for the reason that the verdict is against the law and the evidence, as applicable to the case, which said motion said court then and there overruled.

The accused asked and obtained leave of the court to introduce testimony in relation to his age at the time of the commission of the offense charged in the indictment, to the introduction of which, the People then and there objected.

The court, after hearing evidence touching the age of said defendant at the time of the commission of the offense charged in the indictment, as well on the part of the defendant as on the part of the People, finds: that the defendant at the time of the commission of said offense, as charged in the said indictment, was under the age of eighteen years, and that at the time of the conviction of said defendant he was over the age of eighteen years. Thereupon defendant moved said court to sentence the said defendant to the common jail of Lake county, instead of sentencing him to the penitentiary; to which the People objected, asserting as grounds for such objection, first, that the court has no power under the statute to review the verdict of the jury, and second, because the defendant was over eighteen years of age at the time of his conviction.

The court overruled the motion of said defendant, and thereupon said court sentenced said defendant to one year's confinement in the State penitentiary, at Joliet, to which defendant excepted.

M. S. Searls, for Plaintiff in Error.

C. Haven, District Attorney, for The People.

Caton, C. J. Admitting that the verdict was proper, the prisoner should have been sentenced to the common jail, and not to the penitentiary. At the time when the alleged offense was committed, he was under the age of eighteen years, but was past that age when he was tried and convicted. We entertain no doubt that the true meaning of the statute is, that no one who is under the age of eighteen years when he commits the offense, shall be liable to punishment in the penitentiary. Admitting that there is no doubt that the prisoner is the party who stole the sheep, and that four or even five sheep were stolen, still it is beyond doubt that no more than two sheep were taken at one time, of the value of four dollars. It was not proper for the jury to aggregate the value of the property stolen at several times, for the purpose of finding the value of the property stolen to be over five dollars. A party may be guilty of several larcenies, but if the value of the property taken at any one time amounts to less than five dollars, he is not liable to be sent to the penitentiary.

But more than all this, the evidence is not sufficient in our judgment to justify the conviction of the prisoner at any rate. The most that can be said from this evidence is, that somebody stole the sheep, and that there is some probability that the prisoner was one of those engaged in it. But we think even the decided preponderance of evidence is in favor of his innocence, or rather that there is not a preponderance of evidence in support of his guilt, which is the same thing. In this state of the case we do not think proper to remand the cause for another trial, but shall reverse the judgment, and direct the prisoner to be discharged.

Judgment reversed.

Samuel McCarty, Appellant, *v.* Orrin D. Howell, Appellee.

APPEAL FROM THE COURT OF COMMON PLEAS OF THE CITY OF AURORA.

One part of a contract will be so construed with another as to make the whole stand if possible, construing ambiguous words most strongly against the party who uses them.

A note made payable four months after date, or as soon as the maker shall collect a note from A. D., will be construed as payable absolutely in four months, or at an earlier day if A. D. should pay his note before that time.

McCarty *v.* Howell.

THIS was a suit against defendant for trespass on the case upon promises, damages $200, directed to the sheriff of Kane county.

First count of the declaration avers that the defendant, on the 26th day of August, A. D. 1858, made a promissory note bearing date on that day, and then and there delivered the same to Gideon Marlett, by which said note the said defendant, by the name of S. McCarty, promised to pay to Gideon Marlett, or bearer, by the name of G. Marlett, one hundred and twenty-five dollars with use, four months after the date thereof, or as soon as the said defendant shall be able to collect a certain note against Abram Davis, of Chicago, for value received, and the said Gideon Marlett then and there indorsed and delivered the said note to plaintiff, for value received. Also, common money counts, and count for goods sold, and count on account stated.

Plea of general issue, non assumpsit, sworn to, with joinder by the plaintiff.

At June term, 1859, there was a verdict for the plaintiff, assessing his damages at one hundred and thirty-one dollars. Motion by defendant for new trial and in arrest of judgment, overruled. The cause was tried before PARKS, Judge, and a jury.

The following note was offered in evidence by the plaintiff below:

Aurora, August 26th, 1858.

Four months after date, or as soon as I shall be able to collect a certain note against Abram Davis, of Chicago, for value received, I promise to pay G. Marlett, or bear, one hundred and twenty-five dollars, with use.

(Signed) S. McCARTY.

And upon the back of said note is the following indorsement:

Pay this note to Orrin D. Howell.

(Signed) GIDEON MARLETT.

The signatures were proved.

The plaintiff then asked the following instruction, which was given:

"The jury are instructed that this note of McCarty, the defendant, became absolutely due at the expiration of the four months after the date thereof, whether McCarty has been able to collect the Abram Davis note or not. But if McCarty had collected the Abram Davis note before the expiration of the four months, then he would be liable to pay this note before the four months elapsed mentioned in this note, if the jury believe, from the evidence, that it is the true and genuine signature of McCarty attached to said note, and Gideon Marlett indorsed the same."

S. W. Brown, for Appellant.

Montony & Searles, for Appellee.

Breese, J. There is a rule universally recognized in the construction of statutes which is equally applicable to the construction of contracts. It is this: that one part of a statute must be so construed by another that the whole may, if possible, stand; and that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. There is another rule in the construction of written contracts, that the words used, where ambiguous, are to be construed most strongly against the party employing them, regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument. *Walker, etc.*, v. *Kimball*, 22 Ill. R. 538–9.

Blackstone says, "The principle of self-preservation will make men sufficiently careful not to prejudice their own interests by the too extensive meaning of their words, and hereby all manner of deceit in any grant is avoided, for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them." 2 Blackstone's Com. 380, side paging. And this rule holds not only in grants, but extends, in principle, to all other engagements and undertakings. With respect to written contracts, the generally received principle of law is, that the party making any instrument, should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention he should be bound; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favor, because the words of the instrument are not his, but those of the other party.

Chancellor Kent says, the true principle of sound ethics, is to give the contract the sense in which the person making the promise, believed the other party to have accepted it, if he in fact did so understand and accept it. 2 Kent's Com. 556.

Testing this case by these rules, we have but little difficulty. To give effect to the words "four months after date," it is necessary to give to the note this meaning, as the understanding of the parties to it, that A. Davis' note was payable before the note in suit was contracted to be paid. The appellant contends those words were inserted for the benefit of the maker of the note, and so designed by the parties. We do not understand the insertion of these words could have benefited the maker in any sense, if he was not to pay the note until he had collected

the Davis note. It is not possible it could be for the benefit of the maker to stipulate that the note should be paid at the end of four months, when, if his construction be correct, he might never be required to pay it, its payment being made to depend on the contingency of the payment of the Davis note, which might never happen. If the intention of the maker had been to make this note depend on the payment of the Davis note, he would have used this language: "So soon as I collect the note on A. Davis, of Chicago, I will pay, etc."

But he has undertaken to pay, absolutely, "four months after date;" that is a certain day fixed, but it was in the power of the payee, if he could prove the Davis note was paid before the four months expired, to have demanded payment on that event.

This construction gives effect to all the words and language used, discarding none. The other construction, for which the appellant contends, discards the words "four months after date," as meaningless. By the construction we place on it, the note has meaning, and every clause in it its due effect.

We are referred by the counsel for the appellee to some cases, as having a bearing on this case, and among them the case of *Stevens* v. *Blunt*, 7 Mass. 240.

That was an action of assumpsit on a promissory note signed by Blunt, payable to one Solomon Stevens or order, and indorsed by him to the plaintiff. The note is as follows: "Trenton, Oct. 29, 1806. This may certify that I do agree to pay unto Solomon Stevens or order, forty dollars, by the twentieth of May, or when he completes the building according to contract." It was contended that the action was not maintainable, because the note was payable on a contingency, and not at all events, and therefore was not negotiable, and the court so instructed the jury. On appeal to the Supreme Court, the judgment was reversed, that court holding that the note was payable absolutely, at a day certain.

Mr. Rand, who was the editor of these reports, in a note, says, "This decision is clearly wrong. The promissor had a right of election to pay either at the time mentioned, or when the building should be completed according to contract. The latter event might never take place; and therefore the note, at the election of the promisor, was payable on a contingency which might or might not happen."

According to the canons of interpretation of contracts which we have cited, the court could not have given effect to the words of the instrument without deciding as they did, and we think the decision was clearly right.

So this court decided in the case of *Harlow* v. *Boswell*, 15 Ill. R. 56.

The note, in that case, reads thus: "Twelve months after date, for value received, I promise to pay G. W. Allen, or W. H. Reed, his agent, fifty dollars, or as soon as I can sell the above amount of Allen's Vegetable Tonic." Indorsed to the plaintiff. The court, by Treat, C. J., say, "The note, on its face, was payable absolutely. The plea seeks to show it was payable on a contingency. There is nothing to indicate that the note was not certainly payable."

By our construction of the note, in this case, it would read, "Four months after date, I promise to pay, etc., but if A. Davis, of Chicago, pays his note to me before that time, I will pay it then, but at all events, I will pay it in four months from its date." The construction contended for by the appellant amounts to this: I will pay this note four months after date, but if A. Davis does not pay his note to me, then I will never pay it.

We think the court below put the proper construction upon this note, and we therefore affirm the judgment.

Judgment affirmed.

Ezra L. Sherman *et al.*, Appellants, *v.* Edwin Blackman, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

It is not presumed that the purchaser of a note from the payee, who is a bill-broker, knew that the transaction was usurious, because such broker had sold the same party other notes at usurious rates.

The payee of a note may sell it at such rates as he pleases.

This was an action of assumpsit, on a note for $775, dated Oct. 1, 1857, due May 1, 1858, payable to Greenbaum and Brothers, and indorsed by them in blank.

First plea, general issue. Second plea, usury to part. That the note was made and indorsed, and left with bill and note brokers, to raise money for the makers, of which the appellee had notice when he bought it. Two other pleas, with variations of charge of usury; of three per cent. interest per month, discounted by appellee paying $609.93 for the note, averring it to be a loaning, etc.

Issue joined on all the pleas. To the special pleas, he says: First, he did not purchase and discount the note as alleged. Secondly, he had no notice that the note was in the brokers' hands for the purposes alleged. That he was a *bona fide* purchaser for value paid in the ordinary course of trade and business.

Trial by jury. Verdict, $783.62. Motion for new trial made and overruled, and exception taken.

On the trial the appellee read the note in evidence, then read indorsements on it in these words, viz.:

"Without recourse, Greenbaum & Bro." Also, "note extended and interest paid to 2 | 5 Aug. 1858."

Elias Greenbaum was called for appellants, who testified that his firm were bill and note brokers in Chicago since 1854, which appellee well knew, as he came to their office frequently and inquired for notes; wanted to buy; he bought the note in question of us, Oct. 1, 1857, at 3 per cent. per month interest discounted from note; paid only $609.93 on it. Could not say he knew it was our note or not; nothing was said on that subject. Appellee said he had not bought the appellants' paper before. The appellee made the offer, and it being the most we could get, let him have it; we then indorsed the note "without recourse," putting our firm name on it. We had no interest in the note. He did not ask me if we had discounted the note or owned it; nothing was said by us or asked by him about that. We are in the habit of buying and selling notes; always indorse without recourse. The appellee had purchased other notes of us before that time, so indorsed. The note in question is filled up in Sherman's handwriting, except the payee's name was written by our clerk, after Sherman had left the note with us. I indorsed it at the time he bought it. The indorsement of the payment of interest, etc., on the note, is in the appellee's handwriting, which was read in evidence to the jury.

B. S. Morris, for Appellants.

Mather, Taft & King, for Appellee.

Breese, J. In our judgment, the whole gist of this controversy depends upon this single question, did the plaintiff know, when he obtained the note from Greenbaum Brothers, at an usurious discount, that it was in fact for the benefit of the makers, the defendants here? If he did know it, then the transaction is usurious, and the defendants can avail of it under the general issue. The jury have found this fact against the defendants on the evidence, and we think correctly.

There is no evidence showing that the plaintiff, when he purchased this note of Greenbaum Brothers, who were the payees, were negotiating for the defendants. They were bill-brokers, it is true, and had sold notes before to this plaintiff at usurious rates, but it by no means follows from that circumstance, that this particular note was thus negotiated. The jury did not think that, a fact sufficiently convincing, nor do we.

We do not say that actual notice should be positively proved, but circumstances sufficiently strong to satisfy the jury that the purchaser of the note must, from the transaction itself, and from the nature of things, have had such notice. The mere fact that the sellers were bill-brokers, and sold notes on their own account, sometimes at usurious discounts, was not such a circumstance as would have justified the jury in finding that this particular note was so sold. The sellers of this note were the payees of the note, and we know of no law forbidding the payee to sell a note at such discount as he chooses. *Stevenson* v. *Unkefer*, 14 Ill. R. 105.

We have examined the instructions carefully, and think the action of the court in regard to all of them, was strictly in accordance with well-known and long-settled principles of law. The judgment is affirmed.

Judgment affirmed.

Ezra L. Sherman *et al.*, Appellants, *v.* Edwin Blackman, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

A party who purchases notes at a large discount, of a broker to whom they are made payable, is not affected by usury, if he is ignorant of the fact that they were sold to raise money for the maker.

The allegations of a plea, and the proof to support it, should correspond.

This was an action of assumpsit on two notes, dated April 20th, 1858, payable in six months, to E. L. Sherman, or order; by him indorsed in blank, and indorsed by Greenbaums in blank "without recourse;" one for $1,150, and one for $1,250. It is averred in narr. that E. L. Sherman indorsed and delivered the notes to the appellee.

First plea, general issue. Second plea, to first and second counts, usury. That the notes were made and indorsed to raise money for the appellants, and put into the brokers' hands to negotiate for the money. The brokers offered the notes to one Sherwood, who agreed to and did discount the notes at three per cent. per month for six months, of which appellee had notice when he took them. Five other like pleas, varying the averments; but all aver a loaning and borrowing of the money at three per cent. per month discount, with notice to appellee.

Appellee made two answers to each plea: First, that Sherwood did not take and receive the notes, or discount them, as

alleged. Second, that he (appellee) was a *bona fide* buyer for value paid, without notice of usury.

Trial by jury; verdict for $2,600. Motion for a new trial made and overruled. Judgment for plaintiff below, and appeal granted.

On trial, appellee read in evidence, the notes and blank indorsements.

H. Greenbaum testified that the notes were sold at their office, in Chicago, a few days after their date, April 20th, 1858; don't recollect to whom sold. They were left by Sherman to sell, to take up other notes maturing against the makers. The indorsement of our firm is my brother Elias' writing. We had no interest in the notes; we were acting as agents for the makers; don't know that the purchaser knew what the notes were left for, or for what the money was wanted. Don't know that Sherwood bought the notes; they were sold April 22, 1858, for $2,034, at three per cent. a month for six months; discount, $366. The discount lacks twelve cents of being three per cent. per month, (the notes having run two days, made more than this). Sherwood bought notes of us, but don't know as he bought those notes. But after looking at a book, stated,—it appears from the book that they were sold to a book-keeper of the Marine Bank; his name don't appear; thinks it was Richardson; am not acquainted with him; the entry is my brother's. Sherwood was clerk in Burch's Bank. Witness' firm are bill and note brokers, in Chicago, and have been so engaged since 1854, and were in the habit of receiving and selling paper at a usurious discount, as agents for owners. The appellee knew this, for he had bought of us before that time.

Appellants called *Frank P. Sherwood*, who testified that he did not purchase these notes, and never owned them. He received the notes from James Richardson, to sell to appellee, before due; he told Blackman he had no interest in the notes, was merely agent for Richardson, (who now lives in Montreal;) he was at the time book-keeper in Marine Bank, Chicago; don't know where Richardson got them, except what Richardson said to him.

Elias Greenbaum testified, that he sold the notes as agent for the makers; their firm had no interest in the notes; they were sold to the kook-keeper in Marine Bank, at three per cent. interest per month discounted from the notes, for six months; the amount paid or received was $2,034, which was more than two and a half from face; did not know his name.

The court, for appellee, instructed the jury—

1. That in order to let in the defense of usury against

Blackman, it is necessary the defendants (below) should show, by evidence satisfactory to the jury, that the notes were originally discounted, at a usurious rate, to F. P. Sherwood, and that Sherwood knew the notes were not owned by Greenbaums, who were holders of them, and also that Blackman had notice of the usurious discounting by Greenbaums to Sherwood, when he purchased the notes. The jury must find all this from the evidence in the case.

2. That a note given for a usurious consideration, is not void by the statute of Illinois, and the usury, if any, cannot be set up in any suit brought on negotiable paper, by a purchaser who acquired the note before its maturity, without knowledge or notice of its usurious character.

3. That although a note may be discounted at a usurious rate, still that usury is no defense against a subsequent *bona fide* purchaser, unless defendants prove that such purchaser had notice of such usury when he bought.

4. That in order to sustain the defense of usury under the pleadings, on the part of the defendants, the jury must be satisfied, from the evidence, that the notes in question were sold and discounted by Greenbaums, to F. P. Sherwood, in the manner pleaded in some one of the pleas.

5. The mere fact that a note is sold by a bill-broker, and that he sometimes sells notes at a usurious discount, and that such fact is generally known, and known to a purchaser, who sometimes buys notes, is not sufficient of itself to prove in a particular case of a note purchased, that it was purchased at a usurious discount.

To the giving of said instructions the defendants severally excepted.

The appellants then asked the court to instruct the jury as follows:

1. If the jury shall believe, from the evidence, that the notes in question were made and indorsed with a view to obtain money thereon, and the defendants left the notes with bill-brokers to be sold, to raise money without any interest in the notes, and sold them [as averred in the pleas] at a rate of three per cent. interest per month, discounted from the face of the notes, such transaction was usurious, and that these notes came to the hands of the plaintiff with knowledge of the usury, then in that case he is only entitled to recover the sum paid for the notes, with six per cent. interest per annum.

2. If the jury believe, from the evidence, that the notes in question are not indorsed to the plaintiff in this suit, then he cannot recover thereon, and their verdict should be for the defendants.

3. That usury may be given in evidence under the plea of the general issue, and that if the jury are satisfied, from the proof, that the plaintiff (below) had notice that Greenbaum & Brother sold these notes at a usurious discount, then under that plea in this case, the jury, in their verdict, should deduct the usurious discount, and render a verdict only for the sum of $2,034, paid by the plaintiff for the notes, with six per cent. interest thereon.

The court refused to give them, as asked, but interlined the first instruction, by adding these words—"as averred in the pleas"—and then gave that instruction to the jury; to which several opinions of the court, in refusing to give the instructions as asked, and in giving the one as amended, the defendants then and there severally excepted.

B. S. Morris, for Appellants.

Mather, Taft & King for Appellee.

Breese, J. We are at a loss to perceive how the defense set up can be sustained, there being no proof that the plaintiff had notice of the usury, and it being shown that he purchased the note before it was due.

The note was payable to Greenbaum Brothers, and they sold it at a discount greater than the rate of interest allowed by law, before it matured, to the plaintiff, and we look in vain for proof, that the plaintiff had any knowledge that the note was left with Greenbaum by the defendants to raise money upon, for their benefit.

The pleas of usury failed on another ground. They aver that the note was bought by Sherwood and by him sold to the plaintiff, when the fact is, as Sherwood states, that he never bought the notes and never owned them.

On the principle, that the allegations and proofs must correspond, this defense was not made out. Nor was it sustained under the plea of the general issue. Knowledge is not brought home to the plaintiff of the usury. There are no objections which we regard as tenable, to any of the instructions or rulings of the court, and the judgment must be affirmed.

Judgment affirmed.

HENRY WARNE *et al.*, Appellants, *v.* LAWRENCE M. BAKER, Appellee.

APPEAL FROM KANE.

The statute allows an appeal to supervisors, from a decision of commissioners of highways, when the highway to be laid out, relocated, etc., is on the line between two towns.

BAKER filed a declaration in trespass, containing four counts, that defendants, Warne and Bowne, on the first, tenth, fifth and twenty-sixth days of February, 1859, broke and entered plaintiff's close, to wit, the east half of the south-east quarter of Section 31, in Township 41 north, of Range 7 east, and the east half of lot 2 of the north-east quarter of Section 6, in Township 40, Range 7 east of the third principal meridian, in the county of Kane and State of Illinois, to his damage of three hundred dollars.

Warne and Bowne filed a plea of not guilty, and two special pleas: first, that defendants were highway commissioners of the town of Campton, in Kane county; that before and at the time, etc., a public highway had been laid out and ordered to be opened on the town line between the towns of Campton and Plato, in said county, and upon and across the close in question. That so much of said road as crossed the said close had been duly allotted to the town of Campton, as a road district to keep open and in repair. That plaintiff Baker was duly notified to remove the said fences out of such road; that he refused to do so. The defendants, as such commissioners, removed the said fences, which are the trespasses complained of. Second plea, that said close was a public highway, etc.

Plaintiff filed replications to defendants' pleas, that there was not a public highway laid out, etc.

A jury found the defendants guilty, and assessed the damages at five dollars. Defendants' motion for a new trial was overruled.

On the trial, the plaintiff proved that he was the owner and in possession of premises described in his declaration, and defendants entered upon and removed about four rods of fence at two points on the town line between the towns of Plato and Campton, in Kane county. That they were acting highway commissioners for the town of Campton, and claimed that said fences which they removed were within the line of a public road, which they claimed had been regularly laid out upon the line between the said towns of Campton and Plato.

The defendants then offered as evidence certified copies from

the files and records of the respective town clerks' offices of said towns of Campton and Plato, the authenticity of which was duly proven, to show that the road had been duly relocated by the appropriate authorities, etc., and that proper notice had been given to remove the fence. Which evidence the court, I. G. Wilson, Judge, presiding, rejected.

The following are the errors assigned:

The court erred in refusing to allow the evidence offered by the defendants to be given to the jury.

The Circuit Court erred in giving the instructions to the jury as asked by the plaintiff below.

Glover, Cook & Campbell, for Appellants.

W. D. Barry, for Appellee.

Caton, C. J. The decision of the court in ruling out the evidence offered, raises the question, whether the statute allows an appeal to be taken from the decision of the commissioners of highways to supervisors, when the road in controversy is on the line between two towns.

The eighth section of the twenty-fourth article of the law of 1851, provides for an appeal from an order of the commissioners, in altering, relocating or laying out a new road, by any person or persons aggrieved, to three supervisors of the county, but not of the town, in which the road is located, at any time within twenty days after the order of the commissioners is filed with the town clerk. This appeal had to be addressed to the supervisors by name. The statute then, in sections nine, ten, eleven, twelve and thirteen, describes the proceedings on the appeal. The fourteenth section provides for an appeal from the decision of the commissioners, where they refuse to alter, relocate or to lay out a new road, and says the appeal shall be taken "in the same manner, and subject to the same provisions and restrictions" as in the other case. These are the provisions allowing appeals from the decisions of commissioners to three supervisors, under the law of 1851. The amendment of 1857 makes no change as to the right of appeal, but requires that the application for appeal shall be made to the town clerk, who selects and notifies the supervisors before whom the appeal is tried.

The twentieth section provides, "whenever the commissioners of highways of any town receive a petition, praying the location of a new road, alteration or discontinuance of an old one, upon the line between two towns, such road shall be laid out, altered or discontinued, by two or more of the commission-

ers of highways of each of said towns, either upon such line, or as near thereto as the convenience of the ground will admit, and they may so vary the same, either to the one or the other side of such line, as they may think proper." Under this section, application was made to commissioners of these two towns, who refused to relocate the road on the town line, and an appeal was taken to three supervisors of the county, who reversed the order of the commissioners, and granted the prayer of the petitioners by the location of the road on the town line. And it is now insisted that no appeal is allowed where the road is upon a town line. We are unable to see the least force in this position. There is the same necessity for the appeal in the one case as in the other, and the eighth and fourteenth sections of the law of 1851 give the appeal, in all cases, without distinction. In the law of 1857, the legislature uses the word *clerk* in the singular only, while in this case, it was necessary to take the appeal to the clerks of the two towns, who jointly selected the supervisors who tried the appeal. This is but an assimilation of the law to the exigencies of the case, and thus meeting the requirements of the spirit of the law. The law gives the appeal, and if there were a deficit in the provisions prescribing the detail of the practice, that would not destroy the right, but it would be the duty of the courts, and of those who are to administer the law, to adopt a practice conformable to its requirements.

The court erred in ruling out the evidence, and its judgment is reversed, and the cause remanded.

Judgment reversed.

E. R. Hooper, Plaintiff in Error, *v.* Frederick H. Winston, Trustee, etc., Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A receiver is the officer of the court appointing him, and as such, has a very limited discretion in the performance of his duties. The court has a supervisory power over his expenditures.

It is the duty of a receiver to keep an account current of all his business in that capacity, and if, in his judgment, expenditures are necessary, he should apply to the court for leave to make such outlay.

No single act, calculated to diminish seriously the fund, could the receiver do, on his own motion.

A receiver is liable to account for any benefit, or interest, which he might make from the moneys in his hands.

THE facts appearing upon the record are as follows:

John McCardel, being indebted to the Commercial Exchange Company, (a banking institution in the city of Chicago,) in the sum of two thousand dollars, executed and delivered to Ashley Gilbert (the secretary of said company,) a certain mortgage deed, or conditional bill of sale, to secure the payment of said sum of two thousand dollars, and future advances not to exceed the sum of six thousand dollars, payable in one year. Which mortgage deed or conditional bill of sale embraced the leases, and furniture and fixtures of the hotel known as the "McCardel House," situate in the city of Chicago, and was duly recorded according to law.

That subsequently, the said John McCardel executed and delivered to A. M. Crane another chattel mortgage on the same leases, furniture and fixtures, to secure to the said Crane the payment of the sum of seven thousand two hundred dollars, and interest, payable in two years, provided the interest was paid at the end of one year from the date thereof.

That subsequently, the said John McCardel executed and delivered to Henry L. Wilson a chattel mortgage upon furniture and chattels not embraced in said previous mortgages to Gilbert and Crane, to secure to the said Wilson the payment of the sum of three hundred and sixty dollars, which was duly recorded, according to law.

That subsequently, the said John McCardel executed chattel mortgages to Erastus Corning & Co., John M. Davidson, and Frederick H. Winston, trustee, respectively, to secure the payment of the various sums therein expressed, as by reference to the same will fully appear, and which were duly recorded according to law.

That subsequently, the said A. M. Crane assigned all his right, title and interest in said mortgage to Jonas M. Crane.

That afterwards, the said Jonas H. Crane executed, acknowledged and delivered to E. R. Hooper a power of attorney, by which said Hooper was authorized "to take charge of, manage and adjust" said mortgage assigned to him as aforesaid, and also authorized "to take all legal and necessary and proper steps for the better securing said mortgage debt, or for adjusting the same, or having the same liquidated," and also authorizing him "to do and perform all and everything that might be necessary to be done in his judgment, in the premises, for my (his) interest."

That afterwards, the said mortgage to Ashley Gilbert was placed in the hands of the said E. R. Hooper for foreclosure and collection, and that under and by virtue of the power

of sale contained in said mortgage, the said Hooper advertised the leases and furniture and fixtures embraced in said mortgage, to be sold at public auction, in the city of Chicago, or so much thereof as might be necessary to raise a sum sufficient to pay said mortgage debt, which then amounted to six thousand dollars—the said Hooper, at the time of advertising the same, having taken possession of the furniture and fixtures, and placed a custodian in charge of the same.

That on the 10th day of May, 1855, (the day on which said sale was advertised to take place,) the said Frederick H. Winston, by his solicitors, Messrs. King, Scott & Wilson, filed his certain bill of complaint in the Cook County Court of Common Pleas, in which, after reciting the premises, and averring that the said mortgage to said Gilbert was illegal and void, as against the *cestui que trusts* of said complainant, for the reason that the same had been acknowledged before a notary public, and not before a justice of the peace, prayed for and obtained an injunction from said court, restraining and enjoining the said Hooper, and the said Gilbert, their agents, etc., from selling or otherwise disposing of said furniture and fixtures, but leaving them at liberty to sell said leases under said mortgage.

That said furniture, fixtures, etc., remained in the possession of said Hooper, as attorney for said Gilbert.

That a few days subsequently, the agents and attorneys of the said mortgagees, upon consultation, deeming it advisable to sell the said leases and furniture, and fixtures, as a whole, and in order to prevent a forfeiture of said leases for non-payment of rent, and to save the said furniture and fixtures from being sold to satisfy the arrearages of rent then due, entered into an arrangement with said Hooper, by which it was agreed he should be appointed receiver, pay the arrearages of rent then due, and sell and dispose of said leases, furniture and fixtures, and appropriate the proceeds of such sale according to the provisions of a written stipulation at that time executed by the agents and attorneys of said mortgage creditors and the mortgagor himself, which said stipulation is in the words and figures following, to wit:

COOK COUNTY COURT OF COMMON PLEAS.

FREDERICK H. WINSTON, Trustee,
vs.
ASHLEY GILBERT, Trustee, *et al.*
} In Chancery.

It is hereby stipulated and agreed by the attorneys and agents for the parties, plaintiffs and defendants in the above entitled cause, and by the mortgagor, that the Hon. JOHN M. WILSON, Judge of the Cook County Court of Common Pleas, shall

appoint E. R. Hooper receiver, for the purpose of taking possession of and selling the goods and chattels embraced in the several mortgages and deeds of trust, referred to in the bill of complaint in said cause, and shall pass an order authorizing the sale of said goods and chattels, either together with the leases of the house and appurtenances, known as the "McCardel House," in the city of Chicago, as a whole, or separately from said leases, and either at public or private sale, as the said receiver shall deem most advantageous for all parties concerned, and may sell for cash or on short credit, as he may deem most expedient, and that the proceeds of said sale of said goods and chattels, after the payment of such liens as are undisputed, and such demands and liabilities against said "McCardel House," as it has been or may be necessary to incur and pay, in order to keep the said house in operation, shall be paid into the said Cook County Court of Common Pleas, to abide such decision as the said court may make in the premises.

It is also further agreed, that the said receiver be authorized to pay the mortgage debt, and costs and expenses incurred, of Henry L. Wilson, and that the same shall be deducted from the proceeds of the sale of said goods and chattels, before the same are paid into court.

Provided, that before said receiver shall sell said property at private sale, he shall obtain the consent thereto of the mortgage creditors, their agents or attorneys.

Provided, also, that if it is deemed best to sell both the leases and goods and chattels as a whole, that the mortgage debt held by Ashley Gilbert, secretary to the Commercial Exchange Company, shall be paid out of the proceeds of said sale, and not paid into court, if the same are sufficient.

(Signed) ERASTUS CORNING & Co.,
JOHN DAVIDSON,
By Sedgwick & Walker, Attorneys.
JOHN F. CLEMENTS,
Attorney for Henry L. Wilson.
JONAS H. CRANE, and
COMMERCIAL EXCHANGE Co.,
By E. R. Hooper, Attorney.
THOMAS W. HUTCHINSON,
Agent for Hitchcock & Co.
JOHN MCCARDEL,
JOHN TAYLOR,
JAMES J. JOHNSON,
JAMES BURTON,
By King, Scott & Wilson, Attorneys.

That subsequently, a petition or motion was prepared and presented to the said court, for the purpose of carrying out said stipulation.

That on the hearing at the June term, the said court passed the following order:

"FREDERICK H. WINSTON, Trustee, *vs.* ASHLEY GILBERT *et al.* } Chancery.

"And now, at this day, coming on to be heard, the written stipulation heretofore filed in this cause, and signed by the attorneys and agents of the parties, complainant and defendants, and the motion of the complainant's solicitors for the appointment of a receiver, to sell and dispose of the property mentioned in the proceedings in said cause, according to the terms set forth in said written stipulation: It is thereupon ordered by the court, that Ezekiel R. Hooper be, and he is hereby appointed receiver, to sell and dispose of said property in the proceedings in said cause mentioned, and to dispose of and appropriate the proceeds thereof in the manner, and upon the terms prescribed in the said written stipulation. It is also ordered that the said Ezekiel R. Hooper, as receiver, give bond with surety or sureties to be approved by this court, for the faithful performance of the trust reposed in him by this decree or any future decree or order in the premises."

That according to the provisions of said stipulation said hotel was kept in operation until the 15th day of July, A. D. 1855, when the same was sold by said receiver as a whole, for the sum of eighteen thousand dollars, of which the sum of eight thousand dollars was paid in cash, and the residue secured by the notes of the purchaser, on a credit of six and twelve months, with interest at six per cent. per annum.

That afterwards, said receiver made his report to said court, which was excepted to, and an order entered by said court that said receiver make a further or supplemental report.

That afterwards, the said receiver filed a further or supplemental report in said cause.

That no exceptions were filed to said receiver's said supplemental report.

That according to said receiver's report, there had come into his hands, as receiver, from the sale of said property, for principal and interest, and from rents, the sum of $18,565.

That of said amount said receiver had paid out and disbursed the sum of $14,546.48, as follows: To extinguish liens, $2,606.38; for expenses of sale, $210.25; for expenses over receipts for keeping said hotel in operation, $3,451.45; to Ashley Gilbert, in full of his mortgage debt, $6,000; and to Jonas H. Crane, assignee of A. M. Crane, in part of his mortgage debt, $2,278.40—leaving a balance in the hands of the receiver, subject to the order of said court, of $4,018.52.

That afterwards, said receiver made a further payment to said Jonas H. Crane, on his said mortgage debt, of $2,000, leaving a balance of $2,018.52 in said receiver's hands, subject to the order of said court.

That on the 20th day of June, A. D. 1857, the said cause, by order of said court, was referred to the master in chancery of said court, to take proofs in relation to the premises.

That afterwards, said master in chancery made his report to said court of the proofs taken in said cause, and also his opinion of the proper allowances to be made to said receiver for his disbursements.

That by said master's report, he allowed to said receiver the sum of $3,091.27, for extinguishing liens on said property, for expenses in keeping said hotel in operation, and expenses for the sale thereof, and the further sum of $2,273.40, for the payment by said receiver to said Jonas H. Crane, on his said mortgage, and disallowed the payment of $6,000, made by said receiver to said Ashley Gilbert, on his said mortgage, and all other items of payments and disbursements made by said receiver, as claimed in his said report, and charging said receiver with a balance of $13,200.33.

That exceptions were filed to said master's report, by said receiver and other parties, and that no action was ever taken by said court upon said master's report, or the exceptions thereto.

That afterwards, the said cause was referred back to said master in chancery, to take further proofs therein.

That afterwards, on the —— day of August, A. D. 1858, the said master made his second report to said court, of the proofs taken before him.

That no proof was furnished before said master or before the court, in which it was attempted to impeach the correctness or good faith of said payments and disbursements claimed by said receiver in his said reports.

That proof was furnished by said receiver, to show that said disbursements for expenses for keeping said house in operation, were proper and legitimate for such purpose.

That it is admitted by stipulation that every payment and disbursement made by the receiver, and claimed as a credit, was made as claimed.

That afterwards, on the 8th day of September, A. D. 1858, it was stipulated and agreed in writing before said court, that all the testimony on file in said cause, including that reported by the master in the two reports, and that referred to in certain stipulations on file, "should be used on the hearing of said

cause," "subject to all legal exceptions as to its relevancy or competency, but that the opinion of the master reported thereon shall be disregarded by the court upon such hearing, and the hearing shall be had upon the proofs already taken, or hereafter to be taken in said cause."

That said receiver furnished vouchers or proofs of all his disbursements and payments claimed in his reports, and proofs that all moneys received in said hotel during the time the same had been kept in operation under said stipulation and order, had been disbursed and paid out by the clerks thereof (by whom they were all received,) for the small daily current expenses of said hotel, and that no part of the disbursements and payments claimed by said receiver had been paid out of the said receipts of said hotel. Also, that the small book, containing an account of said receipts and disbursements had been lost or mislaid. That said hotel had been conducted with all due economy, and every reasonable effort made to attract custom and patronage to it. The said receiver also furnished proofs of the payment made to Ashley Gilbert, and Jonas H. Crane, upon their respective mortgages.

That afterwards, said cause came on for final hearing before said court, and on the 18th day of November, A. D. 1859, the said court made and caused to be entered, a final decree in said cause, which decree is in the words and figures following, to wit:

Frederick H. Winston, Trustee, *et al.* *vs.* Ashley Gilbert, Trustee; Roswell Carter, Jonathan Blinn, James Long, James Peck, John S. Newhouse, Isaac Cook, Seth M. Warner, Philander Eddy, Thomas Richmond, John R. Case, Ashley Gilbert, S. G. Russell, Jr., Ezekiel R. Hooper, Jonas H. Crane, Erastus Corning & Co., I. M. B. Davidson, and H. L. Wilson.	In Chancery Bill.

This cause having been brought to hearing upon the bill and answer of the defendants, Isaac Cook and Jonas H. Crane, and the replications thereto, and upon the proofs in this cause, and after hearing King, Scott & Wilson, solicitors for complainants, and W. T. Burgess, for defendant Isaac Cook, J. M. S. Causin, for defendant Ezekiel R. Hooper, and E. Van Buren, for defendant Jonas H. Crane, who is sued by the name of H. Crane, none of the other defendants having appeared on said hearing; and it appearing that due service of process has been made upon all of said defendants, and all of said defendants have appeared in said cause at the June term of this court, 1856; and it further appearing, that none of said defendants,

except the said Isaac Cook and Jonas H. Crane, have filed any answer in said cause; and it further appearing, that at the June term of this court, 1858, an order was made that all the other defendants answer the bill of complaint, or that the bill be taken as confessed against them, and such defendants not having answered, according to said order, the default of all the defendants except said Cook and Jonas H. Crane, was duly entered, and the bill taken as confessed against them; and it further appearing, that the bill in this cause was filed to settle and determine the rights and priorities of the respective mortgagees, trustees, and assignees and claimants mentioned in said bill, and to decree the application of the avails of the property mentioned in said bill to the payment thereof, according to their respective rights.

And it further appearing, that at the June term of this court, 1855, the defendant, Ezekiel R. Hooper, was appointed by this court receiver of the property embraced in the several mortgages mentioned in said bill of complaint, and accepted said trust, and that as such receiver he sold said property, and received therefor the sum of $18,565.

And it further appearing, that there was due on the trust deed or mortgage, made by John McCardel to Ashley Gilbert, as trustee for the Commercial Exchange Company, the sum of six thousand dollars, that such trust deed or mortgage was a valid lien, and was prior to all the other liens and claims mentioned in the said bill, and that said Ezekiel R. Hooper, as such receiver, out of the avails of the property which came into his hands as such receiver, had paid six thousand dollars to said Commercial Exchange Company, upon their said trust deed or mortgage.

And it further appearing, that the said mortgage made by said McCardel to Archibald M. Crane, mentioned in said bill of complaint, had, before the commencement of this suit, been duly transferred to Jonas H. Crane, who is made defendant in this suit by the name of H. Crane, and that the same is a valid mortgage.

And it further appearing, that there is now due and unpaid upon said last mentioned chattel mortgage, after allowing all payments heretofore made upon the same, the sum of five thousand three hundred and twenty-three dollars and forty-three cents, ($5,323.43.)

And it also appearing, that the defendant, Ezekiel R. Hooper, as such receiver, in pursuance of an order made by this court, on or about the 22nd day of October, 1859, has brought into this court the sum of twenty-one hundred and thirty-eight dol-

lars and fifty-two cents, and which is subject to the order of this court.

And it further appearing, that the said mortgage and trust deed to Ashley Gilbert, was the first lien upon said property mentioned in said bill, and which has been paid by said Hooper, and that the said mortgage mentioned in the said bill of complaint, made by said McCardel to said Archibald M. Crane, and assigned to Jonas H. Crane, is a valid, legal lien upon said property, or the avails, and was next in priority to the said mortgage to said Gilbert, and is a prior lien to all the other mortgages and trust deeds and claimants mentioned in said bill, and as such is entitled to be paid out of the avails of said property.

And it also appearing, that the said Hooper has paid out various sums of money for the rents and expenses in keeping open the McCardel House, as such receiver, amounting in the aggregate to thirty-seven hundred and ten dollars and ninety-seven cents, ($3,710.97.) And it also appearing, that there is now in the hands of said Ezekiel R. Hooper, as such receiver, after allowing him all the moneys paid to the said Ashley Gilbert, trustee of Commercial Exchange Company, and to Jonas H. Crane, including the payment of a certain note against Reuben Lovejoy, and which said Crane received as cash, and all payments made to all other persons, and all expenses allowed by this court for keeping open the McCardel House, and after allowing him credit for the said moneys brought into this court, and after allowing him nine hundred dollars ($900) as his commissions as such receiver, the sum of twenty-two hundred and ninety-eight dollars and eighty-two cents, ($2,298.82,) including interest upon the balance in his hands after the date of his report, upon the basis stated in the statement hereto annexed.

It is therefore ordered, adjudged and decreed, that the said mortgage or trust deed made by said defendant, McCardel, to Ashley Gilbert, in trust for the Commercial Exchange Company, was a valid mortgage and a legal lien upon the said property mentioned in said bill, and was the first lien, and had priority over all other mortgages, trust deeds, and claimants mentioned in said bill of complaint, and that said Ezekiel R. Hooper having paid the same, amounting to six thousand dollars, ($6,000,) that the said Hooper be allowed such payment.

And it is further ordered, adjudged and decreed, that the mortgage made by defendant McCardel to Archibald M. Crane, on the first day of September, A. D. 1854, and mentioned in said bill, and which has been assigned to, and at the time of the commencement of this suit belonged and now belongs to the defendant Jonas H. Crane, was also a legal and valid claim upon the

property mentioned in the said mortgage, and set forth in said bill, and is a prior lien to all the mortgages, trust deeds and claimants mentioned in said bill, except the mortgage to Ashley Gilbert aforesaid, and which has been paid, and as such is entitled to be paid out of the said trust fund in this court, or in the hands of said Hooper, as such receiver, or to have the same applied to such payment as far as the same will go, upon which mortgage there is now due and unpaid, after deducting all payments thereon, the sum of fifty-eight hundred and twenty-three dollars and forty-three cents.

And it is further ordered, adjudged and decreed, that there is still in the hands of the said Ezekiel R. Hooper, as such receiver as aforesaid, after deducting all moneys paid by him, and after allowing him all such sums as the court deems reasonable and proper for keeping open said McCardel House, and for executing his trust, and after deducting twenty-one hundred and thirty-eight dollars and fifty-two cents, moneys brought into this court, in pursuance of an order of this court, made on or about the 22nd day of October, 1859, and after allowing him nine hundred dollars for his commissions, as such receiver, the sum of twenty-two hundred and ninety-eight dollars, and eighty-five cents.

And it is further ordered, adjudged and decreed, that the clerk of this court pay to the solicitor of defendant, Jonas H. Crane, to be applied upon the said mortgage of said Crane, as aforesaid, the said sum of twenty-one hundred and thirty-eight dollars and fifty-two cents, paid into court as aforesaid, or so much of it as shall remain after first paying the costs of this suit.

It is further ordered, that the said Ezekiel R. Hooper do, within ten days after service of a copy of this decree, bring and pay into this court the sum of twenty-two hundred and ninety-eight dollars and eighty-five cents, being the balance of moneys in his hands, as such receiver, and when the same shall be brought into this court, the clerk thereof shall pay the same over to the said Jonas H. Crane, or his solicitor, to be applied upon his said mortgage, as aforesaid. All further questions to carry out this decree are reserved.

To avails of sale of property, per your report,			$18,565.00
Cr. By cash paid Commercial Exch. Bank, - - - - -	$6,000.00		
By amount paid Crane, -	2,278.40		
By note of Lovejoy's, received by Crane as cash, - -	2,000.00		
By amount allowed for rents, expenses, etc., - - -	3,710.97		
By amount allowed for commissions, - - - -	900.00		
			$14,884.77
			$3,680.23
Interest from June 2nd, '56, date of report, till Oct. 18th, 1859, - - - - - - -			745.23
			$4,425.46
Deduct cash paid into court, - - -			2,138.52
			$2,286.94
Interest from Oct. 18th, till Nov. 18th, 1859,			11.89
			$2,298.82

J. M. S. Causin, and E. R. Hooper, for Plaintiff in Error.

Van Burens & Gary, for Defendant in Error.

Breese, J. We think it must be conceded that Mr. Hooper was not receiver of this fund until he was appointed such by the court, on the agreement of the parties in interest. He then became an officer of the court, and so denominates himself in his several reports to the court—referring to himself as "your receiver." Hence, all doubt is removed as to the power from which he received his appointment, and the only question is, in what mode and to what extent was he accountable to the court? He was appointed receiver on behalf of all parties, and not of the complainant or of any one of the defendants only, but for the benefit of all parties who may establish rights in the cause; and the money in his hands is in the custody of the law, for whoever can make out a title to it. It is the court itself which has the care of the property in dispute, the receiver being but the creature of the court. As to his powers, he has no other than those conferred upon him by the order appointing him, and the course and practice of the court. *Verplanck* v. *Mercantile*

Ins. Co., 2 Paige's Ch. R. 452. As a general rule, he can pay nothing without an order of court, nor can he make a dividend, in ordinary cases, without the special sanction of the court. The plaintiff here, however, contends that for his powers we are to look to the stipulation of the parties, on which he was appointed receiver. We do not doubt, the general powers of a receiver, may be restricted or enlarged by the parties at whose instance he is appointed, but he remains, nevertheless, an officer of the court. By reference to the stipulation in this case, it will be perceived that the plaintiff in error was appointed receiver for the purpose of taking possession of, and selling, the goods and chattels embraced in the several mortgages and deeds of trust then in litigation, the court to pass an order authorizing the sale of these goods and chattels, either together with the leases of the house and appurtenances known as "the McCardel House," as a whole, or separately from the leases, and either at public or private sale, as the receiver might deem most advantageous for all the parties concerned, and for cash or on short credit. The proceeds of the sale of the goods and chattels, after the payment of such liens as are undisputed, and such demands and liabilities against the "McCardel House," as it has been or may be necessary to incur and pay in order to keep the house in operation, shall be paid into the Cook County Court of Common Pleas, to abide such decision as the court might take in the premises. It was further stipulated, that the receiver be authorized to pay the mortgage debt and costs and expenses incurred, of Henry L. Wilson, the same to be deducted from the proceeds of the sale of said goods and chattels, before the same are paid into court. And it was also provided, that if it was deemed best to sell both the leases and goods and chattels as a whole, that the mortgage debt held by Ashley Gilbert, secretary of the Commercial Exchange Company, should be paid out of the proceeds of the sale, and not paid into court, if the same are sufficient. After making this stipulation, and agreeing upon a receiver, the complainant, Winston, presented a petition to the court, stating that the goods and chattels were designed for hotel keeping, and that it was the opinion of the parties interested, that they would sell to better advantage in conjunction with the leases. He states further in his petition, that a controversy had arisen between some of the mortgage creditors as to their respective rights under the mortgages, which it might require much time to adjudicate and settle, and that it would be most advantageous to sell the property at once, the proceeds applicable to such disputed claims to be held subject to the order of the court, and for that purpose it was prayed that a receiver

be appointed to take charge and dispose of the property according to the terms of the written stipulation, and under such further restrictions and directions as to the court might seem right and proper.

The order of the court following upon this petition and stipulation, was as follows:

"It is therefore ordered by the court, that Ezekiel R. Hooper be and he is hereby appointed receiver, to sell and dispose of said property in the proceedings in said cause mentioned, and to dispose of and appropriate the proceeds thereof, in the manner and upon the terms prescribed in the said written stipulation."

It is contended by the plaintiff in error, that under this stipulation and order of the court, he is not required to bring any of the proceeds of the sales into court, but can apply them, as he has done, in paying off the Wilson and Gilbert mortgages, and in keeping the McCardel House in operation until he sold it, and that he is not obliged to render any account of the expenses of that house, and that he alone was the judge of what was necessary to keep it in operation.

As to the Wilson mortgage, it will be seen that the receiver was allowed to pay it off out of the proceeds of the goods and chattels before they were paid into court. This we understand was on the condition that they were sold separately, and not in conjunction with the leases. If they were all sold together, then Gilbert's mortgage was to be paid out of the proceeds before they were paid into court. The fact being that they were held conjointly, then Gilbert's mortgage alone was to be paid out of the proceeds, and all beyond that brought into court. If this is not so, why was this distinction made in the stipulation? In order to do this, the receiver should have kept a separate account of the sale of the chattels and of the leases, but we see no such account on file. As, however, there are no cross-errors filed in the cause, the allowance of the payment of Wilson's mortgage cannot now be questioned.

As to these payments then, it was expressly stipulated that they should come out of the proceeds before they were paid into court.

The other claim set up by the receiver, to be allowed such expenses as he has chosen to set down, to keep the house in operation, we are constrained to say, we see no ground upon which to base it.

The receiver claims, that in this matter he was vested with a discretionary power, and therefore the court had no authority to examine into the mode or manner of its exercise; that he was

merely the private agent of these parties, that whole subject being left to his own judgment.

We do not deny that he had some discretion in this matter, but it was very limited. We hold, being an officer of the court, he should have applied to the court for leave to make these expenditures, and he is amenable to the court for the exercise of all his powers. As receiver and trustee for parties litigant, it was his manifest duty to have kept regular accounts, item by item, of all the expenses of the house, and of the receipts arising from it, and from all other sources from which money might have come into his possession. He should show an account current of the house, embracing therein, the stock he found on hand, the purchases of every description for the house, and the receipts of the house. That there were large receipts is unquestionable, yet no account has been rendered of any. That a bar furnished with more than fifteen hundred dollars worth of liquors should not, in Chicago, produce any returns, is incomprehensible. Failing to show any account current, every presumption ought to be against him, and for all his charges against the fund entrusted to his keeping, he should show satisfactory vouchers and proofs. He has shown none in the several reports he has made to the court. His judgment was not the limit of the expenditures, but the court, he being one of its officers, has a supervisory power over his acts, and he is amenable to its judgment as to the necessity of these expenditures, in order to keep the house in operation, and he is certainly accountable for the receipts.

The cases referred to by plaintiff's counsel are all cases of persons acting in a fiduciary character, and not by appointment of any court. With the exercise of the discretionary powers of such, courts will rarely interfere. But with its own officers it would be recreant to its duty, if it did not hold them to the strictest accountability.

So delicate is the position of a receiver appointed by a court, upon the selection of the parties in interest, that so far from being anxious to act, and incur liabilities, he is the reverse, and requires, sometimes, to prompt him to act, the spur of the court. His office is one of confidence wholly; his great object should be to prove himself worthy of it. His discretionary powers, as a general thing, are quite limited. He cannot bring an ejectment without leave of the court, nor lay out money in repairs at his discretion. If he does, it is referred, before an allowance, to a master, to ascertain if the repairs are reasonable. In the case of *The Attorney General* v. *Vigor*, 11 Vesey, 563, Lord Chancellor Eldon observed, that the court was not in the habit of

permitting receivers and committees to apply the trust fund in repairs, to any considerable extent, without a previous application. In the case of *Waters* v. *Taylor*, 15 Vesey, 25, which arose out of the management of an opera house, the same chancellor said, that the court would not, in the broad discharge of his duty, permit a receiver to lay out more than a very small sum at his discretion.

In the management of the McCardel House, although the receiver was required to keep it in operation until the sale, he had, as an officer of the court, but very little discretion allowed him, and should have applied to the court, by a brief petition, setting out the facts and asking for a reference, whether such and such expenditures would be for the benefit of the interested parties, and necessary to keep the house in operation, or for whatever other purpose the expenditure may have been desired. No single act, calculated to diminish seriously the fund, could the receiver do, on his own mere motion, and in the exercise of his discretion. The thing is unheard of, and the claim set up here to do so cannot be allowed. And he should have sold the property at the earliest practicable moment, so that keeping it in operation should not seriously have diminished the fund.

We are satisfied the plaintiff should be charged with interest, as he received interest on the sale, or might have done so. A receiver is liable to account and pay over the amount of any benefit or interest which he might make of the moneys in his hands. *Shaw* v. *Rhodes*, 2 Russel, 539.

The decree of the court below is affirmed.

Decree affirmed.

John Yates, Appellant, *v.* Thomas Shaw, Appellee.

APPEAL FROM PEORIA.

Although the government surveys should rule, where they can be ascertained, yet if parties agree upon other lines of division, they will be estopped thereby.

What a party stated in reference to a boundary line, at the time he was supposed to have recognized it by planting a hedge, is proper evidence for a jury, as a part of the same transaction.

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

Grove, McCoy & Harding, for Appellant.

Manning & Merriman, for Appellee.

WALKER, J. This was an action of *quare clausum fregit*, instituted in the Peoria Circuit Court, by appellee against appellant, for breaking and entering his close on the S. E. 11, T. 10 N., 7 E. of the fourth principal meridian. An issue was formed on the plea of not guilty; a trial was had by the court and jury, which resulted in a verdict of twenty-five cents in favor of plaintiff. The defendant thereupon entered a motion for a new trial, which was overruled by the court, and judgment rendered on the verdict, from which defendant prosecutes an appeal.

This controversy grows out of a disputed boundary line between adjoining quarter sections. As a general rule, the lines and corners of lands established by the government surveys, when it was first surveyed, platted and recorded, must control when they can be ascertained and identified. But owing to the wild, unsettled condition of the country at the time, the want of skill and experience of the men employed in many instances, the want of care and attention in others, the imperfection of instruments used, the variation of the needle, and the obliterating effects of time, it is, in most cases, a matter of no small difficulty to ascertain, with certainty, where such corcorners and lines were established by the government. Many of the most skillful and experienced surveyors differ more or less in determining where they were located. Lines and corners that are supposed to be fixed and established by one surveyor are overturned or left in doubt by another, at a subsequent period. In all matters of uncertainty and dispute, the parties may, without doubt, compromise and end the dispute. And they may as certainly fix by agreement, the boundary lines separating their lands, as other disputes. And when they have thus agreed upon the position of such boundary, and have acted upon it as the true line, they should be estopped from asserting another and different line. Slight acts which may be construed into such an agreement, should not, however, be held to conclude the parties. To have that effect, they should be clear and satisfactory, and not doubtful and equivocal in their character. When the agreement of the parties to adopt a particular boundary is shown, and possession is taken and held according to such agreement, the parties are estopped to dispute that, as the true boundary, and when the fact is satisfactorily established, it is sufficient. And while it may be true that it does not alter or change the original location of such line, still it must be regarded as the true line, and the parties concluded from disputing it. If it was proved that the McFadden line was by agreement adopted and acted upon as the boundary, and that the

parties, in pursuance of that agreement, erected fences or hedges on that line, and took possession in conformity to it, they are now concluded from denying that it was properly and truly located.

It is urged that the court erred, in refusing to give the fifth, sixth, seventh and eighth of defendant's instructions. Had there been no evidence tending to prove that the parties agreed to adopt the line run by McFadden, they would undoubtedly have been correct, and should have been given, but with such evidence, they were properly refused, unless they had been qualified so as to have announced to the jury, that they should be governed by the surveys as made by the government, unless the parties had agreed upon a definite boundary, and had taken possession and held in accordance with the agreement. As they were asked, we perceive no error in their refusal.

The next objection urged is, that the court erred in excluding a portion of the evidence of Dr. Yates, who testified, that when the appellant was planting the hedge, he said the survey was not correct, but as he had the plants he would rather not lose them, and could afterwards use the land south of it for a locust grove. This was excluded from the jury, and it could only have been because it was supposed, the declaration of the party in his own favor, was inadmissible. At the time he made this declaration, he was engaged in planting the hedge on the McFadden line, which fact was proved as an admission or act of his, recognizing that line as the true boundary. And if his acts were evidence against him, it seems to us that what he then said in explanation of the act, was equally admissible. It was a part of the transaction, and should have gone with the act, and been considered by the jury with all the other evidence in the case, and should have had at their hands, the weight it was entitled to receive.

In determining the question of the adoption of a line as a boundary, the declarations and acts of the parties, connected with the transaction, are admissible, to explain the intention of the parties. The court therefore erred in excluding this evidence, and for that reason the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

Samuel Holmes, Appellant, *v.* William Stummel, Appellee.

APPEAL FROM MARSHALL.

A party who sues upon a special contract, cannot recover, unless he shows he has performed the contract substantially; or if he has performed but a part, that the remainder was waived or prevented, and the part performed has been accepted. The measure of the damages is the contract price, to be appropriately apportioned.

If a suit is brought for work and labor in assumpsit, the defendant may show a special contract; if he does, the plaintiff cannot recover unless he shows that, though the work was not done as contracted for, yet that it has been appropriated, when the contract price will rule practically, leaving the defendant to recoup for any injury for non-performance of the contract.

This was an action of assumpsit, for work and labor done, commenced by the appellee against the appellant, in the Circuit Court of Marshall county. The cause was tried before Ballou, Judge, and a jury, at the May term, 1858, of said Circuit Court, and a verdict and judgment against the appellant, in favor of the appellee, for $262.13, to reverse which judgment, the said appellant brings this cause into this court.

There had been a written contract between the parties, in reference to grubbing a piece of land. The controversy arose about the manner of doing the work, and the quantity of work done by the plaintiff.

See this case as reported in 17 Ill. R. 455.

H. M. and J. J. Wead, for Appellant.

Richmond & Burns, for Appellee.

Breese, J. The general rule in suing upon a special contract is, that a party cannot recover unless he shows that he has performed the contract substantially, or having performed part, and the balance waived or prevented by the other party, and the part performed has been accepted and appropriated. In either of which cases, he can recover for what he has done, the measure of damages being the contract price agreed to be paid in proportion to the whole work.

When the suit is brought upon a general *indebitatus assumpsit*, for work and labor, the defendant may defend, by showing a special contract, and the plaintiff cannot recover unless he shows that, though the work was not done as by the contract, that it has been appropriated and enjoyed by the defendant, and in that case the special contract affords the rule of damages, so far as it can be traced and followed, less any amount the defendant

may justly recoup for injury, for non-performance of the contract.

There was contradictory evidence in this case, whether there was a special contract or not, and also if there was, whether the plaintiff has performed it, and though we might not have reached the same conclusions the jury did, we cannot say they have so mistaken the evidence as to justify our interference. As to the law of the case, it was stated correctly, in substance, by the court, in disposing of the various instructions. Though not strictly correct in some particulars, they could not have misled the jury in any way. All the facts were fully before them, and we are disposed to think they have done justice between the parties.

The judgment must be affirmed.

Judgment affirmed.

John Clark, Plaintiff in Error, *v.* Livingston County, Defendant in Error.

ERROR TO WOODFORD.

The Supreme Court of this State has not jurisdiction to enforce a decree against the United States.

This bill alleges substantially that the Congress of the United States passed an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, approved Sept. 28, 1850.

The 3rd section limits the grant in effect to the legal subdivisions of land, the greater part of which is wet and unfit for cultivation. The last section of that act extends its provisions to the State of Illinois.

That the lands so granted to the State were granted to the counties in which they were situate, by the act of the legislature of the State, approved June 22, 1852.

That in the month of December, 1855, the complainant applied to the register at the land office at Danville, the proper office, to purchase these lands, and tendered payment for them, at $1.25 per acre, to the receiver.

That these lands were subject to private entry at the time when the complainant made application to purchase them at Danville. It is alleged in the bill, that these lands were not swamp or overflowed lands; that they were then fit for cultivation; and that in no case, was the greater part of any tract wet and unfit for cultivation. That no part of these lands passed

by the grant contained in the act of Sept. 28, 1850, to the State of Illinois. They still belonged to the public domain in December, 1855, when the complainant offered to purchase them, and tendered the purchase money to the proper agents of the United States.

The bill also shows that, before this time, the lands had been surveyed under the authority of the United States, and offered at public sale, and so were subject to private entry, at the time of the complainant's offer and attempt to purchase.

A demurrer was sustained to the bill, and the complainant brought the case here on a writ of error.

MANNING & MERRIMAN, for Plaintiff in Error.

W. H. L. WALLACE, for Defendant in Error.

BREESE, J. This is substantially a bill for the specific performance of a contract to sell land by the United States, of which we have no jurisdiction. Were the case made out against the United States, and their confederate, Livingston county, we are short of power to compel the United States to perform our decree.

There is no foundation for this bill. The act of Congress of March 3, 1857, confirmed to the several States the swamp and overflowed lands, selected under the act of September 28, 1850, and the 2nd of March, 1849, and they are, or will be, patented to the several States. 11 U. S. Statutes at Large, 251.

We cannot go behind that act, if we had jurisdiction, and inquire if the complainant had not an equitable right to purchase these lands. If he has been, at the instance of the United States, put to expense in ascertaining the true quality of these lands, doubtless that government, on a proper application, will reimburse him. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THOMPSON BROOKS, Appellant, *v.* ZACHARIAH BRUYN, Appellee.

APPEAL FROM WARREN.

To constitute possession of land there must be some unequivocal act of ownership upon it; which may be otherwise than by enclosing it with a fence.

The intention or *animus* of a party as connected with his action indicating ownership of land, is a question for the jury; and where it appears that such acts of ownership are in good faith, with the design exclusively to appropriate the land, a verdict will not be disturbed, especially when it is a fourth one on the same question.

THIS is an action of forcible entry and detainer, instituted upon the following complaint before a justice of the peace:

"STATE OF ILLINOIS, WARREN COUNTY, ss.

"Zachariah Bruyn, being duly sworn, deposes and says, that he is now lawfully entitled to the possession of north-west quarter of section nine (9), in township nine (9) north, in range two (2) west, in Warren county, in the State of Illinois, and that he was and has been lawfully entitled to the possession of said land ever since the 26th day of June, A. D. 1856. That on or about the second of July, A. D. 1856, he, said Bruyn, was in the actual possession of said land, claiming to be seized in fee thereof. That on said day, when he, said Bruyn, was in the actual possession of the said land, one Thompson Brooks made an entry on said land, when entry was not given to him, said Brooks, by law. That said Brooks continued in possession of said land, and continues in possession of said land, and now detains, forcibly and wrongfully, and ever since said day of said entry has forcibly and wrongfully detained said land from the possession of the said Bruyn, your affiant. Your affiant further states, that the said Thompson Brooks entered on said land wrongfully on or about said second day of July, A. D. 1856, and without right, and kept the said affiant, Z. Bruyn, from regaining possession of said land, and now withholds, and ever since said entry, has withheld possession of the said defendant. Your affiant further avers, that the said Brooks was not, at the time of said entry, lawfully entitled to the possession of said premises. Your affiant further states, that on the day of the date hereof, he did, by his agent and attorney, George F. Harding, make a demand in writing for the possession of said premises from said Brooks, and that said Brooks altogether refused to give up possession of the said premises.

"Sworn to and subscribed before me, this 10th day of September, A. D. 1856."

A verdict and judgment was rendered for the plaintiff, from which this appeal is taken, and the following errors assigned:

That the Circuit Court erred in admitting improper evidence offered by the plaintiff.

That the Circuit Court erred in excluding proper evidence offered by the defendant.

That the Circuit Court misdirected the jury by giving improper instructions on the part of the plaintiff.

That the Circuit Court erred in refusing to instruct the jury as asked by defendant.

That the Circuit Court erred in overruling defendant's motion for a new trial, and in rendering judgment for the plaintiff.

That the Circuit Court erred in not rendering judgment for the defendant.

That the Circuit Court erred in rendering said judgment, because the same is against the law and the evidence.

The evidence of prior possession of the land by the plaintiff, was in substance as follows:

Nathaniel Bruyn testified, that he was the father of the plaintiff, and that he knew the land in controversy. First became acquainted with it six or seven years ago. It is rolling prairie land, having a creek running through it, with stone and coal on it. The first act of improvement was done by witness in September, 1855, at which time he put a rail pen on the land; that on the 26th day of September he hauled a load of rails fifteen miles on said land, and laid them up into a square pen, with a floor, on the corner of the quarter near the house of Joshua Coates, with his assistance, and that on the next day, September 27th, he hauled another load of rails on to said land and threw them off in a pile with the others, but does not recollect whether they were laid up by him or not. He hauled the rails there and built the pen to take possession of the land, and for Coates to put corn in to feed his hogs. That at the time he hauled the rails on said land, he claimed the land under a special warrantee deed from David Crawford to him, dated June 25th, 1852, which was exhibited and read to the jury. That at the time he hauled the rails on to the land, he leased the same to Joshua Coates, and executed to Coates the following lease: "Roseville, Sept. 27, 1855. I this day agree to let Joshua Coates have the north-west of section quarter 9, 9 north, 2 west, 4th principal meridian, for the term of one year, for the sum of one dollar cash in advance, the receipt whereof I acknowledge to have received."

Plaintiff then offered and read in evidence a deed from Nathaniel Bruyn to Zachariah Bruyn for the land, dated June 26th, 1856, and recorded April 2nd, 1857. The witness further testified, that nothing more was done on the land from September 26th, 1855, until the last day of June, 1856, when the plaintiff took five yoke of oxen and a prairie-plow from the house of witness to the land; that he went with plaintiff, and that they broke four furrows around the entire quarter, part of the way, and three furrows the balance, and laid off three or four lands for breaking; at that time he saw that about one acre had been broken on the south side, near the centre of the quarter; had no knowledge before, that any breaking had been done; that after having marked out from forty to sixty acres for breaking, that day, he returned home, leaving the plaintiff breaking, and returned there again with the plaintiff on the

2nd of July following; that the plaintiff remained on the land until the 1st of July, when he returned to the house of witness, and that they started to return to the land in the evening of the 1st of July, and reached the land about 11 o'clock at night; that they took with them two loads of lumber, and left the wagons and the lumber standing on the land all night; the next morning at sunrise, plaintiff and witness commenced building a shanty, 16 × 8, and plaintiff went to building a yard to keep the oxen in; on coming from breakfast, plaintiff brought his bed and carpet-bag, and put in the shanty; finished shanty and yard about noon; about 10 or 11 o'clock in the forenoon, ten or eleven men came on another part of the land, with several wagons and teams loaded with logs; the men laid up the logs for a stable, but put no roof on; some breaking had been done on the land we had laid out, from the time witness left there on Monday, to the time he returned on Tuesday night. After the 2nd July, and before this suit was commenced, plaintiff broke from forty to sixty acres, all that was laid out, and built a dwelling-house, 16 × 24—a framed house, which he commenced the 1st of July. The plaintiff occupied the shanty until his house was finished, and then moved into it. On his cross-examination, witness stated that at the time he hauled the rails on the land, the lines of the land had not been run off; did not go back there from the time he hauled the rails there until June, 1856; when he went back, he staid until the middle of the afternoon, and then he saw a little patch of breaking on the land. The lumber that was hauled down belonged to witness; saw people at work on the land on the same day that we commenced the shanty on the land; did it to take possession; the furrows run around the land included the rail pen; Coates owned the land on the south side; some of the rails were on the land, when he went back in June, 1856.

Patrick Clark testifies to the same effect, and that plaintiff forbid them coming on the land with the logs—that Coates replied, they were doing it for Brooks, he (Brooks) not being present.

John S. Chandler testified, that he had known the land since the fall of 1855; he knew the house moved on the quarter in controversy, on the 2nd of July, 1856; before it was moved, the house stood near the line between the quarter occupied by Brooks and Coates, each having one-half. Cincinnatus Memford lived in the house before, and when it was moved on the land in controversy; that he had seen Coates take the rails that made the pen, spoken of by Bruyn, off the land, in the winter of 1856, and afterwards hauled them back again.

On cross-examination, witness stated that the quarter in controversy was open in the winter of 1855 and 1856, on the west, north and east sides, and was then vacant and unoccupied.

George Morse testified, that he was a carpenter, and built dwelling-house on land in controversy for plaintiff; commenced in August, and finished in September, 1856; before this suit was commenced, fifty or sixty acres of prairie were broken by plaintiff while the witness was building said house; after plaintiff had done said breaking, the defendant, with some hands assisting him, came on plaintiff's breaking, and sowed wheat; the plaintiff forbid the defendant seeding, but the defendant disregarded the plaintiff, and continued to sow.

On cross-examination, witness stated that he saw another house on the land, about thirty rods from the place where he built the house for the plaintiff; defendant forbid plaintiff making any further improvements; does not know whether the defendant sowed all the land broken by plaintiff.

Harrison Jones testified, that he was acquainted with the land in controversy; that plaintiff slept in shanty on the night of the 2nd of July, 1856, and continued to stay there until he removed into the house built on the land by him; that there was a stone quarry on the land; in the fall of 1855, witness and Coates were quarrying stone there, and Coates said to witness that he would have to charge people something for stone, to get enough to pay for his lease; that he had a lease from Nathaniel Bruyn, which he had agreed to take of the quarter; that he had seen men at work quarrying stone there before that time.

The defendant objected to the evidence of witness as to the quarrying of stone, and the statements of Coates, but the court overruled the objection, and allowed the evidence to go to the jury, and defendant excepted.

On cross-examination, witness stated that he did not pay anything for stone, and that the land was vacant and open prairie.

Joel Franklin testified, that he knew the stone quarry on the land in controversy, in October, 1855; saw Coates and Jones quarrying stone there; Coates spoke of others getting stone there, and said he would have to charge something for stone, so as to get enough to pay for his lease, as he had leased the land from Bruyn, and asked the witness if he had not seen that pen up there, as Bruyn had put it there to hold possession; and that the land was vacant and unoccupied.

The defendant objected to all the evidence of this witness, but the court overruled the objection, and the defendant excepted.

Jackson Smith testified, that he knew the land, and saw the rail pen in the fall of 1855, or spring of 1856. It was seven or eight rails high, and looked as if feeding had been done around it. The pen was three or four rods from the road. There was no other improvement on the land except the pen.

Martin Jones testified, that he knew the land in controversy, and that he saw the defendant sow wheat in September, 1856, on the east part of the breaking done by plaintiff; that he saw the defendant breaking prairie on the quarter, in the afternoon of the 2nd of July, 1856.

Cincinnatus Memford testified, that he knew the land in controversy, and that he assisted in moving a house and log stable upon the land on the 2nd of July, 1856. Saw defendant, on the 25th of June, 1856, with one Richard Ray, break about two acres on the land in controversy. That defendant did nothing on the land from that time until the morning of the 2nd of July, when Coates came to the house of witness and woke him up—said that plaintiff was on the land and was building a house, and asked the witness to notify some of the neighbors, when witness and the neighbors went on said land with logs to build a stable with. The plaintiff was then building on the land, and he forbid them going on. The defendant was not there until the stable was put up; he came about noon, and that about noon of the same day defendant bought of Coates the house that witness then lived in, and the house was moved on the land in controversy in the afternoon; that he continued to occupy said house with his family after it was moved on the land; that he supposed he was still the tenant of Coates. The next day after the house was moved on, defendant came and built a yard around the house. At the time the defendant broke the land on the 25th of June, either the rails or the pen built on the land by Nathaniel Bruyn were on the land; does not recollect whether the rails were laid up or not. The defendant knew of the lease of Nathaniel Bruyn to Coates as early as the fall of 1855; have heard him and defendant talk about it.

On cross-examination, the witness stated that the lease he referred to, commenced in the fall of 1855, and was for one year. He had frequently seen it in the hands of Coates. [Here the lease of Nathaniel Bruyn to Coates was handed to witness, and proven by him as the identical lease he had seen in Coates' possession. The lease was then offered in evidence, and read to the jury.] The witness stated that he thought the rails placed on the land by Nathaniel Bruyn were loose. On the 25th day of June, A. D. 1856, Coates made the request to go and move the stable on the land. Coates said they were at work for defendant. On the last day of June, plaintiff ploughed three or four furrows;

that the land was vacant and unoccupied (except the rails) when the defendant made his breaking on the 25th of June. Plaintiff was at work building his shanty before the logs were taken by Coates and others, to build a stable for defendant.

On re-examination, witness stated that there was no breaking done on the land by the defendant during the year 1856, except what was done on the 25th day of June, and no other act of improvement except moving the stable and house on 2nd of July, and building fence; knew men to go on the land and get stone; witness had got coal there while he was tenant of Coates —that the land was unoccupied when defendant did his breaking, except the rails—no roof put on the log stable.

Joel L. Chandler, being re-called, testified that defendant told him there was a man breaking up prairie on the land in controversy, and that he (defendant) did not want it done, because he wanted the land for pasture. No fence was built on the land until the spring of 1857, except the yards around the houses.

Nathaniel Bruyn, being re-called, testified that after the lease was signed and delivered by him to Coates, on the 27th of September, 1855, it was agreed between them that the plaintiff or witness could go on the land any time and make further improvements, and Coates was to board the hands while at work; an agreement was made in 1854, after plaintiff was 21 years old, between him and myself, by which the witness agreed to let plaintiff have a quarter section of land, if he would remain and work for the witness until his farm was open and improved. No particular quarter was at the time mentioned. Plaintiff agreed to do so, and worked for the witness for about two years —until his farm was improved. In winter or spring of 1856, as early as March, witness agreed to let plaintiff have the quarter in controversy; he was to go on early in the spring, but was prevented; that no deed was made to plaintiff by witness until 26th of June, 1856, when deed was made in pursuance of previous agreement; that at the time he put the rail pen on the land, in 1855, he claimed title as owner of the land, by deed from David Crawford, dated June 25th, 1852.

The defendant objected to all the evidence of this witness, but the court overruled the objection and allowed the evidence to go to the jury, and defendant excepted.

The plaintiff then offered to prove the payment of all the taxes assessed on the land for 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, and 1848, by George W. Berrian, and for 1849, 1850, 1851, by D. Crawford, and for 1852, 1853, 1854, 1855, by N. Bruyn. The defendant objected to such evidence, and the court sustained the objection, and plaintiff excepted.

Witness, on his cross-examination, stated, that the first day he hauled the rails he laid them up in a pen, and the next day he went and wrote the papers—he wrote one, and Coates wrote the other; that he did not go back again until he went with his son on the last day of June, 1856. The defendant admitted that demand had been made in writing for the premises before the commencement of this suit, and thereupon rested.

The defendant, to show that his possession was prior in time to the plaintiff's, and that the illegal entry, if any, was by the plaintiff upon him, read in evidence a deed for the land from one J. H. Baker to him, dated December 24th, 1855, and recorded Jan. 1, 1856, and called *Richard Ray*, who testified, that he worked for defendant in the summer of 1856, and ploughed corn for him in June; that on the 25th of June, witness and defendant went on the land and ploughed about two acres. Did not then see any improvement on the land, and does not think there was any. The defendant at that time told him he wanted to break the land so as to put in fall wheat. Thinks that defendant told him he desired to fence and improve the land. The stable was put on the land in the forenoon, and the house in the afternoon of the 2nd of July, 1856. They were put on for defendant.

This witness, on his cross-examination, stated that no breaking had been done on the land before or after that time, at that season. Defendant said, he wanted to do the breaking to take possession of the land, and if he could, he wanted to fence and sow wheat for the purpose of taking possession. Defendant helped move the house on, but Coates "bossed the job."

It was omitted to state, that *William Clayton* testified for the plaintiff, that he was laying out a road on the west line of the land in controversy, in May, 1856; that there was a bad place about the middle of said quarter on the west line; that he asked the defendant if they might build a bridge east of the line on this quarter, and defendant replied that he could not give any permission, as the west half of the quarter belonged to Joshua Coates, and that since then he had another conversation with the defendant, and he said that Coates was to have half of the land, and that he had no title for it, or nothing to show for it; and further said, that if he lost the land, of course Coates would not get his half.

To all the evidence of this witness the defendant objected; but the court overruled the objection, and allowed the evidence to go to the jury, and defendant excepted.

The deed from plaintiff to Harding, made in 1858, and a reconveyance from Harding to Bruyn, in 1859, for this tract of land, are of no importance in the case.

H. M. AND J. J. WEAD, for Appellant.

W. C. GOUDY, for Appellee.

BREESE, J. When this case was before this court at a former term, *Brooks* v. *Bruyn*, 18 Ill. R. 542, we then said that actual possession of land may arise in different ways, as by entering upon and improving the same, with the intention of appropriating the land to an ordinary or useful purpose, which acts, in their nature, in connection with the claim of right, indicate an exclusive use and control of the property; by erecting buildings; by breaking prairie for cultivation; by inclosure; by opening shafts for raising coal or ore, quarries for obtaining rock, and using them to the exclusion of others; by the use and control of timber land belonging to a farm or homestead, although disconnected therewith, for the ordinary supply of wood or timber for such farm or homestead, as in *Davis* v. *Easley et al.*, 13 Ill. R. 198. To constitute possession, there must be some unequivocal act of ownership on the land itself, but it is by no means necessary that the land should be inclosed by a fence. That idea has been long since exploded. Even to defeat an adverse title, it is not necessary. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention, such as entering upon land and making improvements thereon, raising a crop, which may be done without a fence, felling and selling the trees thereon under color of title. *Meredith* v. *Pearl*, 10 Peters, 413.

As a general rule, any act done, evincing to the neighborhood in which it is situate, that the land is appropriated to individual use, is sufficient. The possession will then be deemed co-extensive with the title under which the party doing the act claims. *Dills* v. *Hubbard*, 21 Ill. R. 328.

The intention with which such acts, whatever they may be, are done, is exclusively for the jury, and though this court held in this case, as reported in 18 Ill. R., *supra*, that doing some useless thing on the land, as erecting a pen, sham building, leaving a few rails or timbers, with the intention thereby of excluding others, and not of permanently improving and using the land, would not amount to actual possession, yet when to such acts are superadded others, manifesting an intention to cultivate and use the land, an actual possession could be maintained.

The other acts, as found in this case now, are, running three or four furrows entirely around the land—laying out strips for ploughing "lands"—erecting a dwelling-house upon it, and

breaking and inclosing forty or more acres. These acts were submitted to the jury, to determine, from them, the *animus* with which the plaintiff entered upon the land, and we think, are acts of possession not equivocal, and so the jury have found.

The facts show, it is true, that appellant, on the 25th June, 1856, broke about one acre of this land, but did nothing further evincing an intention to improve it, until the 2nd of July following, when his neighbor, and tenant of this land, seeing plaintiff erecting his shanty upon it, went, in the absence of appellant, and roused the neighbors, and with their assistance moved an old roofless stable from the land he occupied, on to this land, and on the same day, in the afternoon, the house occupied by Memford, with his family in it, mounting it on wheels, and placing it on the disputed property. The *animus* of all the acts of these parties was a proper matter for the consideration of the jury, and they have found, by their verdict, that they were not done for the purpose and with the intention of using and improving the land, but rather to anticipate and exclude the plaintiff. The evidence is quite sufficient to show, that plaintiff, before these acts done by appellant, was in the actual possession of the land, with the *bona fide* intention of appropriating it to his own use, and that intention consummated, by breaking forty or more acres of the land, inclosing it with a fence, and building a house upon it. And the acts done by both parties were finally left to the jury, under proper instructions from the court, and as it is the fourth verdict, as alleged and not denied, that the appellee has obtained against the defendant, and no glaring errors perceived in the rulings of the court, we do not feel disposed to disturb the verdict. "It is for the interest of the State that an end should be put to litigation," and four verdicts ought to have this effect.

The justice of the case seems clearly with the appellee, and if there be some errors in the record, we do not deem them sufficient to justify our interference. The judgment must be affirmed.

Judgment affirmed.

George M. Hadden, Appellant, *v.* Peter Innes *et al.*, Appellee.

APPEAL FROM THE COURT OF COMMON PLEAS OF THE CITY OF AURORA.

Under a plea of set-off, a defendant cannot establish usury. Such a defense should be made by a direct plea.

If a party voluntarily pays a principal sum and any usury upon it, the matter is ended, under our statute.

Hadden *v.* Innes et al.

THIS declaration is in assumpsit, and contained one special count on the following note, to wit:

$561. *Aurora, June 13th,* 1857.

One year after date, we promise to pay to the order of George M. Hadden, five hundred and sixty-one dollars, value received, with ten per cent. after due.

And also the common counts and account stated, *ad damnum*, $1,000.

The defendants filed the plea of general issue in due form, and a plea of set-off in the usual form, and the latter stated (among other things) that the plaintiff before and at the time of the commencement of the said suit, to wit, at the city of Aurora, aforesaid, was and still is indebted to defendants in a large sum of money, to wit, the sum of $500, for money by defendants before that time lent and advanced to, and paid, laid out and expended for plaintiff, at his request; and for other money by plaintiff before that time had and received to and for the use of defendants; and for other money due and owing from plaintiff to defendants for interest, upon and for the forbearance of divers large sums of money, due and owing from him to them, by them forborne to him for divers long spaces of time before then elapsed, and at his request; and for other money due and owing from plaintiff to defendants uponaccount stated, etc.; with the usual conclusion to their plea of set-off.

To the said plea a replication was filed, to which was added the usual similiter.

At June term, 1859, PARKS, Judge, presiding, a jury found the issues joined for plaintiff, and assessed his damages at $598.71, and the defendants entered their motion for a new trial, which was denied. Judgment upon the verdict was rendered by the court. Defendants below prayed an appeal in this cause.

On the trial of the cause, the plaintiff, to maintain the issue on his part, read to the jury a promissory note, of which the following is a copy, to wit:

$561. *Aurora, June 13th,* 1857.

One year after date, we promise to pay to the order of George M. Hadden, five hundred and sixty-one dollars, value received, with ten per cent. after due.

(Signed) PETER INNES.
A. SPAULDING.

On it there was and is the following indorsement: "Received the interest on the within note up to October 14th, 1858."

This was all the evidence introduced by the plaintiff.

Defendants then called a witness by whom they offered to prove that, on June 14th, 1858, at the city of Aurora, Illinois, it was agreed between the plaintiff and defendants, that the former should give the latter four months further time of payment of

the $561, in the note specified, that is, four months from the said 14th of June, 1858, inclusive. And that the defendants, in consideration of the forbearance of the day of payment of said sum for the four months as aforesaid, should pay to plaintiff $67.32, that is, three per cent. per month for four months. And that they should give their note to plaintiff for said $67.32, and make it payable sixty days after the date thereof. And that, June 14th, 1858, in the said city, in pursuance of such agreement, they gave their note to plaintiff for $67.32, payable to him, sixty days from its date, that it bore date June 14th, 1858, and that it was paid by them to him when it became due, that is to say, August 13th, 1858.

To the introduction of which evidence to the jury, for any purpose, the plaintiff, by his counsel, objected, for the reason that there was no plea to meet the proof, which objection the court sustained, and excluded the evidence from the jury, for the reason that there was no special plea to meet the proof.

The defendants then offered to prove the same facts by the witness, for the purpose of having the jury allow to them, either as an offset to, or as a payment so far, upon said note of $561, all of the $67.32, after deducting therefrom the legal interest on the $561, for the forbearance of the day of payment thereof, for the four months aforesaid.

Defendants offered to prove the said facts to the jury by said witness, so that the jury might allow to them, either as an offset to, or as payment, so far, upon said note, all the $67.32, after deducting therefrom six per cent. interest per annum on the $561, for the four months.

The defendants then offered to prove the said facts to the jury, so that the jury might allow to them either as an offset to, or as a payment so far, upon the said note of $561, all the $67.32, after deducting therefrom ten per cent. interest per annum on the said $561, for the said four months.

The defendants then offered to introduce to the jury, proof of the said facts, for the purpose of having the jury allow to them, either as an offset or payment so far, upon the note of $561, $48 of the $67.32, as being the excess over and above the legal interest on the $561 for the said four months.

The defendants then offered to prove the said facts to the jury by the witness, for the purpose of having the jury allow to them, as an offset on said note of $561, on which the suit was brought, $48.72 of the $67.32, as the excess over and above the legal interest on the $561 for the said four months.

The defendants then offered to prove the said facts to the jury by the said witness, so that they might allow to them, the defendants, as a payment so far upon said note of $561, of

$48.72 of the said $67.32, as the excess over and above the legal interest on the said $561, for four months aforesaid.

To the introduction of all which evidence the plaintiff objected, and the court sustained the objection, and excluded the evidence from the consideration of the jury.

There was a bill of particulars filed by defendants in the above cause, with the plea offset in the words and figures following, to wit:

GEORGE M. HADDEN, Dr.,

To ABIRAM SPAULDING and PETER INNES:

1858.	To Cash, - - - - - - - - - - - - -	$67.32
	To note, - - - - - - - - - - - - -	67.32

MONTONY & SEARLES, for Appellants.

W. H. L. WALLACE, for Appellee.

CATON, C. J. The only question in this case is one of pleading. On a general plea of set-off, for money had and received, etc., the defendant offered to prove that he had paid usurious interest on the note. Had he filed a special plea, setting out the facts which he offered to prove, we presume it will not be questioned that he might have had the interest thus paid deducted from the principal of the note. Else nothing could be more easy than to evade the statute of usury. Whenever the usurious interest is paid in advance, the statute would become a dead letter. Such is not the true spirit of that law; it cannot be thus evaded, weak as it no doubt is, and comparatively innocent of injury to the usurer.

But it is insisted by the defendant that the usurious interest which he has paid might at any time be recovered back, as for money paid and advanced, or for money had and received; and that having such a demand against the plaintiff, he had a right to set it off in this action. If the premise is correct, the conclusion follows. Whether that be right, depends on the statute of usury. It is this: "If any person or corporation in this State shall contract to receive a greater rate of interest than ten per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due such person or corporation." It is manifest that the legislature had no intention of giving a cause of action to the person who has paid usury and fails to make the defense, when sued for the debt upon which the usury has been paid, or agreed to be paid. If he voluntarily pays the principal sum due, and the usury agreed to be paid upon it, that is an end of the matter so far as

this statute is concerned. Suppose the party sued upon an usurious note fails to make the defense authorized by statute, but suffers judgment to go against him for the principal and the usurious interest, and pays it, the statute gives him no right to recover back the interest thus paid; and yet he can have no greater right where he pays it voluntarily. It was manifest that it was only the intention of the legislature to furnish a shield for defense and not a weapon for attack, by the passage of this act, and that defense should be made in a legitimate way, according to the well-settled rules of pleading.

The judgment must be affirmed.

Judgment affirmed.

WALKER, J., *dissenting*. I am in this case unable to concur in the opinion of the majority of the court. While it is undeniably true, that many decisions of the courts of this country may be found, which hold that usury, to be available as a defense, must be relied upon by plea, yet it is believed in every case, it was only because the statute under which the decision was made, had required it to be pleaded. At the common law, the defense might, in actions of assumpsit, and debt on simple contract, be made under the general issue. 1 Chit. Pl. 477. But this rule of the common law was changed by the fourth section of the interest law of 1845, which required the defense to be made by plea. But since subsequent legislation has repealed that requirement, and has not prohibited the defense under the general issue, I am constrained to believe that the common law practice should obtain.

The majority of the court hold that the note in this case, which was given alone for usurious interest, would have constituted a defense to the extent of the sum paid upon it, had it been made under a plea of usury, whilst it could not be set off against a recovery. In general, all debts and demands which are liquidated, and owing by the plaintiff to the defendant, and which may be recovered under the common counts, can be set off, by plea in the nature of a cross-action. This then raises the question whether the excess of usury paid over the legal rate of interest may be sued for and recovered, in indebitatus assumpsit, for money had and received.

So far as I have been able to find, the British courts have unanimously held that it may be so recovered. *Browning* v. *Morris*, Cowp. R. 790; *Smith* v. *Bromley*, 2 Douglass R. 696, notes; *Williams* v. *Hedley*, 8 East, 378; *Fitzrary* v. *Gwillim*, 1 T. R. 153; *Astley* v. *Reynolds*, 2 Strange, 915; Chit. Cont. (8th Am. from 4th Lond. Ed.) 550, and authorities there cited. And many of the American courts have, without any qualification,

adopted the same rule. *State* v. *Ensminger*, 7 Blkf. R. 105; *Smead* v. *Green*, 5 Porter Ind. R. 308; *Bunts, Ex'r*, v. *Tivebaugh*, 12 B. Mon. 87; *Parchman* v. *McKinney*, 12 Smedes & Marsh. 631; *Wheaton* v. *Hibbard*, 20 J. R. 290; *Boardman* v. *Roe*, 13 Mass. 105; *Miller* v. *Green*, 2 N. Hamp. 333; *Grow* v. *Albee*, 19 Verm. 540. I might multiply authorities on this point but deem it unnecessary, as these, so far as I have been able to discover, are unopposed, and have not been overruled. As far as the weight of judicial determination can do so, I think it has determined the question that the action may be maintained, as a common law remedy. This seems to my mind to be in conformity to principle, and supported by the analogies of the law.

This case does not fall within the rule that parties *in pari delicto*, cannot recover. The act of agreeing to, or paying usurious interest involves no turpitude, and is not like the agreement to perform an act *malum in se*. Nor is it within the policy of those statutes which prohibit acts which are immoral, or against good policy. But the object of the statute is to prevent one class of community from oppressing another, having from their situation the power in a great measure to exact their own terms, however hard, from those with whom they deal. It is only prohibitory, imposing no penalty. If it did, however, it is not the penalty which creates the offense or renders the act unlawful. It is the statute which prohibits the entering into the contract. And when money has been received which it prohibits, no legal title or right to retain the money can be shown. It has been acquired in direct violation of the law, and the title is still in the debtor who paid it, and he should be permitted to recover it, precisely as if he had acquired it from any other person, by an action for money had and received. And when money may be thus recovered, it may undeniably be set off, against a demand of the plaintiff.

This action for money had and received, has, by Lord Mansfield and other judges, been said to depend upon equitable principles. And that it lies, whenever one person obtains money of another, which he in equity and good conscience has no right to retain. That usury, paid for the forbearance of the payment of money may be recovered, and its collection prevented in equity, seems to be well settled in the courts both of Great Britain and this country. In fact, I am not aware of any case which has denied the chancellor's power to assume jurisdiction over the question. This, then, if Lord Mansfield is correct in saying that it is an equitable action, would seem to give the right of recovery.

From these considerations, I am irresistibly impelled to the conclusion that the demurrer should have been overruled, and that the judgment of the court below should be reversed.

Allen Robbins, Appellant, *v.* Charles Butler *et al.*, Appellees.

APPEAL FROM COOK.

Any interest in the result of a suit, renders a witness incompetent. But a witness may be made competent by showing that he had, in good faith, divested himself of all interest, even though it be done for the purpose of giving his testimony in the case.

The shareholders in a private joint stock company are each personally liable for all the debts of the company, and cannot transfer this liability to others, except in the way pointed out in the articles of association.

An interest derived under a parol agreement for a sale of lands, renders a witness incompetent, since the statute of frauds and perjuries may not be pleaded.

The admissions of a party to a fact, wherever or however made, are evidence against him, even though they may be found in an answer or bill in chancery.

A trustee cannot be the purchaser, directly or indirectly, of the property entrusted to him to sell.

This was a bill filed by Charles Butler, John P. Chapin, and Walter S. Gurnee, on behalf of themselves and all other shareholders in the Chicago Land Company, and Mahlon D. Ogden, the surviving trustee of said association, against Allen Robbins, for a specific performance of a contract for a sale of land in the city of Chicago.

The bill avers, that on the 31st of May, 1847, William B. Ogden and Allen Robbins were owners in fee simple, as joint tenants, and not as tenants in common, of certain parcels of land, situate in Chicago, Cook county, Illinois, (describing them.)

That one Jane E. Wight, widow of John F. Wight, deceased, was entitled to dower in said land, and that the said Ogden and Robbins, for the purpose of settling her dower claim, and for other purposes, on the same day entered into an agreement in writing, as follows, to wit:

"This indenture, made this 31st day of May, A. D. 1847, witnesseth, Whereas, we, William B. Ogden, of the city of Chicago, in the county of Cook and State of Illinois, and Allen Robbins of the city, county and State of New York, hold the title to and are owners in fee simple, as joint tenants, and not as tenants in common, of (here follows a description of the land.)

"And whereas, Jane E. Wight, of Erie, in the State of Pennsylvania, widow of John F. Wight, late of Erie aforesaid, deceased, did release to us her right of dower in all said premises, and did quit-claim to us all the right, title and interest whatsoever which she had or might be supposed to have therein. Now be it known, that in consideration of said releases of dower, and quit-claim of all right and interest in all of said

premises, made and duly executed by the said Jane E. Wight to us, and for other considerations to us thereunto moving, we hereby agree as follows: That said lots and lands shall be placed in the immediate care, and be under the exclusive supervision and management of Ogden and Jones of Chicago, (and the survivor of them, and their successors in business in Chicago,) subject to the general directions of us, the said Ogden and Robbins, the survivor of us, our executors and administrators; that the said Ogden and Jones, their survivors or successors in business in Chicago, shall proceed to survey, plat, subdivide and and improve said property; that such surveys, plats, subdivisions and improvements, including the erection of bridges, buildings, fences, the making of streets, avenues and alleys, the construction of side walks, grading and macadamizing, paving and planking of roads, streets, avenues and alleys, the planting of trees, shrubs and plants, the fencing and cultivating of lots, blocks and fields, the employment of laborers, horses and superintendents, and all other necessary expenses, the laying out of public and private squares, and places, the appropriation and donation of lands for the same, and for churches, schools, or other public institutions, and for any other purposes which shall, in the opinion of said Ogden and Jones, their survivor or successors, be calculated to advance the value of the property, shall be done by said Ogden and Jones, their survivor and successors, under the general direction of us, the survivor of us, our executors and administrators, when, where, and to such extent as we and they shall think proper; and they shall also make, under the general advice and direction of us, the survivor of us, our executors and administrators, any and all such other improvements, and take such steps and proceedings in connection with, or relating to said property, as to them or us, the survivor of us, our executors and administrators, shall, from time to time, seem meet and proper, and for the best interest of said property, and most beneficial results to be derived from the same.

"The said Ogden and Jones, their survivor and successors in business, shall proceed to make sales of said premises, or lease or otherwise dispose of, in part or in whole, when, where, and as they shall, in their discretion, think and deem to be most advantageous and conducive to the best interests of said property, and most beneficial to the results to be realized from the same; such sales, leases, or other disposition of said property, to be made at such time or times, hereafter, and in such manner and on such terms for cash and credit, or in exchange for other property, thing or things, or partly on credit, or partly for payment in hand, or for other property or thing in exchange, as we or our survivor, executors and administrators, or the said Ogden

and Jones, their survivor and successors in business, in Chicago, shall, in our or their discretion, think to be most advantageous to said property, and best calculated to enhance the amount to be derived therefrom. All the accounts with said property shall be kept by and with Ogden and Jones, their survivor or successors, at their office in Chicago. And they shall make semi-annual statements of their accounts with said property to the said Allen Robbins, and to James C. Marshall, of the borough of Erie, aforesaid trustee, and in case of his death, to the said Jane E. Wight, her executors or administrators, on the first days of February and August in each year, and shall at such times pay over any surplus proceeds then in their hands, as is herein provided for, such payments to be made at their office, unless otherwise agreed upon hereafter. The costs of all the aforesaid improvements, and the amount of all disbursements hereinbefore provided for, together with all taxes, assessments, and other necessary expenses or proper charges, accrued or accruing, incurred or charged on or against the aforesaid premises, or growing out of the general care and management thereof, together with ten per cent. commissions, to be charged by said Ogden and Jones, their survivor or successors in business, for their services, on the amount of all such taxes, assessments, expenses and disbursements, and on the amount of the costs of all improvements made in accordance herewith, and on the amount of all sales made of said property, to be first reserved by said Ogden and Jones, their survivor or successors in business, at such semi-annual statements of their account, to be made by them from the proceeds of any sales, rents, or other receipts realized by them from said property. And six per cent. interest is to be allowed them upon any balance of accounts in their favor with said property, until the same shall be paid them. And they are, in like manner, to allow six per cent. interest on any balance in their hands on the first day of February or August in each year, until the same shall have been paid over by them, or until the party entitled to the same shall have been notified of their readiness to pay over the same; the said Robbins from time to time to pay the said Ogden and Jones one-half part of any such excess of disbursements by them, and to receive the same, with six per cent. interest, back again from them from any future balance of account, in favor of said property, on the books of Ogden and Jones. When all of the above items of disbursements, charges, expenses, and interest shall have been first fully met, returned, and satisfied, from the proceeds of said property, or otherwise, to said Ogden and Jones, and their successors, and to said Robbins, then one equal one-third part of any surplus net proceeds which shall be received therefrom, over and above

the current and accruing disbursements and expenses hereinbefore mentioned and provided for, shall be applied in payment to said Allen Robbins and to Ogden and Jones, herein named, or to their respective representatives, and for their respective sole use and benefit; each party receiving half, until they shall have been paid altogether the sum of eleven hundred and four $\frac{53}{100}$ dollars, with six per cent. interest thereon from the date hereof; and the further sum of two thousand and seventy-six dollars and forty-nine cents ($2,076.49), with six per cent. interest from and after the fifth day of February, A. D. 1849, until paid, provided the same shall not be paid previous to the fifth day of February, A. D. 1849, from sales made from the property hereinbefore described. All like surplus net money proceeds received from the other two-thirds part of said property, to be from time to time, on rendering semi-annual statements by said Ogden and Jones, their survivor and successors, of their accounts, paid over to said Allen Robbins, and Ogden and Jones, or their legal representatives respectively, according to their respective interests in said proceeds, to wit, one-half to said Allen Robbins, or his legal representatives, and the other half to said Ogden and Jones, or their legal representatives, for the sole use of them, and for their respective representatives. When the aforesaid sums of eleven hundred and four $\frac{53}{100}$ dollars, and two thousand and seventy-six dollars and forty-nine cents, with interest as aforesaid, shall have been fully paid said Robbins, Ogden and Jones, from the net proceeds of said one-third part, after all other liabilities, and accruing and current charges hereinbefore named, shall have been fully met and paid from the general proceeds of said property, any further net proceeds received and realized from said Ogden and Jones, or by us, from the said one-third part from which the aforesaid payment to Robbins, Ogden and Jones shall have been previously made and deducted, shall be paid over to the said James C. Marshall, trustee, as aforesaid, or, in case of his decease, to the said Jane E. Wight, her executors and administrators; and when all previous expenses, charges, taxes, assessments, costs of collections, and disbursements for improvements, or for services rendered or otherwise, and all commissions on the same, and on all sales made, as is hereinbefore provided for, shall have been paid and satisfied, and the sum of eleven hundred and four $\frac{53}{100}$ dollars, with interest from the date hereof, and the further sum of two thousand and seventy-six dollars and forty-nine cents, with interest from and after February fifth, A. D. 1849, (provided it shall not be sooner received and paid from proceeds of said property, as is herein provided), shall also have been realized from the net proceeds of one equal third part of sales and receipts

from said premises, and have been paid over to said Robbins, Ogden and Jones, or to their respective legal representatives, then, at the request of the said James C. Marshall, trustee, as aforesaid, or in case of his decease, of the said Jane E. Wight, or her executors or administrators, or, if desired, by us, or the legal representatives of either of us, the equal one-third part of any remaining unsold portion of said premises, (if any), after the same shall first have been legally and equitably divided, together with one-third in amount and value of all the outstanding contracts, assets, or other effects, (if any), belonging to and resulting from said property, shall be released by us, and conveyed to the said James C. Marshall, trustee, as aforesaid, or in case of his decease, to the said Jane E. Wight, her executors and administrators, or to whom he, she or they may direct, and all his, her or their claims upon us, under or by virtue of this agreement, shall thereby and thereupon be fully settled, discharged and satisfied; and a like division of the other two-thirds, half to said Robbins or his legal representatives, and half to the said Ogden and Jones, or their legal representatives, for their respective use and benefit, shall also then, or at any other time thereafter, be made when desired by either party thereto, or by the legal representatives of such party hereto; and this agreement, with its provisions, conditions and stipulations, shall thereupon be fulfilled, terminated, and held for naught. Should no such request be made by either party, however, nor by the legal representatives of either of said parties, the said property shall continue to be managed as is hereinbefore provided for, until such request be made, at least by one of the parties herein named, or their legal representatives, or until the whole be disposed of, and the proceeds thereof be realized and divided as hereinbefore provided for. Should the equal one-third of said property not prove to be sufficient to meet the expenses accruing on account thereof, as is hereinbefore provided for, and also to pay the said sum of eleven hundred and four $\frac{53}{100}$ dollars, with interest thereon, as aforesaid, and the further sum of two thousand and seventy-six dollars and forty-nine cents, with interest thereon, as hereinbefore provided, to said Robbins, Ogden and Jones, neither the said James C. Marshall, nor the said Jane E. Wight, shall, in that event, be liable for any such deficit, but the same shall be borne and suffered by the said Robbins, Ogden and Jones, and their legal representatives. The only claim or interest growing out of this instrument of writing made by us, is intended and hereby declared to be but a personal contingent claim or money demand against us personally, for a part of the net money proceeds to arise from the sales or other disposition of the premises named herein, and is

not, and shall not be construed as creating any right to the realty or fee of the same, until the happening of the contingent condition herein provided for, requiring a division and conveyance from us of a portion of the unsold remainder of said property, if any remain, nor shall it then constitute any claim to the realty or fee thereof, until such conveyance shall have actually been executed by us, or our legal representatives, and delivered to the said James C. Marshall, trustee, as aforesaid, or, in case of his decease, to said Jane E. Wight, her executors or administrators. It is hereby stipulated, and expressly agreed, that the said Ogden and Robbins, and their legal representatives, shall have the privilege and right of purchasing of said James C. Marshall, trustee, as aforesaid, or, in case of his decease, of the said Jane E. Wight, or her executors or administrators, all and every interest which he, she or they may acquire, under or by virtue of this agreement, at such price and terms as any other person or persons shall agree or bind himself or themselves to give or pay for the same, (provided he, or, in case of his decease, she, or her executors or administrators, shall elect to sell the same); and any sale of such interest, without first offering the same to said Ogden and Robbins, or their executors or administrators, at the like price, and on the like terms as those for which the same shall be sold to another person or persons, shall be declared void; and said Ogden and Robbins, or their executors or administrators, shall, at their election, be declared the purchasers of the same, upon paying to said Marshall, trustee, as aforesaid, or, in case of his decease, to said Jane E. Wight, or her executors and administrators, the price for which said premises shall be sold, on complying with the terms and conditions of such sale or sales.

"The said Ogden and Robbins, and the survivor of them, and in case of decease of both of them, their executors, administrators, or the executors or administrators of either of them, shall have the right and power, in case said Ogden and Jones, and the survivor of them, shall cease to act as the agents of the aforesaid lands and lots, and they shall be succeeded in business by another party or firm, to take away and remove said agency and business from such successor, and give and commit the same to such person or persons as shall be appointed by the judge of any court of chancery, held in said county of Cook, to act in the premises as the agent for, and to have the management of said property in as full a manner as said successor or successors might do by virtue hereof, and successively to transfer such agency and management from time to time, as they may see fit, in the like manner and with the like authority. Notice of the application to such judge for such appointment,

shall be given personally to the parties hereto, or published in some newspaper published in the city of Chicago, for sixty days immediately preceding such application; but the power of such successor may be suspended without such notice, by either of said Ogden and Robbins, or either of their executors or administrators, by filing notice of such suspension in the recorder's office of said Cook county aforesaid.

"In witness whereof, the said Ogden and Robbins have hereunto set their hands and seals, the day and year first above written. W. B. OGDEN. [L. S.] ALLEN ROBBINS. [L. S.]"

"We hereby accept and agree to and approve of the terms, conditions and provisions in the above instrument contained.

"Witness our hands and seals this thirty-first day of May, A. D. 1847. JAMES C. MARSHALL. [L. S.] JANE E. WIGHT. [L. S.]"

Acknowledged by Wm. B. Ogden, Allen Robbins, and James C. Marshall, May 31st, 1847, and by Jane E. Wight, June 28th, 1847, and recorded in the recorder's office of Cook county, July 9th, 1847.

That at the making of said agreement, the firm of Ogden and Jones therein mentioned, consisted of William B. Ogden and William E. Jones; and afterwards, on the first of July, 1850, they associated with them Mahlon D. Ogden, one of the complainants, and one Edwin H. Sheldon, and thereafter transacted business under the name of Ogden, Jones & Co. That on the 9th of March, 1851, the said Jones deceased, leaving the said Wm. B. Ogden as the survivor of the said Ogden and Jones. That the said Wm. B. and Mahlon D. Ogden and Sheldon continued the business, after said Jones' decease, as partners, under the name of Ogden, Jones & Co., as the successors of said Ogden and Jones, up to the 1st of January, 1853, when they associated with themselves one Edwin R. La Bar, and continued the transaction of said business under the name of Ogden, Jones & Co. That said La Bar deceased on the 2nd of January, 1854, and said business was continued by Wm. B. and Mahlon D. Ogden and Sheldon, under the name of Ogden, Jones & Co., until the 1st of November, 1855, when one Stanley H. Fleetwood was admitted into the firm, and since then they have transacted business under the name of Ogden, Fleetwood & Co. That said firm of Ogden, Jones & Co., consisting of its different members, at different times, were the successors in business of the firm of Ogden and Jones, and that Ogden, Fleetwood & Co. have been since the 1st of November, 1855, and are now, the successors of said Ogden and Jones.

That on the first of June, 1852, the said Wm. B. Ogden, the survivor of said Ogden and Jones, and acting as such survivor,

and for said Ogden, Jones & Co., the successors in business of said Ogden and Jones, for himself and the other parties to the agreement above set forth, entered into a verbal agreement with John Bradley and A. Hyatt Smith, which was, on the 10th of November, 1852, reduced to writing, and is as follows:

"Whereas, Allen Robbins, of New York, and Wm. B. Ogden, of Chicago, in the State of Illinois, in and by their certain indenture and instrument of writing, dated 31st day of May, A. D. 1847, and duly recorded in Cook county, in the State of Illinois, on the ninth day of July, 1847, in book 24 of deeds, on pages 37, 38, 39, 40 and 41, did, among other things, for a consideration therein expressed, contract, consent and agree that Ogden and Jones (a firm composed of the said Wm. B. Ogden and Wm. E. Jones,) their survivors and successors in business, shall proceed to make sales of, or lease or otherwise dispose of the lands and premises described in said indenture, in part or in whole, when, where, and as they shall in their discretion think and deem to be most advantageous and conducive to the best interests of said property, and most beneficial to the results to be realized from the same. And whereas, James C. Marshall, of Erie, Pennsylvania, trustee of Jane E. Wight, and named in said indenture, did in writing assent to the same. And whereas, William E. Jones, of the said firm of Ogden and Jones, has, since the making of said indenture, died, leaving surviving the said Wm. B. Ogden, the other member of said firm of Ogden and Jones, named in said indenture. And whereas, the said Wm. B. Ogden, survivor as aforesaid, acting for himself, for the said Allen Robbins, and for said James C. Marshall, trustee of the said Jane E. Wight, parties named in said indenture, and having an interest in said premises, or the proceeds thereof, under and by virtue of the provisions in said indenture contained, has, as party of the first part, agreed to sell and dispose of all the lands and premises hereinafter described, being part and parcel of said lands and premises in said indenture mentioned and specified, to John Bradley, of Burlington, Chittenden county, Vermont, and A. Hyatt Smith, of Janesville, Rock county, Wisconsin, party of the second part, and their heirs, on the terms and conditions hereinafter mentioned.

"Now, therefore, this contract made between the said party of the first part, before named and described, and the said Bradley and Smith, party of the second part, Witnesseth, that the said party of the first part has sold and disposed of to the said party of the second part, and to their heirs forever, all and every the lands and premises hereinafter specified, namely:"

(Here follows a description of the lands in controversy.)

"And the said John Bradley and A. Hyatt Smith, parties of the second part hereto, agree to pay to the said party of the first part hereto, at the office of Ogden, Jones & Co., in Chicago, for the lots, blocks, lands and premises hereinbefore named and described, the full sum of one hundred thousand dollars, in manner following, to wit: Twenty-five thousand dollars in cash on the execution of these presents, with interest from the first day of September, 1852; twenty-five thousand dollars on the first day of September, 1853; twenty-five thousand dollars on the first day of September, 1854; and twenty-five thousand dollars on the first day of September, 1855; together with six per cent. annual interest from the first day of September, 1852, to be paid annually on the first day of September, in each year, hereafter, on the whole sum from time to time remaining unpaid.

"And also agree that they will well and faithfully, in due season, pay, or cause to be paid, all ordinary taxes, assessed for revenue purposes, upon said premises, or any part thereof, subsequent to the year 1851; and also all other assessments which now or may be hereafter charged or assessed upon or against said premises, or any part thereof. But, in case the said parties of the second part fail to pay any or all such taxes or assessments upon said premises or appurtenances, or any part thereof, whenever and as soon as the same shall become due or payable, and the party of the first part shall pay from time to time, or at any time, any or all such taxes or assessments, or cause the same to be paid, the amount of any and all such payments so made by the party of the first part, shall immediately thereupon become an additional consideration, and payment to be made by the party of the second part hereto, for the premises herein agreed to be conveyed.

"And upon the faithful performance by the said second party hereto, of their undertakings in their behalf, and upon the payment, by them, of the principal and interest of the sum above mentioned, and in the manner and at the times specified, then under and by virtue hereof, and in accordance with the provisions, powers and intent of the above named indenture and agreement, dated 31st of May, 1847, and first hereinbefore referred to, and upon which this contract and agreement of sale and purchase is based, they, the said second party hereto, shall be entitled to, and shall thereupon and thereafter, when demanded by them, receive from said first party hereto, a deed or conveyance in law of all said lots, lands and premises hereinbefore named, the same to be duly executed and acknowledged and delivered to them, the said second party hereto, their heirs or assigns, and to convey to them, the said second party hereto, their heirs or assigns, all their (the said first party hereto)

right, title and interest, of, in and to the above described premises, with their appurtenances. And it is further mutually agreed between the parties hereto, that the second party hereto, (the first cash payment of twenty-five thousand dollars, to be made hereon, first being punctually paid on execution of these presents) may at any time hereafter, at their election, demand a deed for said premises, to which they shall be entitled, on thirty days written notice being given, they duly executing to the said first party hereto, in return, a proper bond and mortgage upon all of said premises; such bond and mortgage to contain a provision, that in case said second party shall fail or neglect to make any payment of principal or interest, or any part of such payment of principal or interest, when and as the same becomes due, then and thereupon the whole of said principal moneys and interest, named in said bond and mortgage, shall forthwith become due and payable, and suit, or foreclosure, or both, or other legal procedure, may be had for the collection thereof, the same as if so expressed in said bond and mortgage, in the first place, anything therein or herein contained to the contrary notwithstanding; and so, in case of failure on the part of the said second party hereto, to meet and make the payments of principal or interest, or any part thereof, when and as the same respectively fall due, it is in like manner agreed, that the whole amount of principal and interest then due, owing, accrued, or remaining unpaid hereon, shall thereupon become due and payable, and subject to suit, foreclosure or other legal proceedings, as provided in a case of bond and mortgage, as above named, anything hereinbefore contained to the contrary notwithstanding.

"It is understood, that the deed to be made, pursuant to this agreement, to the party of the second part, their heirs, shall include all the right, title and interest of said Ogden and Robbins, and all other parties named in said indenture of the 31st day of May, 1847, hereinbefore named, to the property and every part thereof, hereinbefore described, and contracted to be conveyed to the said party of the second part.

"In witness whereof, the said William B. Ogden, acting for himself, Allen Robbins, and James C. Marshall, trustee, and the said party of the second part, have hereunto set their hands and seals, this tenth day of November, A. D. 1852.

WM. B. OGDEN. [L. S.]
JOHN BRADLEY. [L. S.]
A. HYATT SMITH. [L. S.]"

"Signed, sealed and delivered in presence of
S. H. FLEETWOOD."

Recorded, Nov. 19th, 1852.

That in making said contract, the said Wm. B. Ogden acted with the full knowledge and approbation of said Mahlon D. Ogden and Edwin H. Sheldon, his copartners, and that he intended to exercise all the power and authority vested in him individually, or in said firm of Ogden, Jones & Co., and to vest in said Bradley and Smith a complete equitable title to said land, upon the performance by them of their part of said contract, which was so understood by them, and by said firm of Ogden, Jones & Co., at that time.

That on the 13th of March, 1855, said Bradley and Smith executed a declaration of trust, stating that they had purchased the said property for the sole benefit, account and use of the Chicago Land Company.

That on the 2nd of May, 1853, Robert J. Walker, Eli Chittenden, A. Hyatt Smith, Charles Butler, William Sloan, John Bradley, Jacob P. Eastman, John P. Chapin, Edwin F. Johnson, Albert A. Bliss, William B. Hotchkiss, Walter S. Gurnee, and Daniel S. Miller, associated under the name and style of the Chicago Land Company, and entered into written articles of association between themselves, as shareholders, and said William B. Ogden, Mahlon D. Ogden and Edwin R. La Bar, as trustees, wherein, among other things, it was recited that—

Whereas, the subscribers to said articles had theretofore purchased certain tracts of land in the city of Chicago and vicinity, more particularly described in said articles; and whereas, only a portion of the purchase money had been paid on said several tracts of land, and there were considerable sums remaining to be paid, as the same should fall due, which said purchases had been made in the name of some one or more of the subscribers thereto, for the benefit of all, with the understanding that all of the property should for management and disposition be vested in trustees as therein named, for the benefit of all the parties in interest, and their assigns; and whereas, the parties to said presents, of the second part, had agreed to take and execute such trust upon the terms and conditions thereinafter named; therefore it was thereby agreed and declared, that

The name and style of the association shall be the Chicago Land Company, and its purposes and objects should be the management, improvement, development, lease, sale or other disposition of the lands acquired for the benefit of the members of said association, situate in the city of Chicago, in the State of Illinois, or in the vicinity of said city, and especially all the lands thereinafter described; and the said William B. Ogden, Mahlon D. Ogden, and Edwin R. La Bar, all of Chicago, par-

ties of the second part, were thereby created trustees for the purpose of carrying into effect said articles; and that

The title of all property owned or held, or to be owned or held, for the benefit of said association, should be held by the trustees in their individual names, in fee simple, as joint tenants, and not as tenants in common, to them and to their assigns, and to the survivors and survivor of them, and to his heirs and assigns.

That the premises proposed to be conveyed to said trustees were, among other premises, certain lots and lands contracted for by William Sloan and others, for account of said association, a particular description of which was not then at hand, but by reference to said contracts, would more fully appear, which provision refers, among other things, to the contract hereinbefore set forth, between the said William B. Ogden and John Bradley, and A. Hyatt Smith.

And that the title in fee simple to all of which property, lots and lands, should be duly conveyed to, and vested in said trustees, as soon as the same could be conveniently done; and it was in and by said articles of association further provided, that either of said trustees might resign, and discharge himself of his trust, by an instrument in writing, under seal, on executing such conveyances to his co-trustees or successor, as might be necessary to invest his co-trustees with all his interests and powers.

That the said Edwin R. La Bar afterwards, on or about 2nd of January, 1854, deceased; and that said Wm. B. Ogden, on the 19th of March, 1856, by an instrument under his hand and seal, resigned his said office of trustee, and on the 19th of March, 1856, by his deed of that date, conveyed to said Mahlon D. Ogden, all the right, title and interest in and to any lands or property held by him, as such trustee, and that Mahlon D. Ogden is now the sole surviving and remaining trustee of said association.

That the shares or certificates of said association might be transferred from time to time by the holder thereof, or his personal representative, by indorsement under hand and seal, and giving notice of such transfer to said trustees, with a proviso, that the assignee of such share or shares should become a party to said articles of association, by subscribing his name, and affixing his seal thereto.

That the said John Bradley and A. Hyatt Smith, on the 6th day of April, 1855, by their deed of that date, assigned, transferred and set over, unto Mahlon D. Ogden, as such trustee, his heirs and assigns, forever, all their right, title and interest in and to all the lands described in the said contract between William B. Ogden, and John Bradley and A. Hyatt Smith,

together with all rights which they might have under or by virtue of said contract.

That said John Bradley and A. Hyatt Smith, on the execution of said contract between themselves, and said William B. Ogden, to wit, on the 10th day of November, A. D. 1852, paid to the said William B. Ogden the full sum of $25,000, being the first payment under said contract, together with the sum of $295.83, for the interest thereon, from the 1st of September, 1852, to the time of said payment; and that the said Ogden indorsed upon said contract, a receipt of the same.

That the remainder of the purchase money of the premises was fully paid by the said Chicago Land Company, to the said William B. Ogden, and to the said firm of Ogden, Jones & Co., together with the interest on the same, at the times when the said purchase money and interest respectively became due; and that said John Bradley, A. Hyatt Smith, and the Chicago Land Company, have, from time to time, paid and discharged all taxes and assessments upon the premises.

That the trustees of said Chicago Land Company, under and by virtue of said contract with said Bradley and Smith, and soon after the execution thereof, entered into possession of said premises, and have ever since remained in possession.

That on the 20th of March, 1856, for the purpose of vesting the legal title to the undivided one-half of the premises mentioned in said last mentioned contract, which remained in the said William B. Ogden, in the said Mahlon D. Ogden, as trustee of the Chicago Land Company, the said William B. Ogden, by his deed of that date, conveyed and confirmed unto the said Mahlon D. Ogden, his heirs and assigns forever, the undivided one-half of the said premises, described in said last mentioned contract.

That heretofore, to wit, on the — day of ——, A. D. 1856, James C. Marshall and Jane E. Wight, by her deed of that date, released, remised, and forever quit-claimed unto Mahlon D. Ogden, his heirs and assigns forever, all right, title, claim or demand, which she might have in or to said premises, or any part thereof.

That Mahlon D. Ogden has applied to said Robbins to execute a deed to pass the legal title remaining in him to the undivided half of said premises, but that said Robbins refuses, and at times pretends that said William B. Ogden had no power, under the agreement of the 31st of May, 1847, to make said contract with said Bradley and Smith, and at other times that before the execution of said contract he had revoked the power of said Ogden under said agreement.

Charges, that said Ogden had full power to make said contract; that said power was irrevocable; that said Robbins was fully aware of the terms and conditions of said contract while it was in negotiation, and that he approved of them; that said power was not revoked, or if it was, neither said Bradley nor Smith, nor the shareholders of the Chicago Land Company, had any notice thereof; and that his omission to notify them of said revocation, knowing that they were about to enter into said contract, is such a fraud as will deprive him of all advantage which might otherwise be taken by reason of such revocation.

Prays for the usual process against Allen Robbins, requiring him to appear and answer said bill, but not under oath, and that he be decreed to execute and deliver to Mahlon D. Ogden a deed of conveyance of the legal title to an undivided half of said premises, and of all his right, title and interest therein, and for such other and further relief, etc.

Amended answer of Allen Robbins denies that Wm. B. Ogden did, on the 1st of June, or at any time prior to the 10th of November, 1852, enter into a verbal agreement with Bradley and Smith, for the sale of said premises, but admits the execution of the written agreement of the 10th of November, 1852.

Alleges, that defendant has no knowledge of the execution of the declaration of trust by Bradley and Smith, dated the 13th of March, 1855, and denies that said company was ever incorporated, or that it was known or recognized by any law whatever, public or private.

Denies that Wm. B. Ogden had, under the agreement in said bill set forth, full power to enter into the said agreement with Bradley and Smith; or that the power conferred upon said Ogden and Jones, their survivor and successors, was irrevocable; or that defendant was aware of said agreement when it was in negotiation, or that he assented to the making of it; or that the shareholders in said Chicago Land Company had no notice of the revocation of the powers committed to Ogden and Jones, their survivor and successors, etc.

On the contrary, defendant avers that after the execution of the agreement of the 31st of May, 1847, said Ogden and Jones accepted of the trusts; that they, and the firm of Ogden, Jones & Co., who succeeded said Ogden and Jones in business, from time to time, between the date thereof and the first of September, 1852, made several sales of small parcels of said estate, and incurred some expenses, and became entitled to some commissions, but the precise state of the account defendant cannot specify; that on the first day of September, 1852, the unsold portions of said estate were of the value of $250,000, and are now of the value of $600,000, and will continue to increase

largely for several years; that said property abuts upon each bank of the north branch of the Chicago river; that said river is navigable up to the extreme northern boundary of said property, and is valuable on account of its docking and wharfing privileges; that the Chicago, St. Paul and Fond du Lac Railroad, on the 1st of September, 1852, was, and now is, located over that portion of the property described as Wight's addition to Chicago, laid out on the west side of said north branch of Chicago river.

Defendant further represents, that the true intent and meaning of the trust aforesaid was to improve the property, and sell such portions thereof as should be necessary to pay for improvements, and discharge the taxes, costs, and other reasonable charges, which might be incurred in the management of the property, to reimburse to Ogden and Robbins the moneys by them expended in the purchase of the property, and in extinguishing such liens and incumbrances as existed upon it, and also to raise money to satisfy and discharge the dower claim of the said Jane E. Wight; that for these objects said property was placed under the supervision and management of said Ogden and Jones, and the survivor of them and their successors in business, subject, nevertheless, to the general directions of said Ogden and Robbins; that by the terms of said agreement it became the duty of said trustees,

1st. To improve, manage and disencumber the whole, and dispose of such portions of said property as should be necessary to accomplish the purposes of said trust, with care and faithfulness to the common interests of the parties to said agreement;

2nd. To render fair, just and accurate accounts, touching the execution of their said trust;

3rd. To promptly pay over the proceeds of said property to the persons entitled thereto, under said agreement;

4th. To pay interest on such balances as they might neglect to pay over;

5th. To make no other or greater sales of said property than should be sufficient to accomplish the object of said trust;

6th. To make partition of said property according to said agreement.

Defendant further represents, that the said Ogden and Jones, and their successors, made improvements upon said property contrary to defendant's directions, and were wasteful and extravagant in their management; and in view of these abuses of the trust, defendant, in the exercise of the reserved power contained in said agreement, determined to put an end to said trust, procure a division of said property, and to take his share under

his own control, when the time contemplated by said agreement arrived.

That pursuant to this determination, on the 4th of March, 1848, defendant wrote a letter to Ogden and Jones, which was received by them, containing the following: "I, therefore, give you notice, that you must not make any further improvements on the property, without my written assent, and in order to obtain this, you must furnish me with your proposed improvements, and the estimated cost of them. I also give you further notice, that I shall call for a division of the property as soon as the sales amount to sufficient to cover advances, which is, I believe, according to the contract." That on the 27th of August, 1852, defendant wrote a letter to Wm. B. Ogden, which contained the following: "I take this occasion to repeat the notice given you in my letter of March, 1848, that I shall require a division of the property as soon as the sales cover the advances, and I repeat my orders, that you must not make any further expenditures on the property, for improvements or otherwise, to which you have not my written assent, nor any sales exceeding in amount the advances, or any sale about which I am not consulted, and to which I do not give my assent." And the defendant further alleges, that on various occasions between the dates of said letters, he notified the said Wm. B. Ogden that he would not consent to the sale of the residue of said property, except so much as might be necessary to satisfy the trust contained in said agreement. Defendant further represents, that notwithstanding these repeated notices, the said Ogden, intending to defraud defendant in the premises, commenced negotiating for the sale of the whole of said property, and pretends that he did, on the first of June, 1852, bargain and sell the whole of it to Bradley and Smith, for $100,000. That said Bradley and Smith were then, and still are, both insolvent; and that said pretended purchase was made for the benefit of the Chicago Land Company. That said Wm. B. Ogden is either a stockholder in said company, or that there was a secret understanding between him and said company, that the profits of this speculation were to be divided between them. That there was an understanding that all the property purchased for said company, including this, should, for management and disposition, be placed in the hands of said Wm. B. and Mahlon D. Ogden, and Edwin R. La Bar, (who, on the 1st of January, 1853, was admitted into the firm of Ogden, Jones & Co.,) as trustees for the parties in interest; and that said lands, ever since the pretended sale to Bradley and Smith, have been under the control of the said Ogden, Jones & Co., and their successors, with power from said company to sell the same on commission.

Defendant charges, that said sale did not take place on the 1st of June, but on the 13th of November, 1852; that he has never ratified the same, but repudiated it as soon as he was notified. That said Wm. B. Ogden was so anxious to make said sale in defiance of defendant's directions, that he consulted with several lawyers, as to his power to sell and compel defendant to join in a conveyance, and received advice adverse to his wishes, but persisted, notwithstanding, in making the sale. That the property was worth $250,000, and the consideration received was so grossly inadequate as to indicate a fraudulent breach of trust on the part of Ogden. That all the charges upon said property remaining due and unpaid at the time of said sale did not exceed $12,000, and the sale of the whole property to pay said balance was a breach of trust; that said sale was illegal and void, contrary to equity and good conscience, and ought to be set aside.

Defendant further says, that the contract of sale set forth in said bill, does not purport to be the deed of defendant, nor is it executed in his name or sealed with his seal, and it cannot operate, either in law or equity, to bind him or affect his interest in the premises.

Defendant further says, that by the agreement of May 31st, 1847, the power to manage and make sales of said property for the purposes therein expressed, was conferred upon Ogden and Jones, and their survivor and successors in business at Chicago, subject to the general directions of Wm. B. Ogden and defendant; that upon the organization of the new firm of Odgen, Jones & Co., July 1st, 1850, all the trusts, power and authority, which had before been held and exercised by Ogden and Jones, passed to and became lodged in Ogden, Jones & Co., and after the death of Mr. Jones, March 9th, 1851, the same devolved upon the surviving members of said firm, to wit, William B. Ogden, M. D. Ogden, and Edwin H. Sheldon, who continued business as the successors of the previous firms. That on the 1st of July, 1850, the new firm of Ogden, Jones & Co., did in fact assume the management of said estate, kept all the accounts, received all the payments, made all the disbursements, and transacted all the business relating thereto; and after the death of Mr. Jones, the surviving members of said firm retained said business and continued to manage said property.

Defendant insists, that by the express terms of the said agreement, and according to the intention of the parties manifested by the acts and conduct of all concerned, the co-operation and act of all the successors in business of the said Ogden and Jones, were essential to the validity of any contract for the sale of any portion of said land, made after the 1st of July, 1850; that it was not competent for the said Wm. B. Ogden to

sell said lands, or any portion of them, after the decease of said Jones, without the personal co-operation and act of his said copartners, Mahlon D. Ogden and E. H. Sheldon, and that, therefore, the pretended sale to Bradley and Smith, was so far as defendant is concerned, unauthorized and void; and defendant claims the same benefit of this defense as if he had demurred to said bill.

Defendant, further answering, denies that said Ogden, in making said contract, acted with the full knowledge and advice of his said copartners, but whether he did, or did not, defendant insists that said contract is invalid.

Defendant further says, that the amount of money which was a charge upon said land, at the time of said sale, was uncertain, but defendant believes and avers that he had advanced and paid his full proportion, but if there should be any balance due from him, he offers to deposit, under the direction of the court, such sum as will suffice to pay such balance.

For the reasons and under the circumstances aforesaid, defendant insists that complainants are not entitled to relief, and prays to be hence dismissed, etc.

The complainants' proofs, as far as they are necessary to an understanding of the case, were as follows:

Stipulation admitting the execution and delivery of the following instruments set forth in the bill of complaint, to wit:

1. Agreement of May 31st, 1847, between Wm. B. Ogden, and Allen Robbins, and James C. Marshall, and Jane E. Wight.

2. Contract of sale of November 10th, 1852, between Wm. B. Ogden, and Bradley and Smith.

3. Declaration of trust by Bradley and Smith, March 13th, 1855.

Stipulation, admitting that, on the 2nd of May, 1853, Robert J. Walker and others, associated themselves together for the purposes and in the manner set forth in the articles of association before referred to.

That certificates for 18,400 full paid shares had been issued to the shareholders; that many of said certificates have been assigned and surrendered, and new ones issued, etc., until the shareholders were upwards of sixty, as in said bill alleged.

That the purchase money of said premises has been paid, and that Bradley and Smith, and the Chicago Land Company, have paid all taxes and assessments, as in said bill alleged.

That the trustees of said company entered into, and have remained in possession under said contract, as alleged in the bill.

That a deed in due form was presented to said Robbins for execution, and that he refused to execute the same, as alleged in the bill.

That no portion of the purchase money received from said Bradley and Smith, or said Chicago Land Company, has been received by said Robbins, and that he has always declined to receive the same.

Resignation of trusteeship by Wm. B. Ogden, dated March 19th, 1856, directed to the executive committee of said company, under his hand and seal.

Deed of Wm. B. Ogden to Mahlon D. Ogden, trustee, dated March 19th, 1856, releasing and quit-claiming all the right, title and interest, vested in him as trustee of said company, in and to the lands and premises therein described. Acknowledged March 20th, 1856.

Deed from Wm. B. Ogden to Mahlon D. Ogden, dated March 20th, 1856. After referring to the agreement of May 31st, 1847, between Wm. B. Ogden, Allen Robbins, Jane E. Wight and James C. Marshall, and to the contract of November 10th, 1852, between Wm. B. Ogden and John Bradley and A. Hyatt Smith, and reciting that the said Bradley and Smith did, on the 6th of April, 1855, assign said contract to Mahlon D. Ogden, trustee of said company, and that said contract had been fully performed on the part of said Bradley and Smith, and their assigns, for the purpose of vesting the legal title to the undivided half of the premises thereinafter described, which remains in said Wm. B. Ogden, in said Mahlon D. Ogden, this deed conveys to said Mahlon D. Ogden, the undivided half of the premises in controversy, particularly describing them. Acknowledged March 20th, 1856.

Release from Jane E. Wight to William B. Ogden, Allen Robbins, and Ogden, Jones & Co., dated June 30th, 1855, from all claims and liabilities under the agreement of May 31st, 1847. Acknowledged March 20th, 1856.

Assignment by John Bradley and A. Hyatt Smith to Mahlon D. Ogden, trustee, of the contract from Wm. B. Ogden to them, of November 10th, 1852. Dated April 6th, 1855.

The depositions of Bradley, Sheldon, and Steele, were offered on the part of complainants, and excepted to, on the ground of an interest, on the part of the witnesses, in the result of the suit. They were, however, admitted by the court, and exception taken; but as this court has decided that they should not have been admitted, they are not inserted.

The deposition of William B. Ogden was excepted to by defendant, and excluded by the court below, but as the statements contained in it are necessary to an understanding of the opinion, it is given, and is as follows:

On or about the 31st of May, 1847, I and Mr. Robbins executed an instrument for the purpose of adjusting the dower of

Jane E. Wight in certain lands in Chicago, Sec. 5, T. 39 N., R. 14 E.

The instrument referred to, is the same set forth in the bill of complaint.

I made a sale of the unsold balance of the premises described in said indenture, to John Bradley and A. Hyatt Smith, as survivor of Ogden and Jones, about the 15th of June, 1852. Full contracts of sale were executed about the 10th of November, 1852. Several sales of small portions had been previously made to other parties, between May, 1847, and June, 1852. (Objected to.)

The paper exhibited, is the contract of sale with Bradley and Smith.

I know the signatures of Bradley and Smith. The signatures to the contract are genuine.

I had conversations relative to the sale of this property, with the defendant, at different times; first in Mr. Burch's banking office, in the back room occupied by Mr. Robbins, where I showed him a proposition—say about June 1st, 1852, or not long before the sale to Bradley and Smith—made by me to Mr. Ward, of Boston, for the sale of said property to him, at about $97,925, and of which proposition Mr. Robbins took a copy. At that time, I also informed Mr. Robbins that Mr. Ward had the refusal at that price; also, that Mr. Bradley and his associates were applicants for the purchase of the property, and that I had proposed to sell it to them at $100,000, provided Mr. Ward did not accept the proposition made him. And I proposed to give Mr. Ward notice that he must decide either to take it, or not, and I afterwards did give him such notice, and he declined, as he said, from inability to fulfill in time, and I then gave notice to Mr. Bradley and his associates, that they could have the property for $100,000. Some few days after giving Bradley such notice—I should think not three days—I met Mr. R. in front of the Tremont House. He asked me if I had concluded the sale to Mr. Bradley and associates. I told him that I had not, as they had not yet decided to take it, but I thought they would do so as soon as they could make their arrangement, which would be in a few days. He replied, that if they did not decide to take it very soon, he would not let them have it, and he did not know but that he would take it himself at that price. I told him I should be very glad to let him have it, if he wanted it. He declined to take it. These are all the interviews that I remember having had with Mr. R. previous to the sale to Bradley and associates.

Mr. Robbins made a proposition to sell me, or Ogden, Jones & Co., his third interest in the unsold property, named in the

contract of May 31st, 1847, for $15,000, including in such price his one-third advances for improvements and expenses, but exclusive of $2,362.11, or thereabout, advanced by him on account of the Jane E. Wight interest—that is, Mr. R. offered to take $17,362.11 for his entire interest, including all his interest in unpaid contracts, and all his advances, and proposed to receive payment as follows: In cash, $5,362.11; in one year, $4,000; in two years, $4,000; and in three years, $4,000, with six per cent. semi-annual interest. This proposition was made about November, 1851. My memorandum of it bears date Nov. 23rd, 1851. This proposition was considered too high, and was declined. (Objected to.)

According to the terms of this proposition, his estimate of the value of the property was $45,000, including balances unpaid on contracts, which I think was from three to six or seven thousand dollars, but I am not at all certain about the amount due on the contracts. (Objected to.)

I made a memorandum of said proposition at the time, and I now produce it just as I then made it, and hereto attach it. (Marked "Exhibit A.") (Objected to.)

I do not recollect positively the terms of payment in the Ward proposition, but I think they were much easier, and on longer time than the sale to Bradley and Smith. My impression is, that they extended from one to six years, or more, in annual payments, with six per cent. interest. I am not certain that there was not some abatement assented to from $97,925, in the proposed sale to Ward.

At the date of the sale to Bradley and Smith, the amount chargeable to the property for purchase money, advances, expenses and interest, was about $17,437.49, less about $2,299 received from previous sales, leaving $15,138.49, which was to be first paid as provided in the contract of May 31st, 1847.

I mean, by my answer to interrogatory 3rd, that I made a written memorandum of the proposition in June, which was accepted about the 15th, and the agreement of sale concluded thereby, but I gave the parties a few days to enable them to gather funds to make their first payment, $25,000. Meanwhile, I went to New York, and failing to return, they came there and closed the arrangements by full contracts, which, with details and particulars of sale, were there executed in duplicate.

The whole of the purchase money stipulated in said contract has been paid, with interest, substantially in accordance with the terms of the contract. The payments were all made by Bradley and Smith, or their assigns, and were all made to the successors of Ogden and Jones, as provided in the indenture of May 31st, 1847; and notice was given to the defendant, from time to time,

of such payments, and that his proportion of the same was held subject to his order. Jane E. Wight, or James C. Marshall, trustee, or both, were also notified, and made demand therefor, and have been paid, and have given receipts in full for their proportion thereof, and have duly conveyed their proportion of the premises to Bradley and Smith, or their assigns. (Objected to.) The survivor, and legal representatives of Odgen and Jones, have also received their portion of the proceeds of said sale in full, and deeds for their interest in the premises have been duly executed to the assignees of Bradley and Smith. (Objected to.)

Cross-Examination.—I have not in my possession the memorandum of the proposition submitted to Bradley and Smith, referred to in my answer to interrogatory 12th, but I have a rough memorandum of the substance of the proposition made at that time, which does not specify the terms of payment, but intimates a modification made as to time of drawing interest, on leaving out eight lots, the title to which was not included in the indenture of May 31st, 1847, and which they understood to be included in the proposition of $100,000, and which were then estimated at about $1,400, and the interest on the sale from the 15th of June to 1st of Sept., 1852, amounting to $1,250. It was agreed to leave out the eight lots, and make the sale draw interest from the 1st of Sept., instead of the 15th of June, as a set-off for them. The memorandum submitted reads, " Offered Sloan and others," Sloan being one of the parties associated with Bradley and Smith, and interested in the sale made to them, and most of the purchases made by him and his associates prior to or about the time of this, having been made in his name. (Memorandum attached, and marked " Exhibit B.")

The memorandum given to Bradley and Smith was substantially the substance of the contract afterwards executed. I first proposed giving them more time on the payments, but understanding from Bradley and others that Mr. Robbins preferred payment of a quarter down, I required it of them.

I don't remember positively that any terms of payment were expressed in said memorandum, but presume there were. There might have been two memoranda made, probably not. There might have been a memorandum for the time proposed and might not.

It was a memorandum of the proposition for the sale of the property to them, and in pursuance of which the contract was executed after acceptance by them. I don't know whether my name was signed to it or not — it was in my handwriting, I have no doubt, but it may have been written by some other party in the office, and I have no other copy of it than the one just filed.

I must have given them the memorandum previous to the 15th of June. They accepted the proposition about the fifteenth of

June. Whether they did so verbally or by writing, I do not recollect. There was no contract signed at the time between us. They accepted substantially without modifications, except that the time of payment might have been shortened, and the interest commencing September instead of June, in consequence of eight lots having been left out, which were not included in the indenture of May 31st, 1847.

It is my impression that the proposition did not mention any lot by name, but was for the unsold balance of the so-called Wight property. That subsequent to the indenture of May 31st, 1847, Mr. Robbins and Ogden and Jones bought sundry lots in Wight's addition, some of which were not mentioned in said indenture, but in the list of that property kept by Ogden and Jones were included as part of the Wight property, so called. Such lots as were not included in that indenture, I was not authorized to sell. Bradley supposed they formed part of the property and were included in the offer made to sell, and perhaps under the circumstances, had a fair right to think so. In order to correct the misunderstanding, an abatement of interest about equal to their valuation was assented to.

No memorandum of the bargain made by me with Bradley and Smith was signed by the parties prior to Nov. 10th, 1852. I might have signed a proposition made to them as above stated.

All the notice I ever received from Mr. Robbins up to the time of my negotiations with Bradley and Smith, was the letter I here submit, dated March 4th, 1848. (Annexed, and marked "Exhibit F.")

I did receive a letter from Mr. Robbins, dated August 27th, 1852, soon after it was written, and submit the same. (Annexed, and marked "Exhibit C.")

I understood at the time that Bradley and Smith purchased the property for themselves and others, who were, or were to be interested with them.

I know nothing of the extent of their association, but think I heard the names of Robert J. Walker, Mr. Eastman, Eli Chittenden, Mr. Page, and perhaps Mr. Chapin, and others I do not know.

At the time of making this sale to Bradley and Smith, I had no knowledge of the formation of any company for the purpose of buying, improving and selling this and other property in and about Chicago. In the spring of the next year, I think, a joint stock association, called the Chicago Land Company, was formed for the purchase and sale of property, of which the property in question formed a part.

I believe the pamphlet shown me to be a copy of the articles of association of said Land Company.

My understanding was, that a small part only of those who signed said articles of association, were interested at the time of the sale to Bradley and Smith. Many of them became subsequently interested. All that I remember to have heard spoken of at the time of the sale, besides Bradley and Smith, were Walker, Eastman, Johnson, Chapin, Chittenden, and Sloan, and I have no means of knowing that they were all interested, only from hearsay. Some of the others named in the articles, have not, at any time, to my knowledge, been interested, except as trustees.

The parties interested in the purchase, at the time of the negotiation with me, did not, to my knowledge, have it in contemplation to form such a company as they afterwards organized. I never heard of it.

According to my recollection, the first I heard of such a company, was when Mr. Eastman, and perhaps Mr. Chittenden, called upon me in New York, in the spring of 1853, for a copy of the articles of the American Land Company Association, of which I had long been a member, from which they proposed to draw articles of association for themselves and associates, and the articles they adopted are in a great degree copied from the articles of the American Land Company Association. They then solicited the house of Ogden, Jones & Co. to act as their agents for the management and sale of all their property in Chicago, of which the property in question formed a part, and they requested myself, Mahlon D. Ogden, and Edwin R. La Bar, to act as trustees for the association, to which we assented, our business being that of general land agents. I don't recollect hearing the association spoken of previous to this time.

I have never been interested in the stock of said company, not a dollar, directly or indirectly, at any time. It may be, that stock may have been assigned to me as trustee, for the benefit of the company, but I never was interested, in my own right, or for my own account, in any way.

Ogden, Jones & Co., and Ogden, Fleetwood & Co., for account of the trustees of the company, have made large sales of the property of the company, and have received commissions therefor, but I am not aware that they have sold for the company any of the property in question, except it be the right of way for the Chicago, St. Paul and Fond du Lac Railroad Company; but whether they received commissions on that sale I do not know.

At the time of the negotiation with Bradley and Smith, I did not expect to become thereafter an agent for the management and sale of the property in question. There was no such understanding. Nothing of the kind was thought of by me. The

sale was unconditional, the same as any other of the large sales made by me or my firm.

I am connected with Mahlon D. Ogden in business, whom I believe now to be the sole trustee of said company, but not so connected as to be entitled to any commissions he may receive as such trustee.

It strikes me that when the solvency of Bradley and Smith was doubtful, the trustees required a declaration of trust from them concerning this property, to prevent their creditors from reaching it.

I don't know where Mr. Robbins spent the winter of 1851–2. I saw him in Chicago, I should think, about the 15th of June, or about the time and previous to the sale to Bradley and Smith. He was here, I think, when the offer was accepted by them. The purchase money was to draw interest from the 15th of June, and my impression was, that the sale was closed on that day, but it may have been that the proposition was made on that day, and the interest to draw from that time, and the sale consummated a short time after.

I think I made sale of a lot (a portion of this property) to Joy, previous to the negotiation with Bradley and Smith. I think it was made verbally, pending that negotiation, and they were to carry it out. I don't remember the particulars, but they were to ratify the sale. The lot Joy was to have, was included in the sale to them; Ogden, Jones & Co.'s books will show.

I don't remember anything about the paper now shown me, (an account of the sale to Joy.) Don't know who made it. Think it looks like Mr. La Bar's writing, who was a clerk in the office of Ogden, Jones & Co. at that time.

The paper now submitted is in the hand of Wm. P. Fleetwood, at that time a clerk in our office. It is probably the correct statement of the price and terms of a lot sold to Mr. Joy, and of the payments made thereon at that time, but probably incorrect as to the sale being made for Ogden and Robbins, provided the agreement of sale to Bradley and Smith was carried out. My recollection is, that Mr. Joy claimed that I had verbally agreed to sell the lot to him, before the sale of it, with the balance of the Wight property, to Bradley and Smith, and that I got Bradley and Smith, after the sale to them, to agree to let Joy have it at the price he claimed I was to sell it to him for, and that the clerk, not being advised of the circumstances, made out the account of Hiram Joy with Ogden and Jones. My impression is, that the money received from Joy was credited Bradley and Smith, and that this lot was included in the sale to them.

I do not know whether the amount due to Mr. Robbins, on account of this sale to Joy, was afterwards tendered to him.

Mr. Bradley reported to me that he had had interviews with Mr. Robbins in regard to the sale (to him and Smith), and that Mr. R. was willing to make a sale of the whole for $100,000. Whether he went to see Mr. R. at my suggestion, or not, I don't remember, but I think it was very likely. I did advise him to see Mr. R., and, though I had the power to sell, independent of Mr. Robbins, I thought it courteous to refer to him.

The commissions charged by us upon the sale to Bradley and Smith were precisely those provided for in the indenture of May 31st, 1847.

I think the first time I met Mr. Robbins, after the negotiation with Bradley and Smith, was in New York, in the office where I transacted my business, and it was after the completion of the contract of sale, and after the first installment was paid by them thereon.

I don't recollect that I assigned any reason to him for having made the contract. The interview was very short.

I did not give him as a reason that I wanted to get my commissions. No such thing took place.

Some time after the sale was made, I heard a street rumor that Mr. Robbins had objected to the sale, since the making of it, and I asked two or three attorneys whether there was any question as to my obligation and authority to fulfill the sale to Bradley and Smith, and was advised by Messrs. Judd and Wilson, who examined the matter fully, that I had authority. One (I think it was Mr. McCagg) had some question of it. The agreement of sale had been made in good faith, and I fulfilled it.

Re-examination in chief.—I think I did make sales of the property described in the indenture of May 31st, 1847, after March 4th, 1848, and prior to June, 1852, without advising with Mr. Robbins, and that he subsequently joined in the execution of deeds conveying the property as sold. I don't know that I ever consulted Mr. Robbins in regard to any of the sales previous to the sale to Bradley and Smith. On every first of August and February, Ogden and Jones, or their successors, notified him of any sales made in the previous six months, and rendered him an account thereof, which was all that was required by said indenture. (Objected to.)

The signature to the paper now shown me, is in my hand. I have received the consideration therein expressed. (Attached, and marked "Exhibit G.")

The commissions charged upon the sale to Bradley and Smith

stand to the credits of commissions still, on the books of Ogden, Jones & Co., and have never been paid to me.

I have received from the Chicago Land Company a bond of indemnity, and herewith hand it in. The signature thereto of Mahlon D. Ogden is in his hand.

EXHIBIT A.

Statement of cost, etc., of Wight property.

A. Robbins' one-third cost, including interest, Aug. 1, 1851, -	$4,380.82
Cost of improvements of his one-third, with interest to Aug. 1, 1851, and commissions, after deducting proceeds of all sales, -	1,914,23
	$6,295.05
For this Robbins asks - - - - - - - - -	$15,000.00
And to be reimbursed his one-half advances, with interest to Aug. 1, 1851, - - - - - - - - - - -	2,362.11
Nov. 23, 1851, - - - - - - - - - -	$17,362.11

EXHIBIT B.

Offered Sloan and others the unsold portions of Wight property for		$100,000.00
To draw interest six per cent. from June 15, 1852. The interest to 1st September amounted to - - -	$1,250.00	
Eight lots—lots bought of J. H. Jones and Scammon, deducted—called - - - - - - -	$1,400.00	

EXHIBIT C.

Chicago, August 27th, 1852.

WM. B. OGDEN, ESQ.—*Dear Sir:*—I received Messrs. Ogden and Jones' accounts with the Wight estate, and find you still retain Mr. Smith a pensioner on this property. Ds. seventy-eight being charged for his services, a portion for plans for a bridge at Halsted street, a project on which I have not been consulted. As it must be evident that I am not satisfied with your management, and having lost confidence in your integrity as an agent, I shall esteem it a favor and kindness if you will at once accede to a division of the lots and lands at once. This course cannot be other than pleasant to you, as you will then be free from my complaints and censure. I take this occasion to repeat the notice given you in my letter to O. & J. of March, 1848, that I shall require a division of the property as soon as the sales cover the advances. And I repeat my orders, that you do not make any further advances on the property, for improvements or otherwise, to which you have not my written assent, nor make any sales exceeding in amount the advances, or any sale as to which I am not consulted, and to which I do not give my assent.

Messrs. Ogden and Jones have omitted to report the sale of a lot to Mr. Joy, which you named to me. Will you see that it is sent to me.

Yours respectfully, ALLEN ROBBINS.

EXHIBIT F.

East Granby, March 4th, 1848.

MESSRS. OGDEN AND JONES, Chicago—

Dear Sirs: I received at this place your favors of 12th and 14th ult., with accounts relating to the Wight property. Your account contains some charges

which require explanation, which I shall ask of your Mr. Ogden, when in New York, and if satisfactory, will then order a further payment made to you. You are aware that all improvements must have my approval, but you have proceeded so far without consulting me. It would be more satisfactory to me, and, in my opinion, just to all interests, if the improvements to be made were let by tender for cash payments, rather than let in such small detached portions evidently tributary to the business of your office. I notice that you charge newly Ds. 150, for Smith's superintendence, etc. This I think is too bad. I supposed that you were to superintend the business yourselves; if you cannot, you should at least pay your deputies. Your commissions are certainly sufficiently ample for that, and all the other very onerous duties you perform. I have not the contract here to refer to, but if it allows you to charge ten per cent. on your advances, I must allow that I made a very foolish arrangement, and that it is for my interest to dissolve the connection as soon as the contract permits. That you may proceed fairly and understandingly, I give you notice, that you must not make any further improvements in the Wight property, without my written assent, and in order to obtain this, you must furnish me with your proposed improvements, and the estimated cost of them. I likewise give you notice, that I shall call for a division of the property as soon as the sales amount to sufficient to cover the advances. This I can do, I believe, according to the contract. I know not what Mr. Marshall may say of your account, but it must readily occur to him, after examination, that the widow's chance of gain is small and remote. Col. Smith is wrong as to Chicago Avenue. I made no agreement with any one. I did not know that Raymond was interested, or that Lee intended making a road on the North Side. Mr. Lee told me he should drain his land by ditching.

Yours respectfully, A. ROBBINS.

EXHIBIT G.

Know all men, etc., that for and in consideration of $3,000, to me in hand paid, etc., I have this day given, granted, and assigned to said Mahlon D. Ogden, absolutely, all commissions, and all claim and demand I may have to any commissions, upon the proceeds of the sale of the interest of Allen Robbins, in and to a certain tract of land heretofore sold by me to A. Hyatt Smith and John Bradley, etc., etc.

As witness my hand and seal, this 16th day of December, 1858.

W. B. OGDEN. [L. S.]

EXHIBIT H.

(This was a bond of indemnity, given by Mahlon D. Ogden, as trustee for the Chicago Land Company, to Wm. B. Ogden, to save and keep harmless the said William B., from all damages, costs and expenses, which might arise from or grow out of the sale to said company, or to Bradley and Smith, of the land in controversy.)

Agreement of Bradley and Smith:

"Whereas, Wm. B. Ogden, acting for himself, etc., under and by virtue solely of authority vested in said Ogden by an indenture and contract made between, etc., bearing date May 31st, 1847, has this day concluded a sale of all the unsold portions, etc., of the premises named, etc., in such indenture, etc.; and whereas, there was included in said sale, etc., one acre of

ground heretofore contracted by said Ogden, acting for, etc., to Hiram Joy, for $1,500, or thereabouts, said acre being situated, etc. Now it was agreed, in the making of said sale to said Bradley and Smith, between them and the said Ogden, that they should carry out and fulfill the condition of the said contract with said Joy, and upon his making the payment to them, etc., they should make him a proper deed, etc., of the title to said acre, or cause the same to be made to him, his heirs or assigns. The said Bradley and Smith hereby assuming the obligations of said contract, etc., as fully as if made originally by them with said Joy. To all which they bind themselves, etc. November 10th, 1852.

JOHN BRADLEY, [L. S.]
A. HYATT SMITH. [L. S.]

The defendant's proofs, so far as is material, were as follows:

Judge's certificate.—This certifies, that at the hearing had before me, Edward A. Drummond was produced as a witness by said defendant, who testified as follows:

"I am deputy clerk of the United States Circuit Court for the Northern District of Illinois. The papers now produced and exhibited by me, are the original bill and answer filed in the United States Circuit Court, in a certain suit in chancery now pending therein, wherein Robert J. Walker is complainant, and Wm. B. Ogden and Mahlon D. Ogden are defendants. I have also certified copies of said bill and answer, which have been furnished at the request of the defendant in this cause."

I further certify, that at the said hearing, John F. Clements was produced as a witness by the defendant, who testified as follows:

"I know Robert J. Walker. The signature of Robert J. Walker to the original bill filed in the suit *Robert J. Walker* v. *Wm. B. Ogden and Mahlon D. Ogden*, pending in the United States Circuit Court, which is now here exhibited to me, is his genuine signature. He signed and made oath to said bill before me, as United States Commissioner."

I further certify, that the signatures of William B. Ogden and Mahlon D. Ogden, to their answer above referred to, were admitted to be genuine.

Whereupon, the counsel for defendant offered the said bill and answer as evidence in this cause.

To this evidence the counsel for complainants objected as incompetent. This objection was sustained by the court, and the evidence was rejected. To this decision the defendant excepted.

The certified copies of the said bill and answer above referred to, were then put on file in this cause, and it was agreed

by counsel that the said copies should for every purpose connected with this case be held and considered as of the same force, competency and effect as the original bill and answer, for which they are by consent substituted.

I further certify, that the motion by defendant to suppress the depositions of John Bradley and George Steele, was overruled by the court, and to this decision defendant excepted.

I further certify, that by agreement, a certified copy of a certain agreement, dated September 3rd, 1851, signed by John Bradley, E. F. Johnson, J. B. Macy, A. H. Smith, R. J. Walker, and William Sloan, and attached to the deposition of S. H. Fleetwood, filed in the case of *Walker* v. *Ogden et al.*, in the United States Circuit Court, was introduced and read in evidence by said defendant, and the signatures thereto were admitted to be genuine.

GEORGE MANIERRE, [L. S.]
Judge 7th Judicial Circuit of Illinois.

Bill of complaint in the suit, *Robert J. Walker* v. *William B. Ogden and Mahlon D. Ogden*, pending in United States Circuit Court. Filed June 5th, 1855:

[This was a bill filed by Mr. Walker, as one of the shareholders in the Chicago Land Company, against the defendants, as the trustees of said company, to compel them to deliver to him a certificate for 166 shares of stock, which the trustees claimed he had forfeited, by the non-payment of an assessment made upon him, as one of the shareholders, July 19th, 1853, for $4,166.66. It is set forth in the bill, and admitted in the answer, that Mr. Walker was an original subscriber for 1,500 shares—that he had paid for and received a certificate for 200 shares—that he would have been entitled to certificates for the remaining 1,300 shares, upon payment of future assessments, a certificate of one full paid share to be issued for every $25 that should be paid. It was insisted by the trustees, that in consequence of the non-payment of the above assessments, Mr. Walker had forfeited the 166 shares which he would have been entitled to receive a certificate for, had he paid the assessment, as well as all his stock, in the company, except the 200 shares for which a certificate had been issued. (See pages 226, 230, 271, and 305, of the record.) It was claimed by Mr. Walker, that there had been no legal forfeiture, and that on payment of the assessment, which was tendered, he was entitled to his certificate for 166 shares. Another object of the bill was to enjoin the sale of some of the company's lands, which had been advertised by the trustees. Only such portions of the bill and answer as are supposed to be material in this case appear in the abstract.]

To the Hon. Thomas Drummond, Judge, etc., Robert J. Walker, of, etc., brings his bill against William B. Ogden and Mahlon D. Ogden, of, etc. And thereupon your orator complains, and says, that early in the summer of 1851, your orator being convinced, from the extension of railroads and other causes, of the great enhancement that must take place in the value of real estate, in and near the city of Chicago, suggested the formation of a company to purchase land there—in consequence of which suggestion, preliminary articles of association, dated September 3rd, 1851, providing for such purchases, were drawn up by your orator, and signed by him and by John Bradley, Edwin F. Johnson, John B. Macy, A. Hyatt Smith, and William Sloan; that on or about the 9th day of May, 1852, in further progress of said original plan of your orator, William B. Ogden, John P. Chapin, John B. Macy, A. Hyatt Smith, William Sloan, John Bradley, Jacob P. Eastman, Edwin F. Johnson, Albert A. Bliss, Wm. B. Hotchkiss, and your orator, mutually associated themselves together, for the purpose of procuring and purchasing divers tracts of land, etc., in and about the city of Chicago, for the joint benefit and advantage of the said several persons last above named, according to their respective rights and interests in the premises—which said lands, etc., it was then and there agreed should be held in the name or names of one or more of the said several persons, as trustees, for the benefit of the whole, according to their respective interest therein as aforesaid, for the purpose of facilitating the operation of said association; that subsequently, said association contracted to purchase, and did purchase, certain tracts and lots of land in or near the city of Chicago, which are more particularly described in a certain indenture of agreement, bearing date the 2nd day of May, 1853. (The bill then goes on to recite the articles of association of the Chicago Land Company, executed May 2nd, 1853.)

* * * * * * *

And your orator further avers, that per exhibit heretofore referred to, it appears, and such was the fact, that said Wm. B. Ogden, under the articles before referred to, of 9th of May, 1852, was an original shareholder; that said trustees reserved the right to purchase shares under the present articles, and from said facts, your orator believes are large shareholders, etc., etc.

The foregoing bill is sworn to by the complainant, June 5th, 1855.

The joint and several answer of Wm. B. Ogden and Mahlon D. Ogden to the above bill. Filed June 9th, 1856:

These defendants now, and at all times hereafter, saving and reserving, etc., for answer to said bill, each answering for him-

self, and not one for the other, jointly and severally answer and say,

That they are wholly ignorant whether the statement made in said bill, that the said complainant was convinced that a great enhancement in the value of real estate would take place in the city of Chicago, is true or not, and have no information on the subject, and they are also ignorant, nor have they any information whether the said complainant suggested the formation of a company for the purchase of land in said city, as alleged in said bill, and they are unable positively to state whether such statement is true or not, but according to their best knowledge, information and belief, the said statement is not true.

And these defendants further answering, the said Wm. B. Ogden for himself, and the said Mahlon D. Ogden from information derived from the said Wm. B. Ogden, admit that on or about the 9th day of May, A. D. 1852, the said complainant was associated with Wm. B. Ogden and the other persons named in said bill, for the purpose of procuring and purchasing divers tracts of land and property in and about the city of Chicago, as is alleged in said bill. * * * * *

And these defendants, further answering, deny that the said Wm. B. Ogden was an original shareholder under the articles of the 9th of May, 1852, and aver that neither of these defendants ever purchased any shares whatever, never owned any shares under said articles of association, and never held any in their own names, except as collateral security, and as to the rights of said trustees, under said articles of association, reference is hereby made to the said articles, etc., etc.

The answer is signed, but not sworn to, by Wm. B. Ogden, and Mahlon D. Ogden. (It nowhere appears in said answer, that Wm. B. Ogden had resigned his office as trustee.)

Agreement between R. J. Walker and others, dated September 3rd, 1851:

"Whereas, the Illinois and Wisconsin Railroad Company have made certain contracts for the building of their road, from, etc., to the city of Chicago, and thence to the State line of Indiana; and whereas, said company propose to locate one of their depots in the said city of Chicago, which, etc., will give great value to the property in Chicago, near to said depot, etc.; and whereas, it is proposed to purchase said lands thus believed to be appreciated in value, etc.: Now it is understood, that as far as practicable, said lands will be purchased for the joint and equal benefit of the following persons, ten in number, and each holding one equal undivided tenth part of the same, and each contributing one-tenth part of the purchase money therefor, as hereafter stated, which said ten persons are the

following seven persons, namely: John Bradley, Jacob P. Eastman, E. H. Johnson, John B. Macy, A. Hyatt Smith, R. J. Walker, and Wm. Sloan, and the others to be selected as hereafter stated; and whereas, it is contemplated that certain of the ten persons, etc., will contribute the cash toward the payment of purchase money, etc., charging interest, etc., which said cash advances and interest, etc., is to be refunded within two years thereafter, etc.; and whereas, seven of the parties to this contract have subscribed the same, it is agreed the remaining three shall be selected by R. J. Walker, such persons being contemplated, as from their capital or influence, it is deemed by him, would contribute most to the success of this enterprise; and it is further agreed, that said lands thus proposed to be purchased shall be such, as to price and location, as are first approved or selected by John B. Macy and A. Hyatt Smith, etc., they being limited to a sum for the entire purchase not exceeding $300,000, nor at a distance more remote than four miles from the depot of the Illinois and Wisconsin Railroad Company, which depot is to be selected by said Smith and Macy, and the land purchased by them at the best rates, to an extent of about twenty acres, and which they shall set apart out of the purchased property, and to be paid for by said Illinois and Wisconsin Railroad Company, at the price given, or agreed to be given, by said Smith and Macy; provided also, that if said Walker can procure one person to make said advances, said person shall hold three-tenths interest in said lands, or if two persons, said two persons shall hold three-tenths, etc., it being also understood, that for such advances, etc., said Smith and Macy shall transfer said lands, etc., as a security to the party making said advances, and for further security, each of said several parties, etc., to this contract, shall execute his note for his tenth part of the purchase money advanced, etc., made payable in two years, as aforesaid, and notes for the remaining seven-tenths, payable when the remainder of the purchase money is to be paid, etc.

"*New York*, 3*rd Sept.*, 1851.

JOHN BRADLEY.
EDWIN F. JOHNSON.
JOHN B. MACY.
A. HYATT SMITH.
R. J. WALKER.
WM. SLOAN."

Deposition of *Augustus Frisbie*, taken March 29th, 1859:

I reside in Chicago. Am forty years of age. Engaged in the ice business.

In 1852, I was associated in business with Hiram Joy.

In connection with Mr. Joy, I negotiated a trade with Mr. Ogden, which was consummated July 22nd, 1852. The first negotiations were had some two or three weeks before—about

the first of July. Some time elapsed in consequence of my opposing the trade. I had no interest in the purchase. The contract hereto attached, " A," is the original contract signed by the parties. The price was $1,500, on canal time. I would not consent to the purchase until Mr. Ogden extended the time of the first payment. He extended it as expressed in the contract.

Mr. Ogden changed the terms of payment to meet our views, but added $25 to make up the difference in interest on account of extending the first payment.

My recollection is, that Mr. Ogden said about that time that he did not want to sell any more at that price — that it was cheap. He bound us to erect buildings, as appears by the contract. I saw no reluctance on his part to sign the contract and let Joy have the land.

I have not the most remote recollection that anything was said by Mr. Ogden, during the negotiations, about any previous sale of this land to other parties. It is among the bare possibilities that something of the kind may have been said, but my memory is good, and had there been any such conversation I think I should remember it, and I should, according to my custom in such cases, have noted it on the contract, or made some memorandum of it. For the last ten years, I have kept a record and account of all of Mr. Joy's real estate transactions, and have had the general supervision of all his real estate matters, and contracts of all kinds.

On the first day of June, 1853, $603.28 was paid to Ogden, Jones & Co., and their receipt was indorsed on the contract which Joy holds, (a duplicate to the one hereto attached.) On the first of Deccember, 1854, $560 was paid, and receipt taken as above. On the 7th of November, 1855, $584.18, the balance due, was paid, and receipt taken.

The paper hereto attached, marked " B," is a deed of the same property, signed by Mr. Ogden. I know his signature. Mr. Joy told me that Mr. Ogden handed this deed to him, and that he handed it to Mr. Robbins to be executed, and that he declined.

At the time this land was sold, the contract price was all it was worth. It is now worth about $10,000.

I should judge that the whole of Wight's addition was at that time worth $500 an acre. That portion along the river was worth $25 a foot. That is what I could have sold it for, for cash, at that time.

Cross-examination. — I was a party to the negotiations for this land from first to last. My impression is, that the first conversation took place between Ogden and Joy.

There was no agreement upon the terms of the contract until they were agreed upon, between Ogden, Joy and myself. The price had been fixed between Ogden and Joy.

The terms of payment were agreed upon at the date of the contract — it might have been a day or two before.

I recollect that the terms were agreed upon at that time, and might have been a few days or even weeks before.

It is my best recollection that it was not more than two or three days, but it might have been two or three weeks, it could not have more than that at the outside.

I knew nothing of any sale or negotiation of sale of the whole Wight property.

I never applied to Mr. Robbins for the purchase of this property.

Deposition of *Franklin Hathaway*, taken March 30th, 1859:

Reside in Chicago. Am a clerk.

I was engaged in the office of Ogden, Jones & Co., while that firm was in business, as book-keeper and cashier.

I was in the service of Ogden and Jones prior to that, for over three years. The firm of Ogden, Jones & Co., was formed July 1st, 1850. It was changed Nov. 1st, 1855, to Ogden, Fleetwood & Co. I have been in their office ever since.

The business of the concern continued to be managed as though no change in the firm had been made.

Ogden, Jones & Co. assumed the supervision of the Wight property, and kept and rendered regular accounts of sales, disbursements, etc., up to the time of the pretended sale to Bradley and Smith.

I cannot state positively whether Mr. Robbins was indebted to the firm on account of their disbursements for this property, at the time of said sale. My recollection is, that Mr. R. was in the habit of advancing his proportion every six months — so as to keep up with the advances made by Mr. Ogden — but the property was largely indebted for disbursements and advances on its account, at the time of the sale.

I think no change took place in the management of the business relating to this property, in consequence of the death of Mr. Jones. Accounts were made out and rendered to Mr. Robbins by the surviving members.

The account attached, and marked "Exhibit A," was made by me. I presume it was rendered to Mr. Robbins. I believe they were ordinarily made out in this way.

The papers attached, marked "B," "C," and "D," are in the handwriting of clerks in the office. I presume they relate to this Wight property.

I believe the sale to Bradley and Smith embraced all the Wight property then remaining unsold.

I think there was a commission of ten per cent. charged upon Ogden, Jones and Co.'s books for this sale. (Objected to.)

Do not know whether Mr. Ogden has drawn his share.

Mr. Robbins has never drawn any portion of the proceeds of that sale, to my knowledge. My impression is, that he has not.

I have no distinct recollection of the letter from Mr. Robbins to Mr. Ogden, dated August, 1852. I cannot swear positively whether I ever saw the letter or not.

It is impossible for me to recollect any particular letter among the thousands that come to the office. I may have seen this letter, but I have no recollection of it.

I have no recollection as to what occurred about the date of that letter in relation to the sale of the Wight property.

At the time of the sale I think I knew nothing about any instructions given by Mr. Robbins.

I cannot say that I had any knowledge of Mr. Robbins being opposed to the sale. I do not know of Mr. Ogden having taken legal advice about it.

I mean to be understood, that at or about the time of said sale, I had no knowledge on the subject referred to.

I cannot fix upon the precise date when I learned that Mr. Robbins was opposed to the sale, but think it was at or about the rendering of the February semi-annual account of 1853.

I do not know whether any discussion was had between Mr. Ogden, and Bradley and Smith, as to his authority to make the sale.

Edwin H. Sheldon was a member of the firm of Ogden, Jones & Co., through the summer and fall of 1852.

Sheldon was not, I think, a member of the Chicago Land Company.

I do not know whether Wm. B. Ogden made any purchases for the Chicago Land Company in 1852.

Neither Mr. Ogden or his firm bought the Elston property for said company, to my knowledge.

Cross-examination.—The Wight property was indebted, at the time of the sale to Bradley and Smith, for advances, to the amount of about $8,500, perhaps a little less.

Ogden, Jones & Co. kept the accounts and managed this property under the direction and control of Wm. B. Ogden.

There was a sale of a lot in the Wight property to Hiram Joy, in July, 1852. The Chicago Land Company got the benefit of the purchase money.

The first money received on that contract was credited to the Wight property on the books. Soon after the entry was

made, it was ascertained that this lot was a part of the Chicago Land Company's purchase. The entry was then changed by charging the amount entered in error back to the Wight property, and crediting the amount to the Chicago Land Company. The money was received and credited in the latter part of May, 1853, and the entry corrected the latter part of June following.

I should think that the paper attached to Wm. B. Ogden's deposition, marked "Exhibit E," was a transcript of the sales-book, where the sale is noted. The contract appears in the name of Ogden and Robbins, because at that date the legal title to the property was, as I suppose, in their name. The only indication upon the paper, as to what account in the books received credit for the moneys noted therein, appears in a note at the foot of the statement, setting forth that the money was received for the Chicago Land Company.

I was not sufficiently acquainted with the value of real estate here in 1852, to make my opinion of much value.

Direct examination resumed.—The time referred to in my statement about the indebtment of $8,500 of the Wight property, is the 1st of August, 1852.

This debt was contracted for taxes and improvements. Mr. Robbins had, I believe, up to that time, advanced his proportion, but the property was then indebted in the amount named.

The amount received from Joy went to the credit of the Chicago Land Company, in the same manner as receipts for other property sold for them.

The paper attached, marked "E," is an account respecting the Wight property, rendered by Ogden, Jones & Co., to Mr. Robbins, Feb. 1st, 1853.

The paper attached to Wm. B. Ogden's deposition, and marked "Exhibit F," is a letter purporting to be written to Ogden and Jones, and I recognize on the back of it an indorsement in the handwriting of Mr. Jones. I conclude from this that it was received by them.

The following were exhibits attached to Mr. Frisbie's deposition:

EXHIBIT A.

Articles of Agreement, made, etc., the 22nd day of July, 1852, between Wm. B. Ogden and Allen Robbins, by Wm. B. Ogden, his attorney, of the first part, and Hiram Joy of the second part, Witnesseth, that the party of the first part, in consideration, etc., hereby agrees to sell to the party of the second part, all that certain lot, etc., known, etc., as part of the E. ½ of S. E. ¼ of Sec. 5, T. 39 N., R. 14 E., bounded, etc., containing about one acre. And the said party of the second part hereby agrees to pay to said party of the first part, at the office of Ogden, Jones & Co., in Chicago, the sum of $1,525, as follows: $525, June 1st,

1853; $500, June 1st, 1854; $500, June 1st, 1855, with interest annually, etc.; and that he will pay all taxes subsequent to the year 1851, and all assessments, etc. The party of the second part further agrees that he will erect good and substantial buildings on said premises by the first of December next, worth at least $1,000, which shall remain thereon, etc.

(Here follow covenants for a deed, etc. etc.)

In witness whereof, the party of the first part, in person and by attorney, and the party of the second part, in his own proper person, have hereunto set their hands and seals, etc.

WM. B. OGDEN. [L. S.]
ALLEN ROBBINS, [L. S.]
By W. B. OGDEN, his Attorney.
HIRAM JOY. [L. S.]

EXHIBIT B.

(This is a deed of conveyance of the premises described in the foregoing contract, bearing date February 29th, 1856, in which the grantors mentioned are William B. Ogden and Allen Robbins, and Hiram Joy is grantee. The deed is executed only by Wm. B. Ogden.)

The following were exhibits attached to the deposition of Mr. Hathaway:

EXHIBIT "A."

(This is an account with the Wight property, from February 1st to August 1st, 1853, rendered by Ogden, Jones & Co., August 1st, 1853, and commencing as follows:

"THE WIGHT PROPERTY,

In account with Ogden, Jones & Co., successors to Ogden & Jones.")

EXHIBITS "B," "C," AND "D."

(These are other accounts with the same property, from August 1st, 1854, to February 1st, 1856, rendered by Ogden, Jones & Co., and commencing as follows:

"WIGHT PROPERTY,

In account with Ogden, Jones & Co., survivor and successors of Ogden & Jones.")

EXHIBIT "E."

(Another account with the same property, from August 1st, 1852, to February 1st, 1853, rendered by Ogden, Jones & Co., February 1st, 1853, and commencing as follows:

"THE WIGHT PROPERTY,

In account with Ogden, Jones & Co., successors to Ogden & Jones."

This statement contains a credit of $25,000, under date of Nov. 11th, 1852, received from Bradley and Smith, first payment on their contract, and a debit of $10,000, under date of Jan. 31st, 1853, for ten per cent. commissions upon the sale to Bradley and Smith.)

Stipulation, admitting that the letter of March 4th, 1848, from Allen Robbins to Ogden and Jones, attached to Wm. B. Ogden's deposition, and marked "Exhibit F," and that the

letter of Aug. 27th, 1852, from said Robbins to Wm. B. Ogden, attached to said Ogden's deposition, and marked "Exhibit C," were written and received at or about the times they bear date.

Decree rendered May 2nd, 1859, that the agreement of Nov. 10, 1852, set forth in the pleadings, be carried into execution, and that said defendant execute and deliver to Mahlon D. Ogden, trustee of the Chicago Land Company, within thirty days, a deed of conveyance sufficient to convey the legal title to an undivided half of the premises in question. And in case of his refusal to execute such conveyance, the master in chancery shall make and deliver a deed, etc. And it is further ordered, by consent of the parties, that the parties shall have all the benefit of their exceptions to the several rulings of the judge, noted in the judge's several certificates, as fully as if the same were embodied in this decree, and defendant to pay costs, etc.

Defendant excepts to the decree, and prays for an appeal.

Appellant assigns for error,

1st. The court below erred in admitting and considering the testimony of John Bradley, George Steele, and Edwin H. Sheldon.

2nd. The court below erred in excluding from this case, as evidence, the bill and answer in chancery, in the suit of *Robert J. Walker* v. *William B. Ogden and Mahlon D. Ogden.*

3rd. The court below erred in decreeing a specific performance of the contract referred to in the bill.

4th. The court below ought to have rendered a decree dismissing the bill.

Stuart & Ayer, for Appellant.

Beckwith, Merrick & Cassin, for Appellees.

Breese, J. We have devoted all the time at our command to the examination of this record, the errors assigned upon it, and to the arguments submitted by counsel, and have arrived at the conclusions we now proceed to state.

As to the first error assigned, objections to the competency of a witness are not now regarded by courts with as much favor as in former times, their credibility, under all the circumstances, being left to the jury trying the case. In chancery proceedings, where the court alone hears the testimony, the same rule ought to obtain. It is a settled principle, that an interested witness can restore his competency by showing that although at one time he was interested, he had, in good faith, divested himself of that interest, and that, too, in order to make himself a witness. This is every day's practice. The good faith with which the

act is done, is for the court to scrutinize, under the circumstances.

As to Ogden, it will be noticed, that his deposition was excluded by the court, and no point can be made on that now, as the appellees have not leave to assign cross-errors. As to Sheldon, his transfer of his share in the commissions to which his firm would be entitled, if made in good faith, of which the court was to judge, restored his competency in that regard, but in another respect, it was not restored, against which his transfer could have no effect or operation. In case the complainants fail in the suit, this witness, as a member of the firm of Ogden, Jones & Co., is responsible to the complainants, for the interest on the money they have paid into the hands of this company on appellant's third, and which alone the complainants could release, but which they have not released. He then had an existing and a direct interest in the event of this suit, notwithstanding his transfer of his commissions, in the shape of this interest, on the money received, for which he would be liable to the complainants. If the complainants prevail in the suit, appellant, by the contract, can claim no interest of the company; the witness' interest, therefore, is that the complainants shall prevail.

Now, as to the competency of Bradley and Steele. They were both shareholders in the stock of the Chicago Land Company, and, as such, partners. There is no evidence that the transfers that they state they made, have ever been registered on the books of the company, as the articles of association require, or that the liability of their transferees has been fixed, by affixing their names and seals to the articles. Until that be done, if that would do, these witnesses could not be released from their liability as members of the association. They, themselves, have provided the mode by which their liabilities can be made to devolve upon others, and to that mode they must be held. But these shareholders have none of the rights or immunities of such, as in a regularly incorporated company. These stock companies are nothing more than partnerships, and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be, if they have not shifted their liability in the very mode pointed out in the articles of association. They are, therefore, parties to the suit, as complainants. But there is another objection to Bradley. It is shown he was at the time of testifying, a stockholder in the St. Paul and Fond du Lac Railroad Company, which company had obtained from this land association, the right of way for their road over part of this land, one-third of which right they would lose if the appellant

prevails. It is no answer to this view to say, that this was a parol agreement, and void by the statute of frauds and perjuries. It is still binding, notwithstanding the statute, unless the statute be pleaded, and we cannot say that it will be pleaded. Bradley was not a competent witness, for the reasons we have given.

The next error assigned is, to the rejection of the bill in chancery, filed by Robert J. Walker, and sworn to, against W. B. and M. D. Ogden, in the Circuit Court of the United States for the northern district of this State, and their answer to the bill. As the object of offering these files was to get at admissions of a part of those defendants, the Ogdens, to be used in this suit, in which they had a direct interest, we think they should have been received in evidence. The object of the appellant was to show, that in May, 1852, William B. Ogden, who sold the land of appellant in November of that year, was actually a member of the land company buying it. The admissions of a party to a fact, no matter when made or how made, are evidence against him—no matter if they be found in an answer in chancery, in a letter, or proved in some other mode. They are still his admissions, and can be used against him. These files should have been admitted for such purpose.

Having disposed of these preliminary objections, we come now to the important point in the case on its merits, and that is, did the evidence, as exhibited in the record, warrant the court in decreeing a specific performance against the appellant?

Is the contract made with Bradley and Smith, bearing date 10th of November, 1852, binding on the appellant? if it is, the decree on the merits is right, if these preliminaries could be waived.

The parties to the agreement to sell, are William B. Ogden of the first part, and John Bradley and A. Hyatt Smith of the second part, but who really were contracting for the Chicago Land Company, of which W. B. Ogden was a member. The contract recites the agreement of May 31, 1847, under which Ogden's claim to act for Robbins, arises.

It will be observed, that this trust, by this agreement, was not committed to William B. Ogden and William E. Jones, but to the firm of Ogden and Jones, "their survivor and successors in business." The inducement was, undoubtedly, the great reputation this firm possessed as land agents, well acquainted with the value of land in the locality where they operated. As accomplished agents, they were entrusted with the powers by the appellant and Mrs. Wight, acting through her trustee, Mr. Marshall, with a special supervisory power over these lands, subject, however, to the general directions of the appellant and W. B. Ogden, who were joint owners with Mrs. Wight of the

property. Sales were to be made from time to time, of portions of the property, to raise money to make improvements calculated to enhance the value of the property. No interest in the land vested in Ogden and Jones, by this agreement, nor in their survivor or successors. A simple power to make sales and improvements for the purposes indicated, was alone granted, and under the conditions named. As donees of this power, they took no title and could convey none. In executing the power, the stipulations and directions of the agreement should have been faithfully observed.

As to the execution of the agreement in the name of W. B. Ogden, as attorney for Robbins, without the name of Robbins to the deed, it is a clear proposition that at law it is no binding covenant on Robbins, but we are not prepared to say that a court of equity should not recognize it as valid, in the absence of fraud, mistake, or other circumstance casting suspicion upon it.

On another point made by the appellant, we are with him, and that is, the appointees of the power to make a sale of the whole property under the agreement of 31st May, 1847, were not Ogden and Jones only, but they and the survivor of them, connected with their successors in business, for which the agreement amply provided. This power is as follows, in these words: "The said Ogden and Jones, their survivor and successors in business, shall proceed to make sales of said premises, or lease or otherwise dispose of, in part or in whole, when, where and as they shall in their discretion think and deem to be most advantageous and conducive to the best interests of said property, and most beneficial to the results to be realized from the same; such sales, leases, or other disposition of said property to be made at such time or times hereafter, and in such manner, and on such terms, for cash and credit, or in exchange for other property, thing or things, or partly on credit, or partly for payment in hand, or for other property or thing in exchange, as we or our survivor, executors and administrators, or the said Ogden and Jones, their survivor and successors in business, in Chicago, shall, in our or their discretion, think to be most advantageous to said property, and best calculated to enhance the amount to be derived therefrom."

For other purposes, not extending to a sale of a part or the whole property, the disjunctive "or" is used, but when a sale is named of the property, in whole or in part, the conjunctive "and" is used, coupling the successors of Ogden and Jones with them or their survivor. When this agreement was made, William B. Ogden and William E. Jones composed the firm of Ogden and Jones, and it so continued until the first of July,

1850, at which time they associated with them Mahlon D. Ogden and Edwin H. Sheldon, and changed the style of the firm to Ogden, Jones & Co. These parties were then the successors in business of the old firm of Ogden and Jones, and this agency, by the true meaning of the terms of the agreement, devolved upon the new firm. The old firm no longer existed, but became merged in the new. The agreement or indenture shows clearly, that it was never in the contemplation of the parties to it, that the business of the agency should be committed to two distinct and independent firms or parties at the same time. It makes no provision for the concurrent exercise of the power by different parties, but confides it to a single party or firm.

There can be no doubt about this, nor can there be any doubt, from the language employed, that the parties contemplated that the agency should pass to the new firm, in case one was established. And we see the fact to be, that on the establishment of the new firm of Ogden, Jones & Co., the agency was actually carried on by this new firm, and they, therefore, were the only proper parties competent to transact its business. This agency was one and indivisible, Ogden having no power, of himself, and by himself, to make sales of the property, committing other parts of the agency to his associates. There is no such idea in the deed. It follows, then, that under this deed, the power to make sales was, in November, 1852, vested in the Ogdens and Sheldon jointly, they having equal power, interest and authority with respect to this property, and unauthorized to act separately.

In answer to this view, it is contended by the appellees, that, though the power of sale was reposed in Ogden, Jones & Co., it was not necessary that they should all actually join in the sale, their concurrence, verbal or otherwise, being sufficient. We will not say this might not be, but the testimony on this point, being out of the record, can have no bearing on the case, and but very little, if it was in the record. It has relation to a period months anterior to the actual sale of the property, and when, in that locality, property was not on the rise, or if so, but moderately. And there is strong evidence, in the acts of W. B. Ogden himself, showing that their negotiations for a sale had terminated unsuccessfully, or had been abandoned. One strong fact is, that on the 22nd of July, 1852, W. B. Ogden executed, in the name of himself and appellant, for the consideration of fifteen hundred and twenty-five dollars, a contract for the sale of one acre of this very property. The facts about the sale are fully stated by Mr. Frisbie, who made the contract on the part of Joy, and he states that the negotiations for this acre

commenced about the first of July, and that not a word was said by Mr. Ogden about any previous sale, or contract of sale, or negotiation for a sale of the whole or any part of this property to other parties; and Joy testifies that Mr. Ogden said nothing to him about any sale to Bradley and Smith, and that he had no knowledge or intimation of any such sale. The explanation of this given by Mr. Ogden is not satisfactory, if his deposition, which was ruled out, could be regarded. He states, as his recollection, that this contract with Joy was made pending the negotiations with Bradley and Smith, and that they were to consummate it with Joy. This hardly tallies with his previous statement, that the negotiation with these parties, Bradley and Smith, was *concluded* about the fifteenth of June, and that he gave them a few days to raise the money for the first payment. Now, as the negotiation for the sale to Joy did not commence until about the first of July following, which interval Ogden had given to Bradley and Smith to raise the money for the first payment, as Ogden says, is it not more than surprising, that Ogden should not have mentioned that he had actually concluded a contract for the whole property weeks previously, and sent Joy to his vendees to purchase? And could the contract with Bradley and Smith have been pending? Which statement is the true one? A negotiation cannot be pending and concluded at the same time. As the statements stand in the deposition they are irreconcilable, and being so, furnish strong persuasive evidence that the contract contemplated with Bradley and Smith had been abandoned before the sale to Joy.

There is another fact tending strongly to show that no contract of sale was concluded in June with Bradley and Smith, and that is, in the semi-annual statement of sales and expenditures rendered by this agency to appellant on the first day of August, 1852, there is no hint, memorandum, note or mention of any such sale.

In a sale of such magnitude, the constituent should have the earliest intelligence, that he may make inquiries about it, and how strange it is, when it is shown that the appellant was in close proximity to his agents, to be seen and counselled with at any hour of the day, that not one word should have been spoken to him about such a contract, and his opinion solicited. Mr. Ogden says, he did advise Mr. Bradley to see Mr. Robbins, on the ground of *courtesy* merely, not doubting, however, his power to sell independently of him.

An agent, devoted to the interests of his client, has more to do with justice than the empty and idle ceremonies, courtesy may impose, or good manners inspire. Even if he had the

power to sell, independently of the appellant, and without consulting him, did not duty, not courtesy, to his client, require him to see him, and have a full, free and friendly consultation with him as to price, terms, the state of the money market, the expected increase in value, for land was then going up—in short, upon every topic connected with the property and its sale? The proper construction of the deed of 31st May, and its purposes, contemplated as much. The agency of this house was adopted as a mode of selling—as a convenient mode—not as giving the agency any title to dispose of its property at their whim and caprice, but upon consultation with the proprietors, if they were within convenient reach. No title was conveyed, but the joint judgment of all the parties, as to its management and sale, was designed to be secured.

But above all, how remarkable it is that appellant's letter of the 27th August, 1852, should have had no effect upon the active agent in effecting this sale. The letter was written, evidently, under considerable excitement, and even if the pretensions set up in it were unfounded, it should have checked the consummation of any sale, or contract, not legally binding on the parties, until a consultation, at least, could have been had. At any rate, it deserved a reply, conveying the information that a contract had already been concluded with Bradley and Smith as now here set up, for the sale of the whole property, so that the appellant, while it was executory merely, might have availed himself of all his legal rights, and prevented its consummation. In that letter, the agent is distinctly advised, that his constituent had lost all confidence in his integrity, and is expressly forbidden to make any sales exceeding in amount the advances, or any sale as to which he is not consulted, and to which he does not give his assent; and he complains that no report had been made to him of the sale to Joy.

We cannot but think, even if the pretensions of the writer were unfounded, this letter should have checked the further progress of any sale, the preliminaries of which, had been canvassed months before, when the fact was patent, that during this interval, this property had risen greatly in value, not only partaking of the general stimulus to property in the city of Chicago, but of one local to itself—the construction of the Fond du Lac Railroad, whose depot was established in close proximity to it. By the testimony of Mr. Burch, these causes operated to double the value of the property over the sum it was worth in June, when Bradley and Smith had talked of buying it, and when appellant had put the price at the sum for which it was then proposed to be sold to them. It does seem that all these circumstances should have admonished the active agent, that in

disposing of this property, he was, perhaps, doing great injustice to the appellant, and to Mrs. Wight, and that a free consultation with appellant about it, was alike demanded by justice, as well as courtesy.

Whilst this property was growing in value, which a speculator such as Mr. Bradley could not fail to perceive, and desire to profit by, he visits the city of New York, and there consummates a sale on the 10th of November, with Mr. Ogden, of the whole of this property, at the June price of one hundred thousand dollars, though then worth, if we can believe the witness, more than twice that sum. In fact, when the negotiations in June and July were going on, it appears that one acre of it was sold to Joy, for more than fifteen hundred dollars, which, at this rate, would make the whole property worth at that time, in acres, more than three hundred thousand dollars. To this sale, the assent of his copartners was not had—they were not consulted about it, but by the contract itself, Ogden acted as the surviving partner of Jones alone, and what is remarkable, the contract does not allude or refer to any previous verbal sale or contract.

From the fact that W. B. Ogden was a member of the Chicago Land Company, in its inception under another name, as early as May, 1852; that about that time the associates forming this company, commenced the purchase of lands with a view to their rise in value; that Bradley and Smith were members of this company, and their purchases were to go to the benefit of this company, and so known to their associate, Ogden; that he, in selling to them, was, really, selling to himself, or to an association of which he was a member; the sale was void, on the well-known principle that a trustee cannot be the purchaser, directly or indirectly, of the property or estate entrusted to him to sell. We can come to no other conclusion, on all the facts of this case, than that this sale was not made by appellant or by any agent as contemplated in the indenture of May 31, 1847—that it was made in defiance of appellant's remonstrances. Ogden was himself a purchaser as well as vendor. He was a member of the land company to whom he sold the land, and all his associates are chargeable with the same considerations which would bear upon him were he solely interested as purchaser. There is nothing in the character of the case that we can discover, recommending it to the favorable consideration of a court of equity, and nothing to justify such a court in decreeing a specific performance of the contract set up, on which the bill is founded. We see nothing in the case, giving a claim to be heard in equity, and we must reverse the decree below, and dismiss the bill.

Decree reversed.

The Reapers' Bank, Appellant, *v.* Elisha W. Willard, James M. Adsit, and Jesse K. Dubois, Appellees.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

The proviso to the 3rd section of the act of 1857, amending the General Banking Law, is constitutional, although it was not submitted to a vote of the people.

The holder of several bank bills may present them as an aggregate sum and demand specie, and the bank is bound to pay.

In this State, corporations, like individuals, are subject to the control of the legislature, so far as it relates to the enforcing of obligations.

This bill alleges, that the complainant is a corporation, duly organized and in business as a bank, under the general banking law of the State of Illinois.

That Augustus H. Burley has deposited with the auditor of state, United States stocks, to the amount and value of $100,000.

That the auditor, upon the deposit of the stocks, registered and countersigned notes to the amount of $94,000, payable at the office of the complainant bank at Fairfield, in the county of Wayne, and State of Illinois, and delivered the same to the complainant to be circulated as money.

That Augustus H. Burley, on the 14th day of April, 1859, made the certificate required by section seven of the bank act, and that a copy is attached to the bill; that such certificate was duly acknowledged, and was recorded in the office of the recorder of Wayne county, and that copies thereof were filed in the offices of secretary of state and of the auditor of state.

That thereupon, the complainant became a body politic and corporate, and entitled to certain privileges and franchises secured by said law, and by contract with the State of Illinois.

That Augustus H. Burley is the president, and Frederick G. Clapp is the cashier.

That a portion of the notes, countersigned and registered by the auditor, and delivered to the complainant, have been signed by the president and cashier, and circulated as money.

That on the 12th of October, 1859, the defendants, Adsit and Willard, were the owners and holders of a package of $500 of the circulating notes of the complainant bank, and in the forenoon of that day, by the hand of Charles A. Beecher, a notary public, residing at Fairfield, presented the same at the office of the complainant, and demanded the redemption thereof in the legal coin of the United States.

That upon such presentation, the complainant bank tendered to the defendants, Adsit and Willard, in the redemption thereof,

the gold coins of the United States for each and every bill respectively, but refused to redeem said package as a whole, or as though the same were a single obligation for that sum of money.

That the defendants, Willard and Adsit, notwithstanding such tender, caused the said notes to be protested for non-payment, by the said notary, and that the protest and notes accompanying the same, were presented to the auditor and filed in his office, and a copy of the protest delivered to the said Augustus H. Burley, president of the bank, and that a copy of the protest is attached to the bill.

That the said complainant has been notified, by the auditor, Jesse K. Dubois, to pay said notes, with twelve per cent. interest from date of protest, together with costs, protest fees and expenses.

That the auditor is about to sell the stocks deposited, to call in the circulation of complainant bank, and out of proceeds of the sale of stocks to redeem the protested notes.

The bill prays an injunction to restrain the auditor from putting the bank into liquidation.

The defendants filed their answer, (which is, however, by a subsequent order, made the answer of the defendants, Willard and Adsit, only, and the appearance of Dubois is withdrawn,) in which the said Willard and Adsit admit the general allegations in the bill of complaint, and say, that on the presentation of said package of notes for redemption by said Charles A. Beecher, agent of said Adsit and Willard, in the legal coin of the United States, the said Burley, president and acting teller of said corporation, offered to receive of said Beecher one of the bills contained in said package, and to redeem it in the gold coin of the United States, and stated that after he, said Burley, had redeemed that, he would receive another of said bills, and redeem it, and also stated that he would thus continue to receive and redeem the bills contained in said package, one by one, until the whole was redeemed, but refused to receive said package and redeem it as a whole, or to receive, treat and redeem said bills as though they were a single obligation of the amount of five hundred dollars.

A stipulation was filed in said case, by which it is agreed that the facts and circumstances relating to and connected with the presentation, demand of payment, and protest of the said protested notes, as set forth in the answer, and in the copy of the notary's protest attached to the bill, are true, and are to be considered upon the hearing.

This stipulation, by a subsequent order, is made the stipulation of the complainant and the defendants, Willard and Adsit, only.

The default of the defendant Dubois was taken for want of an answer.

On the fourth day of January, the following decree was entered in said case:

"It is ordered, adjudged and decreed, that the order enjoining the defendants, and their agents and attorneys, heretofore entered in this case, be continued and made perpetual, upon the complainant depositing in the office of Jesse K. Dubois, the auditor of the State, the legal coin of the United States, for the redemption and payment of the circulating notes described in said bill of complaint, together with twelve per cent. interest thereon from the date of the protest thereof, and all costs and protest fees and expenses, within ten days from the entry of this decree, or if appeal shall be perfected in said case, then within ten days from notice of the affirmation of such decree by the Supreme Court of the State of Illinois upon appeal, if the same shall be so affirmed; and that on default of such payment, the complainant's bill be dismissed."

Appeal prayed and allowed.

C. Hitchcock, for Appellant.

Walker, Van Arman & Dexter, for Appellees.

Caton, C. J. The decree in this cause will be affirmed, for the reasons assigned by the Chief Justice of the Superior Court of Chicago, when he rendered the decree from which this appeal is taken, whose opinion is adopted as the opinion of this court. We do not understand that opinion as extending the right of the legislature to amend the banking law beyond the rule laid down by this court in the case of the *Bank of the Republic* v. *Hamilton County*, 21 Ill. R. 53, within the limits of which we must be understood as confining ourselves.

Opinion of C. J. Wilson, *of the Superior Court.* The complainant is a corporation, organized under the general banking law of this State, passed in 1851, and established at Fairfield, in this State.

On the 12th of October, 1859, the defendants, Messrs. Adsit and Willard, being joint owners of $500 in the notes of said complainant, caused them to be presented to the president of the bank by a notary public, at the bank, during business hours, and redemption demanded of the same in the legal coin of the United States. The president offered to redeem the bills one by one, separately, but refused to redeem the package as one

obligation, and thereupon the notary protested the package for non-redemption.

The protested bills were presented to the auditor of public accounts by the defendants, whereupon the auditor gave notice to the president of the complainant bank to pay said bills, with interest, and as required by law; and the bill charges, that the auditor is about to sell its stocks, and call in its circulation, and prays an injunction.

One ground upon which the complainant insists for maintaining the injunction by a decree making it perpetual, is, that the act of 1857, amending the act of 1851, is unconstitutional, because it was not submitted to the people.

It is contended that as by the constitution the original law was submitted to the people, and became a law by their approval, no law amending or in any manner affecting the corporations organized under it can be in force and operation, without a like submission to and approval by the people.

That this position is not maintainable has been recently decided by the Supreme Court, in a very able opinion by the Chief Justice, and although the court has expressed no opinion in relation to other provisions of the amendatory acts than those involving the question before them, they have decided that the act of 1851 is amendable by the legislature without being submitted to the people. It does not follow, however, that every amendment the legislature may make is constitutional, for, like all other laws, they may embrace constitutional and unconstitutional provisions.

The question, therefore, is, whether the particular provision upon which the claim of the bill holders rests, is unconstitutional. The grievance of the complainant is, that he was not allowed to redeem the bills presented, separately, instead of redeeming them all at once as a single obligation.

So far as I am advised, the uniform custom in all well-regulated banks is to redeem bills presented together as a single obligation, and it is also the common law rule, independent of the statute. This precise question arose, and was decided in the case of the *Suffolk Bank* v. *Lincoln Bank*, 3 Mason, 1. Judge Story, in his opinion, says: "It has been intimated that each bank bill should have been separately presented for payment, and separately paid. But there is no foundation in law for that suggestion. The holder had the right to demand the whole at once as an aggregate sum, and the bank was bound to pay the whole. Then, as there was a due demand, and no money to the amount paid, or tendered in payment, what ground can there be to say that the bank has not refused?"

No case has been cited establishing a different rule, and as

the bank can gain no legal advantage, but would be subjected to great inconvenience and trouble, by adopting the other rule contended for by the complainant, this practice could subserve no purpose for the bank but to delay and harass the bill holders.

Any act of a bank having this object has been repeatedly decided to be illegal, and equivalent to a refusal to redeem. *Suffolk Bank* v. *Lincoln Bank*, 3 Mason, 1; *Hibbard* v. *Chenango Bank*, 8 Cowen, 88; *Gilbert* v. *Nantucket Bank*, 2 Am. L. J. 157.

If this view is correct, then the proviso complained of is merely declaratory of the common law, and not obnoxious to the objection of unconstitutionality.

But assuming that, at common law, and at the time of the passage of the act of 1851, it was the right of the complainant, when a bill holder demanded the redemption of a number of bills together, to redeem them separately, what wrong has been done to the complainant by the proviso complained of in the act of 1857? Does it deprive him of any right vested by the act of 1851, or does it confer any new right upon the bill holders? Clearly not. By the act of 1851, the banks to be organized under it were bound to redeem their bills in lawful money of the United States, when they were presented for redemption, and were subject to protest if they refused. The rights of the bill holders and the obligations of the banks remain the same. Upon the present assumption, the manner of enforcing the obligations which before existed is changed, and in a manner which makes it less onerous to the bank than the one supposed to exist before.

It is, doubtless, true, as contended by the complainant, that laws of the class to which the act of 1851 belongs, are not subject to repeal and modification by the legislature, as most general laws are. This distinction, however, as I apprehend, applies only to those who have acted under the law, and thereby acquired vested rights under it. So far the act becomes a contract between the State and the corporation, and like any other contract, can be enforced. But I have yet to see any authority which makes such a corporation *imperium in imperio*, and independent of and above the legislature of the State, so that it can claim a vested right in the mode of enforcing an obligation it has assumed.

Rights and obligations are sacred in the eye of the law, and are to be preserved and enforced, but the mode and manner is always subject to legislative control. It is not unusual for a legislature, at a single session, to change the whole remedial system of the State, but no one ever dreamed that those who

made contracts under the old system acquired a vested right to the old remedies.

Whenever the legislature attempts to deprive the banking corporations of rights which they are entitled to by a fair construction of the act of 1851, the cases cited in the able argument of complainant's counsel would be cheerfully adopted as a basis of decision. But in this case, where no right is invaded—no obligation is sought to be enforced which the complainant has not voluntarily assumed, I cannot concede, upon the ground of authority or reason, that a mere change in the remedy, if it is one, is an unconstitutional act of the legislature. On the other hand, under our constitution, every individual and corporation in the State is subject to the control of the legislature, so far as it relates to the mode of enforcing obligations, of whatever character or description they may be.

The traditional rule of the Medes and Persians has never been recognized as a principle of the common law, or adopted as a principle in State legislation. But, on the other hand, the practice, if not the rule, has obtained in most of the States, that no law or rule should long remain unchanged.

The distinction between a vested right, or the obligation of a contract, and the remedy given by law to enforce the right or obligation, has been uniformly recognized by the courts.

In the case of *Sturgis* v. *Crowninshield*, 4 Wheat. 122, the Supreme Court of the United States decided that it is competent for a legislature to pass limitation laws in relation to contracts then existing, and that it could abolish imprisonment for debt, depriving a creditor of the power of imprisoning his debtor in a case where he had the power when the contract was made. So, in the case of *Brown* v. *The Penobscot Bank*, 8 Mass., the Supreme Court decided that it was competent for the legislature to pass a law imposing damages, in the nature of penalties, upon banks previously chartered, for future neglect to redeem their bills in specie on demand—a case, in principle, exactly like the present.

But I may rest the decision of this question upon the authority of the case of the *Bank of the Republic* v. *The County of Hamilton*, 21 Ill. R. 53, before referred to. The principle upon which that decision rests, embraces this case, though it has a much wider range, and embraces a large class of provisions which cannot be said simply to affect the remedy. The principle stated and illustrated in that case, though perhaps new in its application, commends itself to my mind as sound and just, and the reasoning of the court is conclusive and unanswerable, leaving nothing to be desired by way of argument or illustration.

But it is insisted that the proviso to the third section of the act of February 14, 1857, amendatory of the banking law of 1851, applies only to the party presenting the bills, and not to the bank. The proviso is in these words: "*Provided*, that in presenting notes or bills for payment under this section, the party presenting shall not be required to present or receive payment for each bill separately, but the whole amount presented shall be treated as though it were a single obligation of that amount."

The language is plain and explicit, and leaves no room for construction. It first provides, that a person presenting bills may present the whole amount together; and secondly, that the whole amount, when so presented, shall be treated as a single obligation. Treated by whom? The person presenting has nothing to do after presenting the bills, and until then, the treatment does not commence, because the party presenting must make demand before the obligation to redeem accrues. If, then, the proviso does not apply to the bank, it has no force or meaning, and presenting the whole amount together effects no object unless the bank is bound to redeem all the bills as a single obligation. But the proviso says that the party presenting shall not be required to receive payment of each note separately. If so, the bank has no right to pay them in that manner, for it would be absurd to say that the party is not bound to receive the redemption of the bills separately, and that the banks had the right so to redeem. The right to demand and the obligation to redeem are necessarily reciprocal. The existence of the right to demand, pre-supposes the obligation to redeem. In what sense would a demand by the bill holder constitute a right, if no obligation was imposed upon the party of whom the demand was made? And what kind of a demand would that be, which, though authorized by law, the party of whom it was made could satisfy by refusing to comply with it, or by doing some other act than the one required?

Decree affirmed.

THE REAPERS' BANK, Appellant, *v.* ELISHA W. WILLARD *et al.*, Appellees.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

A bank has not the right, when its bills are presented for redemption, to delay and harass the bill holder by a dilatory way of counting out change for redemption.

The law, when it imposes an obligation, requires that it should be performed in a reasonable time, and in good faith.

The protest of a notary is not vitiated, by his statement of the facts as they transpired at the time of the protest.

A necessary statement or averment, well stated, is not weakened or affected by an unnecessary statement.

On the 4th of January, A. D. 1860, a final decree was made in this case, "that the order enjoining the defendants and their agents, and allowing the decree heretofore entered in the above cause, be continued and made perpetual, upon the complainant's depositing in the office of Jesse K. Dubois, the auditor of state, the legal coin of the United States, for the redemption and payment of the circulating notes described in said bill of complaint, together with twelve per cent. interest per annum thereon, from the date of the protest thereof, and all costs and protest fees and expenses, within ten days from the entry of this decree, or if appeal shall be perfected in said cause, then within ten days from notice of the affirmation of such decree, by the Supreme Court of the State of Illinois, upon appeal, if the same shall be so affirmed; and that on default of such payment, the complainant's bill be dismissed."

Appeal prayed and allowed.

The facts are stated in the opinion.

Gallup & Hitchcock, for Appellant.

Walker, Van Arman & Dexter, for Appellees.

Caton, C. J. As in the preceding case, this decree is affirmed, for the reasons assigned in the Superior Court for the rendition of the decree, and we adopt the opinion of that court as the opinion of this court.

Opinion of C. J. Wilson, *of the Superior Court.* The complainant is a banking corporation, organized under the general banking law of this State, passed in 1851.

The defendants, Willard and Adsit, were joint owners of packages of bills, amounting to $500, issued by complainant, and payable at complainant's bank, which were presented to the bank in a package, and redemption demanded, on the 12th of October, 1859, by a notary public, on behalf of said Willard and Adsit.

The president of the bank received the package when presented, and counted the bills, then separated one bill from the package, took a bag of dimes and half dimes, and deliberately counted out the amount of such bill, and handed the amount to the notary, and so proceeded redeeming in that manner, one bill

at a time, for several hours, and until 3 o'clock P. M., and then refused to redeem any more bills of the package on that day, even in that manner; and also refused to redeem in any other manner, although he had thus redeemed only $150 of the $500, and thereupon the notary protested the bills not redeemed, for non-payment.

On that day the notary informed the president of the bank that he should present for redemption, on the next day, another package of the bills of the bank, of the same amount.

On the next day, after 10 o'clock A. M., the notary presented another package of the bills of the bank, amounting to $500, and demanded payment.

The president proceeded to redeem the bills one by one, in the same manner as on the day previous, until 3 o'clock P. M., when he stated that the bank had closed, and refused further to redeem in that manner, or in any other mode. Whereupon the notary protested the bills of the package unredeemed, for non-payment.

The several protested bills were forwarded to the auditor of state, whereupon he gave notice to the president of the said bank to pay said notes, with interest and fees, as required by the statute; and complainant alleges that he believes the auditor is about to proceed to sell the stocks pledged by the bank, and call in the circulation of the bank, etc.

This statement is, in substance, the case made by the bill. A preliminary injunction was granted, to enable the defendants to bring all the facts before the court, if there should be any other facts not stated in the bill, necessary to a full investigation of this case, or should any facts stated in the bill be controverted.

Every question involving the rights of bankers and bill holders under the general banking law, is important, involving to some extent, as it does, the interest of corporations who have invested nearly $10,000,000, and the interests of the business men of this State, who are compelled to use, to a great extent, the issues of these corporations in the transaction of business.

The intention of the framers of the constitution, and of the legislature which passed the act of 1851, is very apparent, which was to obtain a currency easily convertible into money, and secure the bill holder from loss. The subject of banking was considered by the framers of the constitution as one of great importance and delicacy. Hence they took from the legislature the power of deciding what the law should be, until it had been submitted to the people for their approval or rejection.

The jealousy of the ordinary mode of legislation in relation to this subject, and which induced the constitutional convention to require such law to be submitted to the vote of the people,

is easily accounted for by referance to the history of former legislation, and its disastrous results, in this and other States. And the fact that a case like the present should be presented to a court, and the strong arm of a court of equity should be invoked to sustain the assumption of the complainant in this case, as legal rights entitled to protection, by injunction, is an example to show that the jealousy of the constitutional convention in relation to such corporations was not without reason.

What is the right which the complainant asks the aid of the court to protect, and which is about to be violated, as is alleged? It is simply this: The right to have its agent stand at its bank counter, and when a bill holder presents a number of its bills for redemption, count out dimes and half dimes in the most dilatory manner, day after day, for the redemption of the bills, at the rate of $150 to $300 per day; and this court is asked, in short, to adjudge that a banker, when bills are presented for redemption, may stand at his counter, and under the pretense of complying with the law, adopt any and every device to delay and annoy the bill holder, if he does so under the pretense that he is redeeming.

The mode of redeeming, as it was called, in the present case, could have been adopted with no other object than to harass and annoy the bill holder, so as to deter him and others from presenting bills for redemption.

The law, when it imposes an obligation upon an individual or corporation, requires that it should be performed in a reasonable time, and in honesty and good faith. If there was no authority upon the question, we should have no hesitation, upon general principles, in deciding that the facts stated in this case amount in law to a refusal to redeem.

But several cases of a similar character have occurred, and been the subject of adjudication.

The case of the *Suffolk Bank* v. *Lincoln Bank*, 3 Mason, 1, is, substantially, like this: Bills of the Lincoln Bank were presented, and redemption demanded; the cashier proposed to redeem, and commenced counting out small silver coin, of the denomination of one-quarter of a dollar and less, and counted about $500 before the hour of closing the bank, the amount demanded being $3,000. Story, Judge, decided that such conduct amounted to a refusal, and that a protest for a refusal to redeem, was proper. "There is no pretense to say," the judge remarked, "that a bank has a right to delay the holder of bills, day after day, while its officers can count out change, so as to make up the amount in the smallest pieces of coin, in their own way. Every bank is bound to have its specie counted and weighed, ready for delivery," etc. *Hibbard* v. *Chenango*

Bank, 8 Cowen, 88; *Gilbert* v. *Nantucket Bank*, 2 Am. L. J. 107.

The case of *The People* v. *Dubois*, 18 Ill. R. 333, does not involve this question. There was in that case nothing to show that small change was offered, or any act done by the bank for the purpose of vexation and delay, and the only question decided was, that the coinage of the United States, of all denominations, was a legal tender. It by no means follows, because the coin tendered was a legal tender, that the bank had the right, by vexatiously prolonging the payment of a few hundred dollars, to keep a bill holder waiting day after day for his money.

But it is insisted by the complainant, that the notes were not properly protested, because the notary stated in his protest the facts as they transpired at the time they were presented. It is a singular objection for the complainant to urge, because the protest would be sufficient, even if all he excepts to were stricken out.

The notary certifies, that he presented the notes, at the request of the owners, at the counter of the bank, at 10 o'clock A. M., to the president of the bank, stating the amount of the package, and demanded of the said president the redemption of said notes, and that the said president then and there refused to redeem. He then proceeds to state what the president did, under the pretense of redeeming, as before stated, and concludes his certificate by stating, " whereupon, I, the said notary, at the request of the said Adsit and Willard, did protest, and by these presents do solemnly protest, etc., by reason of the non-redemption of said circulating notes so remaining unredeemed," etc. No rule is better settled than this. A necessary statement or averment, well stated, is not weakened, or in any manner affected, by the statement of facts not necessary to be stated. The statement of the manner of the refusal, if improper, can only be regarded as surplusage. Though, in my own judgment, there is no objection to stating the facts in this case, so that if protest is improperly made, the party for whose benefit the protest is made, may decide whether the protest was properly made or not, and proceed accordingly. Clearly, it cannot vitiate a protest, otherwise properly made.

If the facts stated, show that the protest was properly made, a court of equity would not lend its aid to the party protested, to prevent the proper officer from doing what he was required by law to do, under such protest.

In the present case, the court is asked to enjoin the auditor from doing what the law requires him to do, in the case made by the bill.

It is said that the auditor is not a judicial officer, and has no right to determine whether the facts show a proper case for protest.

In the first place, no such duty devolves upon the auditor in this case, as already shown, because the protest is perfect after striking out the special facts stated.

But, were it otherwise, and the auditor had decided upon the facts stated, and decided that the protest was proper, and decided correctly, and proceeded to act as required by law in such cases, I am at a loss to know upon what ground a court of equity would enjoin him.

Admitting that the protest was proper, there remains no equitable ground of relief, so far as this case shows. There is no averment that the auditor is proceeding to do, or threatening to do, any act which he is not required by law to do, if the protest is properly made, and nothing but what, upon refusal, a court would compel him to do, by mandamus.

Decree affirmed.

Jesse Ray, Plaintiff in Error, *v.* Edie S. Bell, Defendant in Error.

ERROR TO LA SALLE.

Great latitude is permitted on the cross-examination of a witness, and questions calculated to elicit answers which will be likely to affect the standing of the witness before the jury, should be allowed.

If a witness, in answer to a question as to what testimony he has given on a former trial, neither directly admits nor denies the act or declaration spoken of, it is then competent for the adversary to prove the affirmative, provided, however, the act or statement is relevant to the matter in issue.

The admissions of a party to a civil suit, knowing his rights, are strong evidence against him, but he is at liberty to prove that such admissions were mistaken or were untrue, unless some other person has been induced by them to alter his condition, in which case he is, as to such person, or those claiming under him, but not as to others, estopped from disputing their truth.

The fact that credits are indorsed on a note to its full amount, is not proof of its payment, unless it be shown that the credits were indorsed by the party holding and controlling the note, or by his authority.

This was an action of assumpsit, brought by Ray against Bell, in the Marshall Circuit Court. The declaration contained a count on a promissory note, hereinafter set out, (in evidence,) and the common counts. The defendant pleaded non-assumpsit and payment, and on these pleas issues were formed. The venue was changed to La Salle.

At February term, 1860, of the La Salle Circuit Court,

HOLLISTER, Judge, presiding, the cause was tried, and the jury rendered a verdict for defendant.

Plaintiff read in evidence a promissory note, and a memorandum on the face of it, as follows:

$2,300. *Lacon, Oct.* 28, 1856.

On or before the twenty-first day of October next, I promise to pay Jesse Ray, or order, the sum of twenty-three hundred dollars, at the Banking House of Fenn, Crane & Co. EDIE S. BELL.

$700 of this in St. Louis Ex. or gold.

And also read indorsements of three credits on the back of the note, as follows:

"Recd Lacon Nov 6 | 57 on the within note six hundred & fifty five dollars."

"Rec on the within five hundred & forty five 05-100 dollars."

"$407.50 Received on the within note Feb 25th 1858 four hundred & seven 50-100 dollars."

Wm. L. Crane, a witness for the defendant, testified: I lived in Lacon; was member of firm of Fenn, Crane & Co. We had the note for collection; got it from the plaintiff soon after it was drawn, and had it some months. It was in our hands till about the day of the last credit. The indorsement of the first two credits are in my handwriting. I don't remember whether I received the money of those credits, or whether Ray directed me to credit them.

When I last saw the note, there was an indorsement in pencil for $700, now partially rubbed out. It was written by me or my book-keeper, late in 1857, or early in 1858; and after the first two credits were entered, and before the last credit of $407.50, now on the note. When that pencil credit was entered, about $735 was paid. It was paid in a kind of family way. Something was said between Ray and Bell about back payments. $35 was paid for exchange. The pencil entry was made a few days after. The note was in my possession in the meantime. At that time the name of our house was Wm. L. Crane & Co. Judge Ramsey was present when that $700 payment was made. The money was received for the benefit of Ray to buy a draft, and was to be a payment on the note.

On cross-examination, the witness testified: I have no recollection how the note came to our banking house. Fenn, Crane & Co. dissolved partnership in spring of 1857. At one time, just before one of the payments, this note was taken away by Ray for a short time, and then brought back; but I don't remember whether that was at the $700 credit, entered in pencil, or not.

I have no recollection of receiving any money on the note,

except the $735. I think I had the note at that time. Ray may have brought the note in at that time, but I do n't remember.

I gave my deposition last summer, in this cause, and then swore, that some time before the $700 payment, Ray took the note away, and returned with it the day of that payment.

Witness, on further cross-examination, said: On the day of that payment, Bell brought into the bank a package of currency (received by express,) of over $1,000. Bell and Ray had talk about the payment. I did not hear it all. Bell wanted Ray to take the $700 in currency, but Ray refused. One or both of them said something to me about exchange. They wanted to know what a draft could be bought for. I said, five per cent.

One of them asked me if I could buy one at that price. I said I could, and I was paid $735 for that purpose. There was some other conversation, but I do n't now recall what it was. I do not remember that, immediately after this money was received by me, Bell paid Ray in currency the $545, which is the second credit now on the note, and that I then and there credited the same as it now appears on the note. That payment and credit may have been at that time, but I do n't remember it. I do n't remember whether it was Ray or Bell who asked me to buy the draft. Ray told me, that when the draft was bought, I should credit it on the note; that is my impression now. Something was said between Ray and Bell about specie, but I cannot remember what. I do not remember that Ray told Bell that he must have gold, or something which Moore, Morton & Co. would accept. Something of that sort was said. Ray told me, when the draft was purchased, to forward it to Moore, Morton & Co., and credit it on the note, and that is all I remember. Think Ramsey and Bell were both there at that time; it was soon after the money was paid. I can't remember who gave me the money. On the day I received the $735, I paid that money out for a draft in Peoria. I do n't remember the name of the man of whom I bought the draft. I bought it at the hotel, and had seen the man two or three times before.

I took a memorandum of his name, and of the draft, and have used it once or twice since. It is now among my papers, either in Pittsfield, where I live, or at Lacon, where I did live. I saw it last after the former trial in this cause. At that trial I was a witness for defendant. I then remembered the name of the man of whom I bought that draft; and I then refused, in giving my testimony, to give that man's name, for several reasons; one was, that there was anything but friendly feelings

between Ray and myself, and as I was not his agent, I thought he might find out his own business without my help.

This refusal to give the name of the person of whom I bought the draft, was after the court had directed me to give the name.

Here plaintiff asked witness the question: "Did the court again direct you to answer on that point, and did you refuse to answer, in disobedience to the order of the court?" To this question defendant objected, and insisted that the contumacy of this witness on a former trial, and the merits of the controversy between witness and the then judge of the Marshall Circuit Court, could not be gone into on this trial. The court sustained said objection, and would not permit said question to be answered, and plaintiff excepted.

Witness further testified: At that time I recollected the man's name. I last saw the memorandum of name and draft in Lacon, after former trial. I never showed it to anybody. At former trial, something was said about a memorandum of the draft, but it referred to the books, in my understanding.

Plaintiff asked witness, "Did you on the former trial swear that you kept no copy or memorandum of the draft, and that you would have done so in doing a banking business?" Witness answered, "I don't think I did."

Witness further testified: My deposition was taken in this case last summer, and I was then asked of whom I bought the draft, and refused to answer. At former trial I was ordered to jail for not answering. I was afterwards in jail, but whether for this, or for not attending as a witness, I don't know. The judge at Lacon refused to hear a petition from me, and I was afterwards taken to Peoria on *habeas corpus*.

I never did any other business with the man of whom I bought the draft, and don't know what became of him. The amount of the draft was exactly $700. Don't remember by whom the draft was drawn; but think by some Wisconsin bank. Don't remember to whose order the draft was payable on its face.

Examined by Defendant.—Ray afterwards asked me if I had heard anything from Moore, Morton & Co. of the receipt of the draft by them. I told him I would not hear; that he would. I advised him to write to them, which he did, and got an answer "that they had not received the draft," and telling him "to apply to me for a duplicate." I did procure a duplicate from the party of whom I got the draft, and returned it to the same party by return mail, and I think on the same day. This was shortly after Ray and I had a difficulty. We have never spoken to each other since.

The reason why I did not attend court, was because of sickness and death in my family. I returned to Lacon at that term, and was arrested. I sent in my sworn petition to be discharged, setting up these facts. The judge refused to hear it read, and fixed my bail at $500. I was afterwards taken on *habeas corpus* to Peoria, and bailed at $50.

Cross-examined.—It was at January term, 1859, that the judge refused to hear my petition.

Plaintiff then asked witness whether it was sickness in his family that prevented him from attending May term of Marshall Circuit Court. This question defendant objected to, that the subject of inquiry was irrelevant; the court sustained objection, and plaintiff excepted.

D. G. Warner, a witness for defendant, testified: Ray, in a conversation in the clerk's office in Lacon, spoke of some transactions between him and Bell, and inquired of Cook if he could not tell him how to get money out of Crane. Ray said Bell had paid the money into Crane's hands for him, and Crane claimed to have bought a draft with it, and sent it to Quincy, but Ray said he did not believe he had. I can't remember exactly what was said, but Ray expressed a fear he would lose the debt; he feared he could not get it of Bell, or something like it. The amount of $700 was mentioned, and Ray said $35 were paid to buy a draft with.

On cross-examination, witness said that this was before the date of last credit on note.

Silas Ramsey, a witness for plaintiff, testified: I was present in Crane's bank when the second credit ($545.05) was indorsed on this note; it was sometime in the fall of 1857, after first credit, dated Nov. 6, 1857, was made. Had before that been informed that Ray had bought land of Moore, Morton & Co., and had a payment to make to them, and that Bell was expected to pay Ray some money at the bank that day. I had occasionally done business for Moore, Morton & Co., and that day went to Crane's bank; found Ray and Crane there. Bell soon came in with a package of currency, and wanted to make a payment to Ray. A controversy arose between them about taking currency. Ray said he had a payment to make to Moore, Morton & Co., on his land, and that he must have $700 in specie; the rest he was willing to take in currency. I suggested that a draft would probably answer Moore, Morton & Co. as well as specie. Ray contended that he would receive nothing but gold. Bell then asked Crane what he would ask for a draft. Crane said he had none to sell, but that he was going to Peoria, and would agree to get him a $700 draft for $35. Bell then paid to Crane $735 in currency, and then turned to Ray, and paid

him in currency $500, and over. Crane then spoke of crediting the whole sum on the note, but Ray said, no, that the currency which he had received might be credited, but that the $700 must not be credited until Moore, Morton & Co. had accepted the draft. Crane thereupon credited on the note the $545 paid by Bell in person. Bell and Ray then left the office together, and the note, I think, was left in the bank. Bell made no objection to the manner of entering the credits as directed by Ray.

Plaintiff also read in evidence the deposition of Francis C. Moore, of Quincy, tending to show that no such draft as Wm. L. Crane claimed to have sent, had been received by him.

G. L. Fort, a witness for plaintiff, testified: I heard the testimony of witness, Wm. L. Crane, on former trial of this cause in Marshall Circuit Court.

Plaintiff then asked witness the following question: "In the testimony of said Crane upon that former trial, did he, or did he not, swear that he kept no copy or memorandum of the draft, and that he would have done so in doing a banking business, or words to that effect?" Defendant objected to this question, that the witness, Crane, in his testimony here, does not positively deny having given such testimony. The court sustained the objection, and plaintiff excepted.

At the instance of defendant, the court gave to the jury the following instructions, to the giving of each of which, plaintiff excepted:

2. If the jury believe, from the evidence, that said plaintiff Ray has, subsequent to the time of the payment of the $735 to Crane, if such payment were made, acknowledged that this was a payment of $700 to him, the plaintiff, and that the $35 was paid by Bell in the lieu of the gold, such payment ought to be allowed as a credit on the note.

3. If the jury believe, from the evidence, that the note in question is and was by its terms made payable at the banking house of "Fenn, Crane & Co.," then Bell was authorized to pay said note at said banking house, and said bankers or either of them were entitled to receive payment of the same, if, at the time of payment, if any were made, they had the legal custody of the note, and to credit the payments on said note. And if the jury further believe, that upon said note there are now indorsed credits to full amount due upon the note, they must find for the defendant.

5. If the jury believe, from the evidence, that the witness W. L. Crane, as the agent of the plaintiff, received from the defendant seven hundred and thirty-five dollars, for the purpose of buying a draft, and that it was agreed when the money was

paid (between the plaintiff and the defendant) that when said Crane should buy the draft he should credit seven hundred dollars upon the note, and that in receiving said money and buying the draft, said Crane acted as the authorized agent of the plaintiff, then the jury ought to allow defendant a credit on said note for seven hundred dollars.

7. It makes no difference whether the amount of the money, that is, the seven hundred dollars, or the amount of the draft, was indorsed upon the note in pencil, or whether it was indorsed at all. If the money or the draft was received by the plaintiff, or his authorized agent, as part payment of the note sued on in this cause, then the jury should allow a credit upon the note, of the amount of the draft or money so received by plaintiff.

10. If the jury believe, from the evidence, that said plaintiff accepted said sum of $735 as a payment of the sum of $700 on said note, any subsequent directions given by said plaintiff to said Crane, as to how and when such payment should be *credited* upon the note, cannot change the fact of payment, and if the credit never was made, or ordered to be made, still the payment would be good, and should be allowed upon the note.

11. If the jury believe, from the evidence, that the plaintiff inquired of Cook, in the presence of the witness Warner, if he knew of any property of Crane's out of which he could make his debt, it is a circumstance which the jury have a right to consider in determining the question whether it was Crane or Bell that owed him (Ray) this debt.

After verdict, and before judgment, plaintiff moved the court to set aside the verdict, and grant a new trial; which motion the court overruled, and plaintiff excepted.

J. St. C. Boal, and T. L. Dickey, for Plaintiff in Error.

Glover, Cook & Campbell, for Defendant in Error.

Breese, J. The ruling of the court, in sustaining the objection made by the defendant to the question put to the witness, Crane, on his cross-examination by the plaintiff, was wrong. Though it had no direct bearing on the merits of this controversy, and would have disclosed only that the witness, on a former trial of the cause, had been contumacious, yet it went to show the state of his feelings towards the plaintiff. Great latitude is allowed on a cross-examination of a witness, as it is one of the most efficacious tests for the ascertainment of truth. The refusal of the witness to give the name of the person from

whom he had purchased the draft, when ordered to do so, by the court then trying the case, in which it was an important fact, he then remembering the name, was a circumstance calculated to affect his standing before the jury, and should, for that purpose, have been allowed. This witness was also asked, if he did not, on the former trial, swear that he kept no copy of a certain letter, and no memorandum of the letter or draft, but that he would have done so, if he had been doing a banking business. The witness answered, he did not think he did—he may have said so in relation to the letter.

For the purpose of impeaching this witness, by laying this foundation, the plaintiff called G. L. Fort, who stated that he heard the former trial, and was then asked this question: "In the testimony of Crane, upon that trial, did he, or did he not, swear that he kept no copy or memorandum of the draft, and that he would have done so in doing a banking business, or words to that effect?" The defendant objected to the question, for the reason that Crane, in his testimony on this trial, did not positively deny having given such testimony; and the court sustained the objection. The rule on this point, as laid down by the elementary writers, and as found in reported cases, is, if the witness neither directly admits nor denies the act or declaration, as when he merely says that he does not recollect, or gives any other indirect answer, not amounting to an admission, it is competent to the adversary to prove the affirmative, for otherwise the witness might, in every such case, exclude evidence of what he had said or done, by answering, that he did not remember. 1 Starkie on Ev. 213. The statement, however, must be relevant to the matter in issue. *Crowley et al.* v. *Page*, 32 Eng. C. L. R. 737.

This matter, of which inquiry was sought, was relevant to the issue, and the court should have admitted the question.

It is objected, that the second instruction for the defendant should not have been given. That is in these words: "If the jury believe, from the evidence, that plaintiff Ray has, subsequent to the time of the payment of the $735 to Crane, if such payment were made, acknowledged that this was a payment of $700 to him, the plaintiff, and that the $35 was paid by Bell in lieu of the gold, such payment ought to be allowed as a credit on the note."

This instruction assumes that such admission is conclusive on the party. The confessions of a guilty party, in a criminal case, are competent testimony, yet they are held, everywhere, as the weakest kind of evidence, and to be weighed with the greatest caution.

The admissions or acknowledgments of a party to a civil suit, knowing his rights, are always held as strong evidence against him, but he is, notwithstanding, at liberty to prove that such admissions were mistaken, or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition—in such a case, a party is estopped from disputing their truth, with respect to such person, and those claiming under him, but as to third parties, he is not bound by them.

Like confessions in criminal cases, verbal admissions are to be received with great caution, for the repetition of oral statements is always subject to much imperfection. The party receiving them may not have correctly understood the meaning, or the precise words used, which, given precisely as uttered, might vary the effect of the statement. But, if there be no misunderstanding—if the party making the admissions, knows his situation, and the party detailing them cannot be mistaken, such admissions are strong evidence against the party making them; for it is inconceivable that a party knowing all the facts, shall make admissions to charge himself, unless they be true. The instruction might have been qualified, so as to tell the jury, that if the plaintiff, knowing the facts, has, etc., such acknowledgment ought to be considered as an acknowledgment of payment. If a party, plaintiff, knowing the position in which he stands, and what his rights are, shall admit, distinctly and freely, and without any equivocation or reservation, that the defendant has paid the debt for which suit is brought, or some other person has done it for him at his request, there can be no rule of law or justice that shall defeat such admission.

Exception was taken to the third instruction. It is this: "If the jury believe, from the evidence, that the note in question is and was, by its terms, made payable at the banking house of 'Fenn, Crane & Co.,' then Bell was authorized to pay said note at said banking house, and said bankers, or either of them, were entitled to receive payment of the same, if, at the time of payment, if any were made, they had the legal custody of the note, and to credit the payments on said note. And if the jury further believe, that upon said note there are now indorsed credits to full amount due upon the note, they must find for the defendant."

The last clause of this instruction is clearly objectionable. The fact that credits are indorsed on the note, to the full amount of the note, is not evidence of the payment of the note, unless it be shown the credits were indorsed by the party holding and controlling the note, or by his authority. The credits

may have been surreptitiously placed upon the note, by one without authority.

We can discover no valid objection to the fifth instruction, which is as follows: "If the jury believe, from the evidence, that the witness, W. L. Crane, as the agent of the plaintiff, received from the defendant seven hundred and thirty-five dollars, for the purpose of buying a draft, and that it was agreed when the money was paid, (between the plaintiff and the defendant), that when said Crane should buy the draft, he should credit seven hundred dollars upon the note, and that in receiving said money and buying the draft, said Crane acted as the authorized agent of the plaintiff, then the jury ought to allow defendant a credit on said note for seven hundred dollars."

The testimony fully justified this application to the court. If the facts supposed were found by the jury to be true, it ends the controversy, whether Crane bought the draft or not. If the currency was paid to him, at the request of Ray, for the purpose of buying a draft, he is responsible to Ray, and Bell is released. The whole controversy turns upon that, and it was fairly put to the jury.

The seventh instruction is a proper corollary from the fifth, and is free from the objections alleged against it. It is as follows: "It makes no difference whether the amount of the money, that is, the seven hundred dollars, or the amount of the draft, was indorsed upon the note in pencil, or whether it was indorsed at all. If the money or the draft was received by the plaintiff, or his authorized agent, as part payment of the note sued on in this cause, then the jury should allow a credit upon the note of the amount of the draft or money so received by plaintiff."

Nor do we see any valid objections to the remaining instructions, to which exceptions were taken, marked ten and eleven. They are as follows:

"If the jury believe, from the evidence, that said plaintiff accepted said sum of $735 as a payment of the sum of $700 on said note, any subsequent directions given by said plaintiff to said Crane, as to how and when such payment should be *credited* upon the note, cannot change the fact of payment, and if the credit never was made, or ordered to be made, still the payment would be good, and should be allowed upon the note.

"If the jury believe, from the evidence, that the plaintiff inquired of Cook, in the presence of the witness, Warner, if he knew of any property of Crane's out of which he could make his debt, it is a circumstance which the jury have a right to consider in determining the question, whether it was Crane or Bell that owed him (Ray) this debt."

There was evidence to support both these instructions.

For the errors we have noticed, we would not deem it proper, or in accord with former rulings of this court, to reverse the judgment, inasmuch as the case was fully submitted to the jury on its merits, and no substantial misdirection of the court, on any important point, is observable.

There is still, however, an error in the finding of the jury, which we cannot get over, and that is, they have found a verdict for the defendant, when the proofs show that there is an actual balance due the plaintiff, for which he must have judgment.

The amount of the note sued on, is twenty-three hundred dollars, dated Oct. 28, 1856, and payable on or before the 21st October next, without interest. Interest, then, is to be calculated from the 21st Oct., 1857, to the time of the first payment of $655 indorsed on the note, which was Nov. 6th, 1857, and amounts to six $\frac{10}{100}$ dollars, increasing thereby the principal sum to $2,306.10. Deducting this payment, there is left, of principal, $1,651.10. The second payment bears no date, but Ramsey says it was made when the $700 was handed to Crane by Bell, which he says was late in 1857, or early in 1858. We assume it was paid on the last day of Dec., 1857, which would be one month and twenty-five days; the interest for that time on $1,651.10 would be fifteen dollars and thirteen cents, making the sum then due, $1,666.23. Allowing the $700 then alleged to be paid, with the undated credit of $545.05, the sum of $1,245.05 was then paid, which deducted, there remained due, $421.18. Interest on this sum to Feb. 25, 1858, when the last payment of $407.50 was made, would be $3.79, increasing the principal to $424.97; deducting the payment then made, $407.50, left due on the note, $17.47, to which is to be added interest to the time of the verdict, which was March 3rd, 1860, two years and seven days, making $2.10, showing a real balance due on the note, of nineteen $\frac{57}{100}$ dollars, for which the plaintiff should have had a verdict.

For this error the judgment must be reversed, as we cannot correct it here, and the cause remanded.

Judgment reversed.

The Howard Fire and Marine Insurance Company, of Philadelphia, Plaintiff in Error, *v.* Samuel H. Cornick *et al.*, Defendants in Error.

ERROR TO COOK.

Representations to an insurance company, so far as they relate to the property insured, must be true, otherwise the policy is void; but a false representation of something outside, and independent of the property insured, which has not in any degree contributed to the loss, will not have that effect.

The warranty of the owner of the property as to the truth of his representations, will not be extended beyond what it was evidently intended by the parties to embrace.

Where instructions have been given, which, though erroneous, could not have misled the jury, to the injury of the plaintiff in error, this court will not, on that account, disturb the judgment of the court below.

In an action against an insurance company, the company should show that they had the right to replace the property, if they desire to avail themselves of that defense. The averment that the money has not been paid, nor any part thereof, though not sufficient on demurrer, is aided after verdict.

Suit brought by defendants in error against plaintiffs in error.

Declaration in covenant, upon a policy of insurance, alleges that policy was issued on the 6th of September, 1857, upon goods in stores Nos. 131 and 133 South Water Street, in Chicago.

Defendants pleaded *non est factum*, and several special pleas, alleging that the purpose for which the building in which the goods insured were kept was used, was not correctly and truly represented and warranted in the said policy and application and survey, and that the same was used for other and different purposes than those for which it was represented and warranted to be used, in the application and survey which formed a part of the policy.

Also, that at the time of the issuing of the policy, the plaintiffs, by their application and survey, which forms part of the policy, represented and warranted that there was but one tenant in the said building; whereas, there was in fact about twenty tenants occupying the building.

These facts were set up in the special pleas in various ways.

General replication. Special replication was put in and stricken out, with leave to give the facts set up in them in evidence.

Cause was tried in April term of the Cook Circuit Court, 1859, Manierre, Judge, presiding, and verdict for plaintiffs rendered by the jury, for $5,400, and plaintiffs remitted $600 of the damages. On the trial of the cause, the plaintiffs offered in evidence the policy of insurance and conditions and application.

The seal to the policy was an impression upon paper at the left hand corner of the policy, without wax or any other adhesive substance, and without any scroll or other seal except the impression upon paper.

To the introduction and reading of said policy in evidence, the counsel for defendants objected, upon the ground, that the policy was not sealed, and the action being covenant it was inadmissible under the pleadings; which objection was overruled by the judge, who then and there decided that an action of covenant could be maintained upon such an instrument; to which decision and opinion the defendants, by their attorney, then and there excepted.

The plaintiffs next gave in evidence proof of loss, etc., and rested their case.

The defendants then introduced as a witness, *H. H. Tappen*, who testified that he knew the premises described in the policy and occupied by plaintiffs. That witness occupied the second floor of the two buildings as a clothing store up to the time of the fire. The upper part was divided into sleeping rooms, and occupied by different persons; could not say how many of the rooms were occupied; there were several, but whether a dozen, he could not say; those occupied were furnished with beds; some of them were occupied up to the time of the fire. On his cross-examination, he testified, that he did not know of more than one tenant, or lessee of Dunham, the landlord and lessor of the premises. Witness occupied as sub-tenant of plaintiffs.

The defendants further proved by *John Summerfield*, that he knew the premises; occupied one of the rooms for six or eight weeks prior to and up to the time of the fire; thinks all the upper rooms were occupied up to number ten.

The defendants next read in evidence the deposition of *Francis C. Cross*, one of the plaintiffs, by which it appears that a large number of tenants occupied the upper rooms up to the time of the fire.

The defendants then rested their case.

The policy of insurance read in evidence, contains the following, among other clauses: "By this policy, the Howard Fire and Marine Insurance Company of Philadelphia, in consideration of $62.50, etc., do insure Cornick, Cross & Co. against loss or damage by fire, to the amount of five thousand dollars, on the following property, as described in application No. 14, which is hereby declared to be a part of this policy, and a warranty on the part of the assured."

Also the following: "The loss or damage to be estimated and to be paid within sixty days after notice, proof and adjustment thereof, in conformity to the conditions annexed to this policy,

unless the said insurance company shall, within thirty days after the proof of such loss or damage, give directions for rebuilding or repairing, or, if merchandise or personal property, restoring the same as before the fire."

Also the following clause: "And the assured hereby covenants and engages that the representation given in the application for this insurance, is a warranty on the part of the insured, and contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property insured, etc., and if any fact or circumstance shall not be fairly represented, etc., then the policy to be void."

Also the following: "It is also declared, that this policy is made and accepted in reference to the written and printed application whereon it is issued, and also to the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for; and it is also agreed and declared by the parties hereto, that no condition, stipulation, covenant or clause hereinbefore contained, shall be altered, amended or waived, or any clause added to these presents, except by writing indorsed hereon or annexed hereto, by the president or secretary, with their signatures affixed thereto."

The 10th condition annexed to the policy, contains the following clause: "And said company shall, in no case, be deemed to have waived a full, literal and strict compliance with, and performance of each and every of the terms, provisions, conditions and stipulations in this policy contained, and hereto annexed, to be performed and obtained by, and on the part of the insured, or any one claiming by, through or under him, to comply with, and observe and perform the same, shall have occurred. And if any agent of this company in the transaction of their business, shall assume to violate these conditions, such violation shall be construed to be the act of the insured, and shall render void the policy."

In the application were the following questions and answers:

7. For what purpose is the building used?	Wholesale and Retail Hardware.
How many tenants?	One.

The plaintiffs then introduced as a witness, *William H. Bunker*, who testified, that he knew Mr. Ellsworth, the agent of the Howard Fire and Marine Insurance Company. That on the 27th or 28th of August, 1857, he called upon Ellsworth to get a policy of insurance upon the goods in the same buildings to Armstrong, Cornick & Co., the predecessors of the plaintiffs in this suit, and

obtained such policy; that on the application for that policy, he told Ellsworth that Darling had a stove in the front room, on the fifth floor; that there were other lodgers on the same floor who had a stove; that those two were all he could recall on that floor. Ellsworth then asked, how many tenants there were in the building. Witness told him he could not tell exactly, that he would describe the building, and give him the number of tenants; that he commenced at the bottom of the building, and told him the purposes the building was occupied for, and what the building contained, etc.

To all this testimony the defendants objected, and the objection was overruled, and the defendants excepted.

This witness never saw the policy or application in this suit, until after they were made out.

The plaintiffs also proved by *Wadsworth*, that the application in this case was in the handwriting of Ellsworth. To this testimony the defendants objected, and the objection was overruled by this court.

On cross-examination of Bunker, he testified, that the conversation of the 27th or 28th of August, 1857, related to the application for a policy for Armstrong, Cornick & Co. Of the application and insurance in this case, he had no personal knowledge.

The counsel of defendants then moved to strike out all the conversation testified to by the witness Bunker, in relation to the application for insurance by Armstrong, Cornick & Co., which motion the court overruled, and defendants excepted.

The judge gave the following instructions for the plaintiffs, to wit:

1st. That if the jury shall believe, from the evidence, that at the time of the making of the application in this case, the plaintiff gave full and exact information to Ellsworth, the agent, as to the number of the tenants in the occupancy of the building in question, and the use thereof by each; that with such information furnished, the agent himself filled up the application in question as the same now is, and induced, by mistake or otherwise, the plaintiffs to sign the application and survey; then, though the jury should find, from the evidence, that the building was occupied by more tenants, and for other business than named in the application, the defendants are estopped from making such objection, to prevent fraud and injustice, and the plaintiffs will be entitled to recover.

2nd. Parol evidence is admissible to show that all the facts are communicated to the agents of the company, at or before the time of the making of the application in question, and notice to the agent is notice to the defendants.

3rd. That if the jury believe, from the evidence, that at the time of making out the application in this case, the defendants' agent had a full knowledge of all the facts as to the number of occupants in the building, and the use made by each occupant of that part of the building occupied by each; that the agent, upon such information, filled up blanks, the application and survey are evidence, and produced the plaintiffs' signature, thereby representing that the same were mere forms, or otherwise; that the plaintiffs signed the same in good faith, believing that the facts were correctly stated therein, then the agent's omission to state the facts truly, will not avoid the policy, or conclude the plaintiffs from alleging the truth.

5th. The court is asked to instruct the jury, that by the terms of the insurance the money became due and payable within sixty days after proof of the loss is notified to the company, and the same will bear interest at the rate of six per cent. per annum from that time until this date.

To all which instructions the said defendants excepted.

The defendants, by their counsel, then and there prayed the said judge to give the following instructions to the jury, in the behalf of said defendants:

1st. If the jury believe, from the evidence, that the premises described in the policy sued upon, or any part thereof, were, at the time of the issuing of said policy, occupied by other tenants than said plaintiffs, then said policy is void, and the plaintiffs cannot recover in this action.

Which said instruction, so prayed, the said judge refused to give, and in lieu thereof, gave the following: "If the jury believe, from the evidence, that the premises described in the policy sued upon, or any part thereof, were, at the time of the issuing of said policy, occupied by other tenants than said plaintiffs, then said policy is void, and the plaintiffs cannot recover in this action, unless the proof establishes, to the satisfaction of the jury, a state of facts estopping the defendants from taking advantage of the condition in the policy."

2nd. If the jury believe, from the evidence, that a part of the premises described in said policy was occupied, at the time of issuing said policy, as a clothing store, then said policy is void, and the plaintiffs cannot recover in this action.

And the said judge refused the instruction as above prayed for, but gave the same, with the following amendment, to wit: "Unless the proof establishes, to the satisfaction of the jury, a state of facts estopping the defendants from taking advantage of the condition in the policy."

3rd. If the jury believe, from the evidence, that the upper rooms of the premises described in said policy were, at the

time of the issuing of said policy, rented to parties other than the said plaintiffs, for sleeping rooms or any other purpose, then said policy is void, and said plaintiffs cannot recover.

Which instruction, as above prayed for, the said judge refused to give, and in lieu thereof, gave the same with the following additions, alteration and qualification thereto attached, as follows: "Unless the proof establishes, to the satisfaction of the jury, a state of facts estopping the defendants from taking advantage of the condition in the policy."

To the refusal of the said judge to give said instructions as above prayed for, and also to the giving of the same with the alterations as above set forth, and to each of them, the defendants, by their counsel, excepted.

The fourth, fifth and sixth instructions, asked by defendants, present the same questions, and were similarly amended by the judge.

The defendants further prayed the said judge to instruct the jury as follows:

7th. There being no evidence that the defendants did not restore the property alleged to be lost at the fire, according to the conditions of the policy in this case, the plaintiffs are not entitled to recover.

The said judge refused to give said instruction, and the said defendants then and there excepted.

The plaintiffs assign the following causes for error:

1. The judge erred in overruling objection to the introduction of the policy of insurance in evidence.

2. The judge erred in deciding that an action of covenant could be maintained on the policy in this case, the same not being under seal.

3. The judge erred in admitting the testimony of William H. Bunker, and in allowing evidence to contradict the representations and warranty made by the assured in the policy, condition and application.

4. The judge erred in overruling the motion to strike out the testimony of Bunker.

5. The judge erred in allowing evidence to contradict the warranty in the policy, condition and application, or to show a waiver of any of them.

6. The judge erred in refusing to give the following instructions of defendants, as proposed by defendants, to wit: Nos. 1, 2, 3, 4, 5 and 7.

8. The judge erred in adding to and amending the following instructions of defendants, to wit: Nos. 1, 2, 3, 4 and 5, and in giving the same as amended.

9. The judge erred in refusing to grant a new trial on motion of defendants.

10. The judge erred in overruling the motion of defendants to arrest the judgment.

11. The judgment is against law, and also against the evidence.

E. A. AND J. VAN BUREN, for Plaintiffs in Error.

SCATES, MCALLISTER & JEWETT, and J. CLAPP, for Defendants in Error.

WALKER, J. It is urged that there was a breach of warranty by the assured, because a portion of the representations regarding the occupancy of the building which contained the goods, was untrue. By the policy, the application, the survey and conditions annexed, are made a part of the contract, and it is justly conceded, that in so far as they relate to the goods insured, they must be true, or the policy will be void. In this case, however, it is not claimed that any part of the description or representation of the goods covered by the policy, is untrue. The false representations relate alone to the building in which they were contained, and to its occupancy. The building was not insured by this policy, and the question is presented, whether a false representation of something outside, and independent of the property insured, can affect the validity of the contract, when the misrepresentation has not contributed in any degree to the loss. This depends upon the construction to be given to the conditions annexed to that instrument.

The first, second and third of these conditions, manifestly relate alone to the insurance of buildings. The fourth, with the exception of the last clause, relates to the insurance of goods, wares and merchandise, and only requires a description of the building which contains them, but contains no requirement as to its occupancy. It seems to us, that by no fair construction can it be held that this clause containing the conditions of the insurance of chattels, was designed to require anything more than a true description of the building in which the property insured is situated, with a description of the property covered by the policy; and we can perceive no reason for extending the terms of the warranty beyond what they were evidently designed by the parties to embrace. The body of the policy also declares the insurance to be "on the following property, as described in the application and survey number fourteen, which is hereby declared a part of this policy and a warranty on the part of the assured." What was a part of the policy and a warranty?

Why, the description of the property insured. The relative in that sentence obviously refers to the description of the property insured, and that description is warranted to be true, and it is not pretended that the description of that property is otherwise than strictly true. If this warranty, then, only engages for the truth of that description, it cannot be broken by a misdescription of something outside of the warranty. Under this warranty, the assured had only engaged for the truth of the description and representations of the property insured, and the warranty has been performed. We are fully sustained in these views by the following adjudged cases: *Sales* v. *North Western Ins. Co.*, 2 Curtis C. C. R. 610; *Kentucky and Louisville Ins. Co.* v. *Southerland*, 8 B. Mon. 634; *Farmers' Ins. Co.* v. *Snyder*, 16 Wend. 481; *Trench* v. *The Chenango Mut. Ins. Co.*, 7 Hill, 122; *Howard Fire Ins. Co.* v. *Bruner*, 23 Penn. (11 Harris) 50; *Roth* v. *The City Mut. Ins. Co.*, 6 McLean, 324; *Masters* v. *Madison County Ins. Co.*, 11 Barb. 624.

In the case of *Trench* v. *The Chenango Ins. Co.*, which was a policy on both the building and goods, and the representations of the building were proved to be untrue, the court, under similar conditions in the policy, held it to be void as to the building, but valid on the goods. The Pennsylvania case referred to, (*Howard Ins. Co.* v. *Bruner*,) holds, that when the survey is made by the agent of the company, and a mistake occurs in the application, the insured is not bound by it, but may show by parol the knowledge of the fact by the agent. And in the case of *Masters* v. *The Madison County Ins. Co.*, it was held that a verbal notice of a mortgage against the property, given to the agent, was sufficient, notwithstanding the policy required it to be in writing.

If the loss had been occasioned by the thing falsely, although unnecessarily, represented, or from its concealment when interrogated as to its existence, then that fact might be shown, for the purpose of establishing a fraud on the company, and would be a matter proper for the consideration of a jury, but no such question is presented by this record. On the contrary, it appears, from the evidence, that the agent who made this survey, had made a survey of this building a few days previously, and was then fully informed of its situation and occupancy. And the evidence fails to show that any change had taken place subsequent to that time. This seems to rebut all evidence of concealment, but even if there had been, there is no pretense that it contributed in the slightest degree to the loss, or was in any way material. Good faith is essential in the contract of assurance, and we see nothing to induce us to believe it has not been observed in this case. There was no evidence showing that

the misrepresentations misled the company in taking the risk, or that they were induced to accept it at a lower premium, and as their agent knew all the facts, it could not have misled them in granting the policy. The evidence of Bunker, while it may not have been material to the issue, tended to show good faith on the part of the assured, and was not calculated in any manner to prejudice the appellants in their rights, and its admission was not such an error as should reverse the judgment.

It is likewise objected that the court erred in modifying the instructions asked by, and given for the appellants. The modification complained of, authorized the jury to determine whether the company had done any act which estopped them from insisting upon the false representations, contained in the application, without having, by any of the instructions, informed them what acts would have that effect. We have no hesitation in saying, that had the instructions asked been proper, then the qualifications would have been erroneous, unless they had also announced what would create an estoppel. But all the instructions, basing the defense upon the want of accuracy in the description of the manner in which the house was occupied, were unwarranted by the evidence, and should have been refused, as we have seen the truth of these representations were not in issue. The modifications could not have misled the jury, to the injury of plaintiffs in error. They operated in their favor, as the jury was informed that these false representations constituted a defense, unless the company had done some act which estopped them from its assertion. There was no error in giving these instructions as modified, of which the plaintiffs in error have any right to complain.

It is likewise urged, that the judgment should have been arrested, for the want of an averment in the declaration, that the company had failed to replace the property destroyed. They had reserved the right to pay or discharge their liability in this mode, or by paying the money in case of loss. If this right related to the loss of chattels, they should have shown it by way of defense, but no such effort was made. The averment that the money had not been paid, or any part of it, though not formal, and though not sufficient on demurrer, is, we think, aided after verdict, as the plaintiffs could not recover until they showed the loss of the property, and a breach of the covenants by the defendants.

Upon the whole of this record we perceive no error requiring a reversal of the judgment of the court below, and it appears to us that substantial justice has been done, and that the judgment must be affirmed.

Judgment affirmed.

Micajah L. Adams *et al.*, Plaintiffs in Error, *v.* Bohan S. Shepard, Defendant in Error.

ERROR TO COOK.

So long as any material issue, in a case which has been submitted to the court, to be tried without a jury, remains undetermined, the plaintiff may submit to a non-suit.

An issue of property in the plaintiff in error, Adams, was submitted to, and tried by the court, in an action of replevin, on the 5th March, 1860, and taken under advisement until the 14th March. On that day the court found the issue for the plaintiff in error, Adams, and the following minutes were made:

By the court:

"March 14—Judgment for defendant, with *retorno habendo*. Motion for new trial overruled—suspend till to-morrow, because question of damages not determined."

By the court:

"March 14—Judgment for defendant, with *retorno habendo*. Damages assessed at $——. Motion by plaintiff for new trial overruled. Excepted."

The following entry was also drawn up at large upon the order book:

"This day again came the said parties, in person and by their respective attorneys, and the court being now sufficiently advised of and concerning the matter submitted, doth order and consider, that the issue of property herein be found for the defendant, and that he have return of the property described in the declaration, and that defendant's damages for the detention of said property, be assessed at seven hundred dollars."

Thereupon defendant objects to the amount of damages assessed by the court, as insufficient; whereupon the court directs the clerk not to enter the said judgment, until the subject of damages shall be further considered, and said cause is again taken under advisement, with a view to reconsider the subject of damages.

After this the parties separate, and plaintiff below, by his counsel, without any notice to defendants or their counsel, returned into court, and entered a motion for leave to enter a non-suit; which was allowed on the 30th March, and defendant in error entered a non-suit in the cause.

W. B. Scates, for Plaintiffs in Error.

J. M. S. Causin, for Defendant in Error.

WALKER, J. At the common law, which recognized trials alone by jury, a non-suit could only be submitted to before the jury retired to consider of their verdict. But, under our statute permitting the parties to try their cause by the court, without a jury, and permitting either party to except to the opinion of the court, a difficulty may arise as to the precise time at which a party must take his non-suit. The question is then presented, whether the non-suit was asked for and submitted to before this case was finally determined. The court had heard the evidence, and found the title of the property in the plaintiff, and that he should have a return, and the damages were assessed, but the clerk was ordered not to enter judgment, until the court had further considered of the damages. At this stage of the case, the plaintiff below submitted to a non-suit, which was allowed and entered by the court, to which the defendant objects, and asks a reversal.

In the case of *Howe* v. *Harroun*, 17 Ill. R. 494, the court say that the plaintiff must have the right to take a non-suit after the court has announced its opinion, and before a note thereof is entered. When the court has heard the evidence, found the issues, pronounced a judgment, and made an entry of its finding and the judgment which shall be entered by the clerk, the case is then ended. But so long as any of the material issues in the case remain undetermined by the court, the plaintiff has the right to submit to a non-suit.

In this case, the court had found the law and facts, and a note was made, but the court opened the finding as to the damages, which was again taken under consideration, and was undetermined when the non-suit was entered. The court had also, when the question of damages was taken into reconsideration, ordered the clerk not to enter up a judgment on this finding. This, then, placed the whole case in the same situation as though the court had made no minute of its finding. And if that order had not been made, one of the substantial issues in the case was before the court, and undetermined. The ascertainment of the amount of damages was important, as it was for real, and not for nominal compensation for the loss of the use of the property. Until that question was determined, the plaintiff had the right to submit to a non-suit.

The judgment of the court below is affirmed.

Judgment affirmed.

The Western Transportation Company, Appellant, *v.* Gilbert C. Newhall *et al.*, Appellees.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

The common law liability of a common carrier cannot be restricted by notice, even when such notice is brought home to the knowledge of the owner.

The express assent of the owner to such restriction, must be proved, in order to give effect to it.

The common carrier is bound to receive and carry goods offered to him for transportation, subject to all the incidents of his employment, and there can be no presumption that the owner intended to abandon any of his legal rights.

The rule is different with regard to persons who are not common carriers, and who are not bound to render the service required. Such may make their own terms, and the owner of the goods is presumed to assent to them if he deliver the goods.

A common carrier may qualify his liability, by general notice to all who may employ him, of any reasonable requisition to be observed, on their part, in regard to the manner of delivery and entry of parcels, and various other matters, but he cannot avoid his liability as insurer of the goods entrusted to him during their conveyance, by any such notice.

The onus of proving the contract, by which the common law liability of a common carrier is claimed to have been restricted, is upon the carrier.

No distinction can be made between a notice in the newspapers, or by handbills, and one printed on the back of the receipt given.

A notice printed on the back of a common carrier's receipt forms no part of the contract, and need not be noticed in the declaration.

Where goods are received by a common carrier, to be carried under the usual bill of lading, it is incumbent on him to show that the injury resulted from one of the causes excepted in it.

The responsibility of common carriers continues until the goods have reached their final destination; after that is reached, there may be circumstances under which their responsibility as carriers would cease, and they become liable as warehousemen only.

This was an action of assumpsit, brought by appellees against appellants, to recover damages from them, as common carriers, for injury to goods which appellants had undertaken to transport for appellees.

The facts on which the case is founded, are very fully and clearly stated in the opinion.

Goodwin, Larned & Goodwin, and Hooper & Willard, for Appellant.

Hoyne, Miller & Lewis, for Appellees.

Breese, J. This case depends, for the most part, upon the evidence, which is preserved, and which we have examined with care. It is a case of bailment, the defendants being declared against as common carriers, on their undertaking to carry safely certain kegs and packages of powder, from Albany to Chicago,

by water, and there deliver them to the consignee at Chicago. A bill of lading, or receipt, of the powder, was delivered by the defendants' agent, to the consignors, upon which the first point made by the defendants arises.

They contend that the qualifications and conditions, appearing on the back of the receipt, were a part of the contract, no matter on what part of the paper they were printed. Being stipulations beneficial to the defendants, and appearing on the contract, which is the foundation of the suit, they must be regarded as constituting the contract of the parties, as much so as any other part of the paper.

Very many decisions are referred to as sustaining this view, one of which, *Barnard* v. *Cushing*, 4 Metcalf, 233, is said, in the defendants' brief, to be a review of most of the cases referred to on the point. We have looked into that case, and find that it is substantially this: Where the payee of a note, at the time it was signed by the maker, and as a part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount when convenient for the maker to pay it, it was held that the indorsement must be taken as part of the instrument, and that the payee could not maintain an action upon it. This was very correctly held, and for the plain reason, that the stipulation indorsed on the note left the contract without the essential elements of a legal obligation, capable of being enforced at law. It is a mere honorary obligation, upon which no action could be maintained. It does not seem to touch this case. But the important question in this case, is raised by the second point made by the defendants, that the conditions and exceptions on the back of the bill of lading, being parts of the contract, must go to qualify and affect the liability of the defendants, and they, therefore, should have been noticed in the declaration; and the omission to do so, constituted a fatal variance between the contract described in the declaration, and the contract proved in evidence.

The conditions and exceptions here spoken of, are contained in a certain clause printed on the back of the bill of lading, or receipt for the powder, under the head of "Conditions and Rules." It is as follows: "The companies will not hold themselves liable at all for injuries to any articles of freight during the course of transportation, occasioned by the weather, or accidental delays, or natural tendency to decay." The objection made by the defendants, to the omission of this clause from the declaration, brings up the questions, Was it a part of the contract? Can a common carrier limit his common law liability, by a notice of this kind, even if brought home to the knowledge

of the owner, or only by a special contract with the owner of the goods?

We believe the rule to be now well settled, that the common law liability of a common carrier cannot be so restricted, for notwithstanding the notice, the owner has a right to insist that the carrier shall receive and carry the goods, subject to all the incidents of his employment, and there can be no presumption, when they are delivered to, and received by the carrier, that the owner intended to abandon any of his legal rights, or yield to the wishes of the carrier. Where a private carrier of goods, having the absolute right to impose his own conditions, and under no legal obligation to carry, receives goods to carry, the presumption would fairly obtain, that they were delivered to him on his terms. The common carrier is bound to receive and convey the goods safely, or answer for the loss.

All the cases referred to by defendants' counsel, on this point, of which the case in Metcalf, before cited, is said to be a review, are, all of them, cases where the indorsements were referred to in the body of the contract, and the contract by its terms made subject to the indorsement, or the contract is referred to in the indorsement; and they are cases, too, of ordinary contracts, where the party in whose favor the indorsement is made, is under no legal obligation to render the service or do the act required, and has the right to impose his own terms. On a delivery of goods to such carrier, the presumption is fair, that they were delivered on his terms.

The duties of a common carrier grow out of the relation in which he stands towards the public, and he is obliged to render the service demanded of him for a reasonable reward to be paid to him, and the owner of goods employing him, is not exposed to the presumption that he waived the performance of any of them. Such waiver can be effected only by a special contract between the owner and carrier. As early as *Southcote's Case*, 4 Coke's Rep. 83, it was determined that any bailee might stipulate for an increased or diminished degree of responsibility from that which the law imposed upon his general undertaking, and it has been so held in England ever since. This court has ruled the same way, in the case of *Ill. Central R. R. Co.* v. *Morrison and Crabtree*, 19 Ill. R. 141, and so have many, if not all, the courts of this country. A notice like this, if brought home to the knowledge of the owner of the goods, at the time of the delivery of the goods or before, and no objection made to it, would have, according to the rulings of the English courts, the force of a special contract. In most of the courts of this country, it is not so regarded. It is well settled here, that a common carrier cannot, by a general notice, even

if brought home to the owner of the goods, limit, restrict, or avoid the liability imposed on him by the common law. The case of the *New Jersey Steam Navigation Co.* v. *The Merchants' Bank*, reported in 6 Howard Sup. Court U. S. 381, is, we conceive, a fair exposition of the law, as it is in this country. That was the case of the burning of the steamboat Lexington, on Long Island Sound, in January, 1840, on which the Merchants' Bank had, in charge of Harnden's Express, some twenty thousand dollars, in gold and silver, to be carried from New York to Boston. The special agreement under which this *specie* was shipped, provided that it should be conveyed at the risk of Harnden, and that the Navigation Company were not to be accountable to him or to his employers, in any event, for loss or damage. This was the agreement with Harnden and the Navigation Company, but which, the court held, did not exonerate the company from their liability to others as common carriers. The court say: "But, admitting the right of a party to restrict his liability by express stipulation, it by no means follows that he can do so by any act of his own, that is, by a general notice. The common carrier is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself, without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court, in the case of *Hollister* v. *Nowlin*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties."

A common carrier being regarded as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from the act of God or the public enemy, it is not deemed salutary policy, that he shall escape this liability, by such general notices as we are considering. He may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be

observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. The case of *Hollister* v. *Nowlin*, referred to in 6 Howard, is cited by the counsel for appellee, and is reported in 19 Wendell, 234. In that case it was held that stage-coach proprietors were answerable as common carriers for the baggage of passengers, and cannot restrict their common law liability by a general notice, that the "baggage of passengers is at the risk of the owners." That he can only do so by express contract, as a contract cannot be implied or inferred from a general notice, though brought home to the knowledge of the owner of the property—that he may, like other insurers, demand a premium proportioned to the hazards of his employment; and may therefore require the owner of the goods to give such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care necessary to the discharge of the trust. To the same effect is the case of the *Chicago and Aurora R. R. Co.* v. *Thompson*, 19 Ill. R. 589 to 592. That a mere general notice, when brought to the knowledge of the owner of the goods carried, will not have the effect to limit his common law liability, unless there is very clear proof that the owner expressly assented to that, as forming the basis of the contract, is also held by the Supreme Court of Vermont. 23 Verm. 206, Redfield, J., delivering the opinion of the court. So in New Hampshire. *Moses* v. *The Boston and Maine R. R.*, 4 Foster, 84; where the court say, The question is not, whether the general rule of law may be controlled and superseded by an express agreement between the owner and the common carrier of goods; but whether, from the mere fact of public notice, the law will imply such an agreement; and they hold it will not.

So it was held by the Court of Appeals of New York, in the case of *Dorr et al* v. *The New Jersey Steam Navigation Company*, 1 Kernan, 485, that when there is no special contract as to the liability of a common carrier of goods, he is responsible for all loss or damage except that which is caused by the act of God or the public enemy, and cannot limit this liability by notice, even if it be brought to the knowledge of the owner of the goods. They may limit their liability by an express agreement with the owner. The same is the case of *Clark* v. *Faxton et al.*, 21 Wend. 155.

The onus of showing the contract by which this common law liability is claimed to have been restricted, is upon the carrier,

and is to be proved, like any other fact, by pertinent evidence. *The Am. Transportation Co.* v. *Moore et al.*, 5 Michigan, 379.

No distinction has been attempted to be made, nor can be made, between a public notice in the newspapers or by hand-bills, or otherwise, and the notice conveyed by this receipt, it being printed on the back of it, for wherever it may be found, it is but a notice.

The case of the *Mich. Central R. R. Co.* v. *Hale et al.*, 6 Michigan, 244, cited by appellees' counsel, is more like this case before us, in all respects, than any other to which our attention has been called.

In that case, the receipt given in evidence by the owner of the goods, is in these words:

MICH. CENT. R. R. COMPANY,
Grass Lake, Oct. 26, 1850.

Rec'd of Hale, Smith & Co., as consignors, the articles marked and weighed as follows:

ARTICLES.	MARKS AND NUMBERED.	WEIGHT.
One car of wheat in bulk,	No. 4966.	24,206.

To be transported on said Railroad to the depot in Detroit, and there delivered to Hale, Smith & Co., or order, upon the payment of the charges thereon, and subject to the rules and regulations established by the company, of which notice is given on the back hereof.

WILLIAM H. PEASE,
Freight Agent, M. C. R. R. Co.

On the back of this receipt is the following:

"Abstract of the rules and regulations, as per published freight tariff:

"The company will not be responsible for damages occasioned by delays from storms, accidents or other causes; for decay of perishable articles by heat or frost to such as are affected thereby, or for damages to the hidden contents of packages, or by leakage or bursting, or by reason of improper packing, when received at the depot; nor will it be responsible for any merchandise unless receipted for by a duly authorized agent; nor for a greater amount than $200 on any one package, except by special agreement and upon payment of extra rates; and all goods and merchandise will be at the risk of the owners thereof while in the company's warehouses, except such loss or injury as may arise from the negligence of the agents of the company. Goods consigned to irregular stations (those not in capitals in the freight tariff) will be delivered at the nearest regular station, unless the owner gives a written order to deliver them at the irregular station at his risk."

After the evidence was closed, the company asked the court to instruct the jury, that they had a right to limit their common

law liability, and if the jury shall find by the terms of the receipt given by the defendants to the plaintiffs in this case, it was stipulated between them, that all goods and merchandise would be at the risk of the owners thereof while in the defendants' warehouses, except as to such loss or injury as might arise from the negligence of the defendants' agents, such stipulation (in the receipt) will define and limit the liability of the defendants in this case.

This instruction was refused, and error assigned thereon.

The Supreme Court say: "This question involves, under the facts of this case, both the power of limitation by notice, and by special agreement; and in this respect it is more broadly put than the facts of the case warrant, as the point thus stated, assumes the existence of an express contract, or implies it from the terms of the receipt and accompanying notice. The error assigned is, that the court refused to charge that the company had a right, by contract with the defendants in error, to limit their common law liability; and that if the jury shall find, that by the terms of the receipt given by the company to the defendants, it was stipulated between them, etc., such stipulation would define and limit the company's liability in this case. We say, the question is more broadly stated than the case warrants, because the assumption of the request that the "terms of the receipt" (by which was intended the receipt, and notice limiting the company's liability indorsed thereon,) determine the contract, is not in accordance with the law. All the cases which give to such notice any validity, agreeing that something more than mere notice indorsed upon a receipt or otherwise brought to the consignor's knowledge, is necessary to relieve the carrier from his common law liability. His assent to this limitation is still necessary, and that is a question of fact for the jury, to be determined by evidence *aliunde*, and is not the subject of presumption from the terms of the receipt alone. And this is the correct rule respecting notices of common carriers, designed to have such effect. The carrier can no more restrict his common law liability, unless upon the free and full agreement of the party dealing with him, than he can refuse to carry when required. Such an agreement is not to be implied from the posting of notices or the simple delivery of one to the consignor, as this would be no more than limitation of his liability by *ex parte* action. Some evidence of assent to the terms of the notice is necessary, from which a contract may be implied."

This reasoning establishes, that the indorsement is not a part of the contract, and therefore need not be noticed in the declaration, and omitting so to do, cannot therefore be a variance. The plaintiffs had no beneficial interest in the exemptions and

stipulations contained in it. If the defendant had, he could have resorted to them by way of defense, and contended that they made, what was without them a general contract, a special contract by which their common law liability was restricted. That was the course in the Michigan case cited. The railroad company brought the question before the court on the instructions, and that was the proper way.

Besides, the plaintiff pleading these indorsements, would have destroyed his whole case, for one of the stipulations is, that "gunpowder will not be received on any terms."

The stipulation that the companies will not hold themselves liable at all, for injuries to any articles of freight during the course of transportation, occasioned by the weather, or accidental delays, or natural tendency to decay, is not an important one, for as common carriers, they would not be liable for such, for they come within the general exceptions of dangers of navigation and the acts of Providence. *Clark et al.* v. *Barnwell et al.*, 12 Howard, 282.

We come now to the instructions. Those given by the court on behalf of the defendant state the law quite as favorably for him as it is, in such cases.

The fourth, fifth and sixth instructions, which were refused, assume that the burden of proving negligence is on the owner of the goods. We understand the law to be, that when goods are received by a common carrier, to be carried under the usual bill of lading, it is incumbent on him to show that the injury resulted from one of the causes excepted in it. In this case, the defendants were bound to show that the injury was caused by the weather, by accidental delays, or by the natural tendency of the powder to decay, neither of which was shown. Had that been shown, then the burden of proof would have been shifted on the plaintiff to prove negligence, but not until then.

We have examined the evidence with great care upon this point, and do not find any, going to show, that the excepted causes produced the injury. The powder was received on board a canal boat, at Albany, belonging to the defendant, about the 13th of November, 1858, arriving at Buffalo in due time thereafter, and in good condition. There being an ordinance of the city of Buffalo forbidding the storage of powder in the city, except in powder magazines, and there being none there able to receive it, the defendant removed the boat without the corporate limits of the city, to Pickard's bridge, about twenty-five miles from Buffalo, where she remained during the winter. About the 19th April, 1859, the powder was loaded on to the schooner Grey Eagle, from the canal boat lying along side, near the light-house pier. No evidence is produced by the

defendant to show the condition of the boat at this time. In the fall, when the powder was put on board, she was in good order, and good men were in charge of the boat. *George H. Clark* testifies, that he is a sailor, and has been for thirteen years, and was master of the schooner Grey Eagle during the spring and summer of 1859. About the 19th of April, 1859, this schooner received on board a quantity of powder, to be carried to Chicago; it was taken from a canal boat; did not examine the boat, and cannot say whether there was any water in it, or not. There were indications that water had been in the boat; some of the kegs of powder were wet and discolored, and looked as if they had been lying in the water. Some of the kegs containing powder had their hoops loose, and on being lifted, the powder appeared as if it was packed together in a solid lump, as it would if it had been in water; a part of the kegs were discolored more or less—some discolored and damp; the mate was ordered to receipt a part of the powder as in bad condition; its appearance indicated that its bad condition had been produced by the powder having been wet, and these indications were its dampness, its being discolored, and its packed or solid-feeling condition in some of the kegs. Some of the powder was left, and not put on board the schooner—about two or three tons; this quantity was not put on board on account of its bad condition; some of the kegs left were broken, and others being very badly stained or discolored. This powder was consigned to D. Eaton & Co., Chicago, and was delivered to them about the 4th May, 1859; contracted to carry it with the agents of the Western Transportation Company, at their office in Buffalo. The powder was well stored and cared for on the schooner.

Henry Roper, or *Roop*, states, that he was the owner of this schooner in the spring and summer of 1859; speaks of the loading the powder from a canal boat; says nothing of the condition of the boat, nor did he see any water in it at that time; the appearance of the kegs indicated that they had been wet, either in that boat, or some other manner; some of the kegs were, apparently, in a good condition, and some were in a bad condition; cannot state what proportion, but a considerable proportion were in bad order; Captain Clark was instructed not to receipt for it in good order; the hoops were off some of the kegs, and the heads of a few were stove in, or were loose; some of the kegs were damp, and had the appearance of having been recently wet; judged from appearances that their bad condition was caused by their having been wet; Henry Sheffield, or one Morgan, engaged the schooner; thinks Sheffield was, at the time, acting for the Western Transportation Company; acted

for that company last season and this, in the capacity of freight agent; Morgan is one of the proprietors or stockholders of that company, and was, at the time, one of its managers.

David Eaton states, that he is in the gun and powder trade; has dealt in powder fifteen years; received the receipts in evidence, from the plaintiffs, a year ago last fall; defendants have an office in Chicago; J. W. Tuttle is their agent; they are carriers and transporters of goods; had a line of boats on the lake, and a wharf also; after receiving the bills of lading, had notice, in May, 1859, that the powder had arrived; it came here on a sailing vessel; notice came first from some one on the vessel called the Grey Eagle, and afterwards received a notice from defendants, or some one of their people; received the powder at the magazine, outside of the city limits; Tuttle declined to deliver it until the charges were paid. The charges were paid under legal advice, and he received the powder. Tuttle agreed that after he had received the freight, and ascertained the damages, he would settle it. The powder was received from the vessel, and put in the magazine about the 9th of May. At this time he received only between 1,700 and 1,800 packages. Three or four weeks afterwards, received about three hundred packages. The powder packages were counted off by Mr. Wood, his clerk, and loaded on the wagon by his brother, and received into the magazine by his brother. Afterwards, in one or two days, Tuttle and he went down to see the powder. There was no examination of it that day. A day or two after, some of defendants' people went down again, and examined such as Mr. Hammond had thrown out while he was receiving it; it was either Mr. Tuttle or some one he sent. Some days after, Wilde, agent of plaintiffs, came and examined the whole of it; it was agreed between Mr. Tuttle and Mr. Wilde, that it should all be examined by witness. He did examine it, every keg separately; it took some four days. There were 2,200 packages. He thinks there were three kegs and three half-kegs short. Some of it had been in the water, and was spoiled entirely, and some was spoiled that had not been in the water. That which was not entirely spoiled, had received damage by moisture; it had marks of having been in the water. All the packages that had been in the water showed stains and marks—one hundred and forty-six kegs showed water marks, seventy-seven half-kegs and eleven cans; each case contained four quarter kegs, of 6¼ lbs.; a case is same as one keg.

The magazine is of stone inclosed in wood.

The powder was good, and if it had been delivered in good condition, it would have been worth, in Chicago, $5 to $5.50 per keg. Some of it was blasting powder, and worth less;

the whole invoice was worth ten to eleven thousand dollars, ($10,362.50.)

He thought the whole powder was so much damaged that it would be worthless, except to re-manufacture, and was not worth, as delivered, more than $2 per keg. There were equal to 2,025 whole kegs of the invoices. The packages were good powder, well put up.

The powder would have kept well in a canal boat, if she was dry, and if she did not leak. Powder gathers and absorbs moisture rapidly, when it is exposed to the damp atmosphere. Stains on the kegs were some months old, and water was still in them. They were saturated with water.

On his cross-examination, he said, he was selected by Captain Tuttle to examine the powder. A large portion of the kegs showed dampness, but no discoloration; labels on some of them loosened, but not discolored; he examined the nail heads in the cases; they were not discolored. Powder is very susceptible to injury from dampness. It might be spoiled from packing in green kegs or boxes or cases; paste upon labels might affect it, if there was moisture enough to reach through the wood. Powder might be defectively manufactured, and cake up, as if wet. Moisture is the principal cause, and when moisture is absorbed, the powder would appear the same as if defectively manufactured. Is assignee and agent of the plaintiffs.

Mr. Wilde testified, that he was agent for the plaintiffs. Saw the powder in June last. Had an interview with Tuttle, who said he had no objection to Eaton examining the powder. Some of the powder was hard, and some was soft; some lumpy, and some the brilliancy of the kernel was destroyed; caused by water. He was in Buffalo in 1859; had an interview with Bryant, secretary, and Foote, president. Foote said Bryant knew all about the matter, and had tried to send the powder forward by sail, but could not send it. He said that it was a good boat, and perfectly safe, and they had good men to take care of it. That the boat was then twenty-five miles from Buffalo.

Witness said, water caused the injury, because some of the kegs were stained, and he inferred it as to the rest.

We think this evidence fails to show that the injury to the powder was caused by the weather, by accidental delay, or the natural tendency of the powder to decay. All these witnesses speak of the powder, when transferred to the schooner, as having laid in the water, and not of its having contracted moisture from the atmosphere, or from any other natural and imperceptible cause, and that the stains upon the kegs indicated the

presence of water, not moisture merely. Though Mr. Eaton states that powder might be spoiled by packing in green kegs, and that paste upon the labels might affect it, yet it is on the fact granted, that the kegs are so green as to be moist, and the labels possess moisture enough to penetrate the wood, which is no more than saying, that sufficient moisture from any cause will affect powder. He does not say this powder was affected in either of these ways, and we think no other conclusion can be reached than this, that the unnecessary exposure in an insecure canal boat near five months, exposed to all the storms and rigors of a northern winter, and to the changes of weather so frequent in that latitude, and so exposed as to leak and admit water, all which, proper care and diligence would have prevented, was the cause of the injury. We say, unnecessary exposure in a canal boat, because we think if a magazine could not be had, then some dry, safe place, an isolated barn or other such shelter, should have been obtained in which to store the powder. It was negligence on the part of the company to have left the powder so exposed for so many months, we say, in an insecure boat, because the company have furnished no evidence of its condition during the winter and spring, and the jury had a right to believe, from the water stains upon the kegs, and their condition generally, that they had been in direct contact with water which had leaked or rained into the boat. No other sensible conclusion can be reached. Mere moisture imbibed from the atmosphere, could not have produced any such effects.

The defendants then, are chargeable with negligence, and that fixes their liability. It is proved upon them by the evidence in the case, and there is no escape from it.

The injury not arising from any one or all of the excepted causes, the right of action was complete against the defendants. The undertaking of the company was to carry and deliver, and they were bound at all hazards to deliver, unless prevented by the act of God, the weather, accidental delay, or the natural decay of the property to be conveyed, or by a public enemy.

Admitting that the close of navigation was a providential cause, and the goods could not be forwarded, still the company stood to them in the relation of carriers, they being on their route to their final destination,—they were still the insurers of the goods, and cannot escape on the plea that they were then under the reduced liability of warehousemen. But if it was so reduced, negligence has been proved, and that of a grave character. The responsibility as common carriers continues until the goods have reached their final destination. When that is reached, there may be circumstances when their responsibility as carriers would cease, but never while they are in

transit; Edwards on Carriers, 515; and so are all the cases cited by appellant's counsel. The counsel argue that it was a necessity the powder should remain in the canal boat out of the limits of the city during the period of its detention. It was twenty-five miles from the city, and no person to look to it but a station agent of the company, who had other business to attend to. The necessity for its remaining in the boat is assumed, it is not proved, nor is the condition of the boat shown. How did the water stains get on the casks, or how did some of them become saturated with water, if the boat was in good condition? Could a damp atmosphere merely, produce the appearances and injury proved? Again, it is asked, How could it be otherwise than that powder, necessarily kept all winter in a canal boat, should be injured by the liability to dampness which such exposure unavoidably occasioned? All this is assumption. If the powder was thus exposed, whose fault was it? Again, it is said, Here was a boat which would be in the water of the canal, whose decks would be covered with the ice and snow of winter, whose seams and joints would be subjected to the contracting and expanding effects of the changes of temperature from winter to spring, and the question is asked, was it hardly within the limits of possibility that a cargo of powder, compelled to be thus exposed, should not suffer injury? We think this statement of fact, and question made on it, decides this whole controversy against the defendants. Who permitted the powder to remain in a boat thus exposed? Under what compulsion were the defendants, thus to suffer it to remain five months? It was their own act, and shows negligence of a most extraordinary character. There is no providential interference, which the company, by reasonable diligence, could not have guarded against. If to expose powder in a canal boat, with no person on board, through a long and dreary winter, and with no fittings to make it water-tight, does not constitute gross negligence, which is nearly allied to criminality, we would be at a loss to say what acts did constitute it. None of the necessary precautions, to avoid the damage, appear to have been taken which prudent men would take under such circumstances—not one. Neither green casks, paste on the labels, or a damp atmosphere, or generated moisture, could, by any possibility, have produced this injury to the extent of two or three tons of the powder. It was water, and that water entering the boat by the negligence of the defendants.

If the injury had occurred while the boat was under way—the boat being staunch and properly fitted—there might be some pretense for claiming that the powder became wet and damp from some innate quality it possessed, or from the atmos-

phere, or changes of weather, and then it might slightly resemble the case of *Clark et al.* v. *Barnwell et al.*, 12 Howard, 280, and *Muddle* v. *Stride*, 9 Carr. & Payne, 380. But it has none of the features of either of those cases, and no redeeming qualities.

As to the instructions in detail, we do not deem it necessary to remark upon them, as we have disposed of them, substantially, in the views we have here expressed.

As to the damages, they are no greater than the proof warrants. The examination of the powder was postponed, at the instance of the agent of the company, for several days, and it was agreed by them that Mr. Eaton should make the examination and estimate the damage.

The value of the whole invoice was stated to be	$10,362 50
Value in damaged state, 2,020½ kegs delivered (4½ short) $2, - - - - - - - - -	4,041 00
Leaves - - - - - - - - -	$6,321 50

which is the amount of the verdict.

As to the pretense that the contract was not made with the company, but with its agent, and that the corporate character of the company was not proved, it is sufficient to say, that the act of the agent has never been repudiated, but was ratified by the president and secretary, and other managers of the company at Buffalo, as appears by the testimony of Wilde, who went there expressly to see them about it, and who told him they had tried to send the powder on, but could not get a sail vessel. The defendants did not deny their corporate character. It is alleged in the declaration, they are a corporation, chartered by a law of New York. They could have put this in issue by pleading *nul tiel corporation.*

As to the rejection of Tuttle's testimony, it is apparent he was the principal obligor in the delivery bond, and was interested. No motion was made to release him, and he was not a competent witness.

Placing the case upon the ground that defendants place it upon, that the injury to the powder was the result of one of the excepted cases indorsed on the bill of lading, then the plaintiffs must recover, as they have proved such facts as warranted the jury in finding negligence.

Placing it on the rigid ground of the common law liability of common carriers, which is the true ground, the loss and injury being proved, the liability of the company is at once determined. In either view the judgment is right, and must be affirmed.

Judgment affirmed.

Springdale Cemetery Association, Appellant, *v.* Job Smith *et al.*, Appellees.

APPEAL FROM PEORIA.

The price, fixed by the parties, for the purchase of property, or the performance of labor, must be adopted as the rule to govern the jury in their assessments of damages.

Whether one instruction qualifies another, without reference to it, must depend upon its position in the series, and its connection with the others; and if it is apparent that they were considered together, and well understood by the jury, then the verdict will not be disturbed, otherwise a new trial should be granted.

Instructions should be as few and simple as possible, otherwise they are more likely to mislead the jury.

This was an action of assumpsit for work and labor on an open account, first tried before a justice of the peace, and afterwards carried by appeal to the Circuit Court of Peoria county. On the trial, the plaintiffs below, proved that they built the vault in question, in accordance with the plans furnished by defendant at the time of making the contract, except when they were changed by order of defendant's agent; also the value of the work and materials furnished.

Defendant proved the following contract:

Contractor to furnish materials and finish work, except front door and stone sill and cappings. Walls to be of good hard bricks, twenty inches in breadth. Walls to be laid hollow to the height of six feet. Excavation to be made by contractor in said hill. To be plastered with coat cement, on the outside, one-half inch thick. Front of foundation to be eighteen inches below surface. Balustrade for front above the arch to be twelve inches thick. The floor to be cemented, also the inside walls. The arch to be twelve inches thick. I agree to furnish materials and do the work in the above plan and specification, for the sum of $525.

(Signed) SMITH & PEIRCE.

And also presented evidence tending to show that the work was not well done, and that the materials used were of inferior quality, in consequence of which, the arch of the vault fell in, soon after it was finished; whereupon defendants refused to make any further payments.

The court gave the following instructions to the jury, on the part of the plaintiffs, in the order of their numbers. Only those referred to in the opinion are inserted.

5th. Unless defendants have proved, by preponderance of evidence, that the work was carelessly and unskillfully done, or materials not of suitable quality, the jury will find for plaintiffs.

6th. If jury believe, from evidence, that plaintiffs built the vault with good materials, and did the work in good and workmanlike manner, they should find for plaintiffs the value of such

work and materials, although the vault fell down, if the falling was not caused by want of skill on part of plaintiffs.

11th. If plaintiffs built a vault for defendants in a good and workmanlike manner, and furnished good materials for same, the jury will find for plaintiffs the value of such labor and materials, after deducting payments made by defendants, unless there was a special contract for building vault for stipulated price; in that case, contract price would govern.

13th. If plaintiffs built the vault in controversy in a good and workmanlike manner and of good materials, the jury will find for plaintiffs the amount of such labor and materials as proved, after allowing defendants credit for payments actually made by them, unless there was a special contract, fixing a stipulated price; in that case, the contract should govern.

14th. If, after said vault was completed, it fell down, yet if it was built of good materials and in a good and workmanlike manner, and did not fall because of defective materials or workmanship, the jury will find for plaintiffs, notwithstanding the arch fell down.

17th. If Loucks and Hall were authorized by defendants to act as their agents, and while they so acted as such agents, plaintiffs furnished materials and built the vault at the place designated by said Loucks and Hall; and if the jury further believe, from the evidence, that plaintiffs built the vault under the personal supervision and direction of said Loucks and Hall, or either or both of them; and if said Loucks and Hall, or either of them, approved of the materials and work as it progressed, defendants are bound by such approval, if fairly made. And if the jury believe, from the evidence, that the whole was approved by the agents of the defendants, plaintiffs are entitled to recover the value of such labor and materials, deducting all payments made thereon, even if the vault did fall down, unless it has been proved that there was some defect in the work or materials, that caused the vault to fall.

To the giving of which instructions, defendants then and there objected and excepted.

The court also gave a large number of instructions for defendant, but as they are not necessary to an understanding of the opinion, they are not inserted. Verdict for plaintiffs for $150, whereupon the defendant below brings the case to this court by appeal.

J. K. Cooper, and Manning & Merriman, for Appellant.

Grove, for Appellee.

WALKER, J. There is no principle, more elementary and better recognized than that, when a price is fixed between the parties to a contract, for the purchase of property, or the performance of labor, it must be adopted as the rule for the recovery. In rendering their verdict the jury must be governed by it, as it is the contract of the parties, and neither the court nor jury have any power to alter it. In this case, in several of the instructions given for the appellee, this rule is either not recognized, or is in terms violated. The evidence seems to show, that the appellees were to furnish the materials and complete the structure, for five hundred and twenty-five dollars. The fifth instruction tells the jury, that the plaintiffs were entitled to recover unless the defendant had proved that the work was unskillfully and carelessly performed, or the materials were not suitable. This instruction fails to tell the jury whether the recovery should be based upon the contract price, or the value of the labor and materials. This instruction, if taken alone, may not have misled the jury, but it would certainly have been better that they should also have been told that if the labor and materials were furnished under a contract, the contract price must govern. But the sixth instruction in terms informs the jury, that if they believe, from the evidence, that the plaintiffs built the vault with good materials and in a workmanlike manner, they should find for the plaintiffs the value of such materials. This is not the law, and may have misled the jury, unless they disregarded the rule laid down by the court for their action. This instruction was manifestly wrong, and should not have been given. The fourteenth instruction asserts the same rule as the fifth, and nearly in the same terms, and the seventeenth fixes the value of the labor and materials as the measure of damages, as did the sixth, and it, for the same reason, was improper, and should not have been given.

Nor are these instructions aided by the qualifications to the eleventh and thirteenth. They were not given in the same connection, nor do they in any manner refer to the others. And they were not so framed that the jury could see that they must be taken and considered together, and even if they could, they are so framed that they may have been regarded as irreconcilable and repugnant. Nor does the twelfth instruction given for the defendant obviate the difficulty, as from its position, and the connection in which it was given, we are not able to see that the jury necessarily considered it in connection with the plaintiffs', and properly understood and reconciled it with them.

Whether one instruction qualifies another without reference to it, must depend upon its position in the series, and its connection with the others. If it is apparent, that the two instructions must have been considered together, and have been properly

understood by the jury, then their finding should not be disturbed, otherwise a new trial should be granted. When instructions are numerous or prolix in their character, they are of course more apt to mislead the jury unless prepared with great care, than when they are few in number and simple in their structure. In the former case, the court would be more apprehensive that they were calculated to mislead unless carefully qualified, than in the latter, and would more readily set aside a verdict for that reason.

In this case we are of the opinion that the jury may have been misled by the plaintiffs' instructions, and for that reason the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

Fletcher Stevens, Plaintiff in Error, *v.* Frederick Faucet *et al.*, Defendants in Error.

ERROR TO SUPERIOR COURT OF CHICAGO.

The intention of the parties, as expressed in their articles of agreement, must, as between themselves, be decisive of the question whether a partnership did or did not exist between them, and as to its extent.

A manufacturer, who makes a contract to deliver work, without requiring pre-payment, is held to have relinquished his lien on the manufactured article.

Trover will lie against one partner, who converts to his own use property which has been entrusted to his firm for manufacture.

The defendants in error, Frederick Faucet, Samuel Isham and Thomas Faucet, filed in the Cook County Court of Common Pleas, their declaration, wherein they complain of Walter S. Stevens and Fletcher Stevens, defendants. For that, on the 10th January, 1857, they were possessed, as of their own property, of 9,000 sides of hemlock-tanned sole leather, of the value of $20,000; that they came to the possession of the defendants by finding, and that the defendants, well knowing, etc., on the day and year aforesaid, converted the same to their own use.

Nolle prosequi entered to defendant, Walter S. Stevens.

Plea of general issue filed for defendant, Fletcher Stevens.

On the trial, Goodrich, Judge, presiding, plaintiffs proved the contract set out in the opinion, and that they furnished to the defendants 18,815 hides to be tanned, of which only 8,248 were returned to them; that defendant, F. Stevens, shipped to Albany and other places a large quantity of these hides, which were sold to various parties, but a part of which, plaintiffs afterwards took

possession of, and sold. They also proved the value of the remaining hides, and the state of the accounts between the parties.

Verdict for plaintiffs.

HOYNE, MILLER & LEWIS, for Plaintiff in Error.

SCATES, MCALLISTER & JEWETT, for Defendants in Error.

CATON, C. J. The decision of this case depends entirely upon the determination of the question, whether, as between themselves, the firms of Stevens & Co., and Faucet & Co., were partners in the purchase and tanning of these hides, and the sale of this leather. If they were such partners, then the defendant below was a joint owner with the plaintiffs, of the leather which he surreptitiously took away and converted to his own use, for which this action of trover was brought. The agreement between the parties was this:

"It is this day agreed between Faucet, Isham & Co., of New York city, and W. H. and F. Stevens, of Stevensville, Sullivan county, New York, that said Faucet, Isham & Co. shall send to said W. H. and F. Stevens, what hides they may require for the purpose of being tanned, and manufactured into sole leather in their tannery, at said Stevensville, for three years from this date. The number of hides is not to be less than fifteen thousand each year, nor more than twenty-five thousand each year, unless both parties, in writing, shall hereafter agree to increase or lessen the amount.

"W. H. and F. Stevens, during the said three years, are not to tan hides for any other party. W. H. and F. Stevens agree to receive the hides at a dock in the city of New York, to pay all expenses of transportation to their tannery, to tan and manufacture them into sole leather in a good and workmanlike manner, to make leather of a quality and a gain in weight equal to that made by all first class tanners, and to return the leather so tanned to said Faucet, Isham & Co., at a dock in the city of New York, clear of all expenses of transportation. For all which services, Fauset, Isham & Co., agree to pay said W. H. and F. Stevens, five (5) cents per pound for each pound of leather so tanned and returned, which shall be due at the average time of each invoice.

"It is further agreed, that all the profit and loss on all the leather manufactured under this contract shall be equally divided between both parties, which shall be determined as follows: After said Faucet, Isham & Co. shall have sold the leather manufactured from each invoice of hides, they shall deduct from the gross amount of such sales the cost of the hides, with five per

cent. added thereto, the amount paid and payable for tanning. All costs and charges of cartage on both hides and leather, inspection, exchanges and interests on all these amounts, till the sales are due, by average. Also six per cent. on the gross amount of the sales, and the balance or difference, being gain or loss, shall be equally divided between said Faucet, Isham & Co., and said W. H. and F. Stevens. Faucet, Isham & Co. are to take the sole risk of all sales made on credit.

"W. H. and F. Stevens agree to return the leather from each invoice of hides within eight months from the time they leave the city of New York, provided that each invoice shall not exceed one thousand hides. In such case they agree to return them in a fair proportionate time; and provided further, that in case hides are sent faster than they can be worked, an allowance shall be made in proportion. Faucet, Isham & Co. shall procure what insurance against fire they may think necessary, one half the cost of which shall be paid by W. H. and F. Stevens.

"New York, Aug. 7, 1855."

As we are investigating this question of partnership, for the purpose of determining in whom the legal title to this leather was vested, it is of paramount importance to determine what was the intention of the parties on that point, as manifested by this agreement. It must be remembered that this is not a question between third persons and the parties to the agreement, growing out of the subject matter of the agreement, but it arises between, and affects only, parties to the agreement. In such a case the intention of the parties must control, in this as well as in all other agreements, when that intention can be satisfactorily ascertained by the terms of the agreement.

After the most careful and scrutinizing consideration we have been able to give this subject, we are well satisfied that it was the intention of the parties that the title to the hides and leather should all the time remain in Faucet, Isham & Co. By the first paragraph, Faucet, Isham & Co. agree to send what hides they may require to the Stevens, for the purpose of being tanned, for three years.

By the second paragraph, the Stevens agree not to tan hides *for any other party*. They agree to receive the hides, transport them to their tannery, to manufacture them into sole leather, and to return the leather, so tanned, to Faucet, Isham & Co., at a dock in New York, clear of all expenses of transportation. *For all which services* Faucet, Isham & Co. agree to pay the Stevens five cents per pound for each pound of leather so tanned and returned. Here is simply an agreement for work and labor of one party, to be performed upon the material of the other party, for a stipulated compensation, and so the parties

understood and intended. Of this there can be no doubt. More appropriate terms for expressing such intent could not have been selected.

The next paragraph stipulates, that the profit and loss, on all the leather manufactured under this contract, should be equally divided between both parties. And the balance of the paragraph shows what Faucet, Isham & Co. should charge against the proceeds of the leather when sold, in order to ascertain the gain or loss, which was to be equally divided between the two firms. This, no doubt, constituted a partnership, but in what, or to what extent, is the question to be determined. Was it the intention of this provision to change the relations which had been established in the preceding part of the agreement? We think it was, to the extent there stated, and no farther. It gave the Stevens a right to one-half the profits which Faucet, Isham & Co. should realize by the transaction, and obliged them to pay one-half the losses which should be sustained, but gave them no interest in, or title to, the hides or leather. It was manifestly still the intention of both parties that the title to the property should belong to Faucet, Isham & Co. If such was their intention, the partnership only extended to the proceeds of the leather, and not to the leather itself, or rather, to the profit or loss resulting from the transaction. Does the law forbid such an arrangement, when the parties so desire and design it? We think not.

Suppose, after what is now written in this agreement, the parties had added a declaratory clause, stating that it was not the intention of the parties to form a copartnership, either in the purchase of the hides, or in the manufacture or sale of the leather, but only that the Stevens should be entitled to an account after the leather was sold, and to share in the profits or loss, when ascertained. Had this been done, none will contend that this declaratory provision would be nugatory, as contrary to any established legal principle. We think the same intention of the parties is manifest from the terms which they have used in this agreement. It is as manifest that all parties intended that Faucet, Isham & Co. should own, hold, and control the hides and leather, as if it had been so declared in distinct terms, and in a separate clause. Indeed, to have inserted such a clause would have been but mere repetition, for the intention is as manifest now as it would be then. When the Stevens agreed to tan hides for Faucet, Isham & Co. for a stipulated price per pound, which the latter agreed to pay them, can any one doubt that it was the intention of both parties that the Stevens should have a right to sue the other parties at law for the price agreed upon? Was it the intention of either

party that Faucet, Isham & Co. should be liable to the workmen employed by the Stevens in the manufacture of this leather? And yet these consequences would follow, if they designed to form a partnership in the purchase of these hides and the manufacture of this leather. Such was clearly not their intention. Although sharing in the profits and loss of a concern or enterprise ordinarily creates a partnership in such concern or enterprise, between the parties thus sharing the profits and losses, yet it will not always do so. Suppose the third paragraph in this agreement had been omitted, and a third party had heard of the arrangement, and, believing it would be a profitable undertaking, had offered Faucet, Isham & Co. ten thousand dollars if they would pay to him one half of the profits which they should make by the operation, and they had accepted the offer; but they, being cautious men, and having some doubts of the success of the enterprise, gave another party five thousand dollars to insure them against loss, or had even purchased such insurance of the same party to whom they had sold the half of the profits, we conceive no partnership in the purchase of the hides and the manufacture of the leather would have been created between the parties to such an agreement, and for the very good reason, that it would not be their intention to create a copartnership. There would be no intention to vest in the party to whom they had sold a share of the profits, any title to, or interest in, the leather, but simply an interest in the profits. If the inquiry be made, why was this arrangement to divide the profits and losses made, if there was no design to create a partnership in the manufacture and sale of this leather, we think it is not difficult to answer the question. The inducements to this provision are quite obvious. The price agreed upon for tanning these hides was a low one. The evidence shows that the hides were about doubled in value by the process, and the price agreed upon for the manufacture of the leather was less than a quarter of its value when manufactured, leaving an apparent profit of more than fifty per cent. on the money which Faucet, Isham & Co. would be required to invest in the purchase of the hides. This could not have escaped remark in the negotiation, and if such profits should be realized, it was but reasonable that the manufacturers should receive a greater compensation for their labor. Both parties might well have deemed it for their mutual interests to provide that a part of the price for the work and labor to be performed, should be contingent, dependent, to a certain extent, upon the manner in which that work should be performed. In this way a higher inducement to perform the work well was presented, than if they

were to receive a fixed compensation to the full value of first-class work. This arrangement was, manifestly, but a mode adopted for part payment for the work to be performed. Such cases are almost of daily occurrence in the transaction of business and in the courts. The case of *Porter* v. *Ewing*, decided at this term, was one where a party was to receive compensation for services to be performed in an enterprise, by receiving half the profits resulting therefrom. There we held, that the party had no interest in the property bought and sold in the prosecution of the enterprise, but only in the profits, when profits should be realized and ascertained, although the party who was held not to be a partner, was, by the agreement, made the active man of the concern, and actually did all the buying and selling of the property.

We are well satisfied that it was the intention of all the parties to this agreement, that the title to this property should be be vested and continue in Faucet, Isham & Co., and that the defendant was liable to them for its conversion.

Some other minor questions were made, but one of which we deem it necessary to notice. It was objected, that the manufacturers had a lien on the manufactured articles for work bestowed upon it, and hence, they had such an interest in it as would protect them from an action of trover and conversion. By the provisions of the contract, they relinquished the right to such lien. They agreed to deliver the leather without requiring pre-payment for their work. This of itself would destroy the lien. But admitting such lien existed, this tort was committed by but one of the partners entitled to the lien, while the other was entirely innocent. The tort feasor could not, by his wrongful act, appropriate to himself the whole amount due to himself and his copartner. This conversion by one partner, would not justify Faucet, Isham & Co. in refusing to pay the other partner or the firm the amount due them for the work done.

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

Judgment affirmed.

The City of Chicago, Plaintiff in Error, *v.* P. T. Burtice *et al.*, Defendants in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

In a proceeding to collect an assessment under the charter of the city of Chicago, any defense is allowable which would show that the assessment ought not to be collected.

The honest judgment of the commissioners for assessment will not be disturbed. But when the assessment is proved to be so far from the real value, as to raise the presumption that the property was designedly over estimated, the court ought to set it aside; and for this reason, proof of the value of the property assessed is allowable.

The action of the common council in confirming an assessment, is not conclusive.

This was a special proceeding on the part of the city of Chicago, to collect an assessment for grading and macadamizing West Madison street, from Sangamon street, west, to the city limits.

The defendants resisted the proceeding on the grounds, that the assessment was not made in conformity to the charter; because the proceedings in the council were irregular; because the amount assessed exceeded three per cent. on the value of the property, and because the valuation made by the commissioners was excessive and fraudulent.

The court heard the testimony offered in support of these various defenses, and decided in favor of the defendants, to all of which, exceptions were taken, and the case is now brought to this court by writ of error.

E. Anthony, for Plaintiff in Error.

Walter B. Scates, for Defendants in Error.

Caton, C. J. We are asked to reconsider what was said in *Pease* v. *City of Chicago*, 21 Ill. R. 500, as to what defense may be made under this proceeding. We there expressed the opinion that any defense which would show that the assessment ought not to be collected, might be made. We have reconsidered the subject, and have bestowed upon it the best reflection of which we are capable. By the seventh section of the seventh chapter of the city charter, an appeal is allowed, from the assessment made by the commissioners, to the common council, who may set aside, correct or confirm the assessment, and if confirmed, it shall be final and conclusive on all parties interested. Notwithstanding this positive declaration, that the assessment, when thus confirmed, shall be conclusive, the section concludes with this provision: "If any assessment shall be set aside by order

of any court, the common council may order a new one to be made in like manner, for the same purposes, for the collection of the amount so assessed." This seems to contemplate that causes might still exist which would justify the courts to interfere and set aside the assessment, and if such cause could exist, we may well suppose that fraud in the assessment or confirmation, would constitute such cause. But the present inquiry is, what influence had the amendment of the charter, passed in 1857, upon this provision, rather than what was the meaning of the section in the old charter. That amendment introduced a radical change in the financial system of the city government, and, among others, in the mode of collecting taxes and assessments. Formerly, assessments were collected by a sale of the property assessed, without the intervention of the courts, but upon the warrant issued by authority of the common council alone, whose confirmation of the assessment had been thus made conclusive. Not so, however, after the amendment. The fortieth section of the amendment provides, that if the taxes or assessments charged in the collection warrant should not be paid on or before the first Tuesday in January, the collector should report the same to some court of general jurisdiction, to be held in the city, for judgment against the lands and lots, for the amount of the taxes, assessments, interests, and costs, respectively due thereon; and provides for publication of notice of the intended application. The forty-third section of the act declares, that "It shall be the duty of the court, upon calling the docket of the said term, if any defense be offered by any of the owners of said property, or any person having a claim or interest 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 report; and shall thereupon direct the clerk to make out and issue an order for the sale of the same, which said order shall be in the 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 have priority over all other cases in said court, and 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 is a new provision introduced into the revenue system of the city—a new jurisdiction is given to the courts, which before they had not possessed, and which necessarily changes so much of the old law as is inconsistent with it. And yet counsel strenuously contend, that the provision of the old law, which makes the confirmation of the assessment by the common council conclusive upon all parties, is still in force. In our apprehension, this provision is inconsistent with the provisions of the amendment. There is no specification or limitation in the amendment as to the defense which may be interposed. The law says, "if any defense be offered," it shall be heard by the court in a summary way, without pleading. And we must now repeat substantially what we formerly said, that if that defense shows that the assessment ought not to be collected, then it becomes the duty of the court to refuse the motion for judgment. When the statute has prescribed no limit, what warrant has the court to reject any defense which shows that the assessment is illegal, and ought not to be collected? If the confirmation by the common council is conclusive upon all parties, then the court cannot inquire whether the commissioners valued the property at all, when they made the assessment. If the court cannot inquire whether the commissioners fraudulently valued the property above its real value, for the purpose of assessing it higher than the law allows, by the same rule, it would be concluded by the confirmation by the common council, from inquiring whether they had not actually assessed it to more than three per cent. on their own valuation. The conclusiveness of the confirmation of the common council would shut out one defense as well as the other. Indeed, according to the general principles of the law, the court should, first of all, listen to a defense of fraud, and it is nothing less than a legal fraud if the commissioners fix a valuation upon property above its real value, for the purpose of evading the provisions of the law, which forbids them to assess property more than three per cent. in any one year. It is true, that the court ought not willingly to ascribe to the commissioners such motives, but when an outrageous valuation is shown, where, without it, the amount desired could not be assessed within the three per cent., it would seem to leave the court at liberty to draw no other conclusion. While the court should be blind to the parties, it should scrutinize their acts with a vigilant eye, and accept such inferences and conclusions as legitimately flow from them. We hold, without hesitation, that this is a proper subject of inquiry, and when established, constitutes a good defense. As no mathematical rule can be applied to determine, with certainty, the value of real estate, and especially unimproved city property,

it must be expected that the judgments of men will differ, and if commissioners honestly estimate property too light or too low, the court will not disturb it, but when an assessment is made so wide of the true value, as established by witnesses, as to raise the presumption that it was over estimated from design, and especially when the court can see the motives prompting to such design, it will not and ought not to hesitate so to find. The court did not err in admitting proof of the value of the property.

Some of the other questions presented in this case we do not consider it necessary now to examine, and others are settled in other cases.

The judgment is affirmed.

Judgment affirmed.

The City of Chicago, Plaintiff in Error, *v.* Benjamin B. Adams, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The exercise, by an inferior court, of its discretion in setting aside a default, will be rarely interfered with by this court.

This was a special proceeding, on the part of the City of Chicago, to collect an assessment levied for macadamizing West Randolph street from Halsted street to Union Park. The case was tried in the Superior Court of Chicago, and judgment taken by default. Afterwards, defendant in error filed a motion, supported by affidavit, to set aside the default, which was granted, and the collection of the assessment resisted on the same general grounds as in the case of *The City of Chicago* v. *Burtice*, *ante*, 489, and judgment rendered for defendant.

E. Anthony, for Plaintiff in Error.

Hoyne, Miller & Lewis, for Defendant in Error.

Caton, C. J. We find nothing in the law under which this proceeding was had, which prevented the court from exercising the discretion with which it is vested in all other cases, to set aside a default at the same term at which it is taken, and admit a defense to be made; and there is certainly as much propriety in exercising such power in this as in any other proceeding, when a proper case is made. Indeed, there may be a greater

necessity for it; for here the parties are not personally served with notice to appear and make defense, but only have constructive notice by advertisement in a newspaper, which may or may not come to their actual knowledge.

This court will rarely, if ever, interfere with the exercise of its discretion by the inferior court, in setting aside a default, and especially so when a default has been set aside, and a successful defense afterwards made.

The other question presented in this case, has been fully considered in the case of *The City of Chicago* v. *Burtice*, *ante*, 489, and what is there said will apply with equal pertinence to this case. We find no error in the record.

The judgment is affirmed.

Judgment affirmed.

The City of Chicago, Plaintiff in Error, *v.* Martin O. Walker, Defendant in Error.

The Same, Plaintiff in Error, *v.* James B. Waller, Defendant in Error.

The Same, Plaintiff in Error, *v.* J. Brenner *et al.*, Defendants in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The commissioners to make an assessment for a city improvement, having failed in their assessment roll to show what was the meaning of the column of figures headed "valuation," parol evidence is inadmissible to supply the deficiency.

Their return of the assessment roll, like the return of process, is amendable, and they should themselves have amended it, after having obtained leave from the common council so to do.

These were all special proceedings on the part of the City of Chicago, to collect assessments for improvements. On the hearing, it appeared that the column of figures headed "valuation" contained no dollar mark or other indication to show what they meant, except in the case of Martin O. Walker, and in that case it was shown that the words, "dollars and cents," which appeared at the top of the column headed valuation, had been inserted by some one since the assessment was confirmed by the common council.

There was no proof that it was done by the commissioners, or that leave to amend had been obtained from the council.

Plaintiff offered parol evidence to prove that the figures in

the column referred to, were intended to represent dollars and cents, which was excluded by the court, and exception taken.

E. ANTHONY, for Plaintiff in Error.

W. B. SCATES, for M. O. Walker,

HOYNE, MILLER & LEWIS, for J. B. Waller,

SCAMMON, MCCAGG & FULLER, for J. Brenner *et al.*,

Defendants in Error.

CATON, C. J. The only question which we propose to consider in this case is, whether it was competent to show by parol proof what was the amount of the valuation fixed by the commissioners in their return, under the column headed "valuation," containing only figures, without anything to show what those figures meant. We think the court properly rejected the parol evidence. In the case of *Brown* v. *City of Joliet*, 22 Ill. R. 123, we held that this return was like a return to process, and as such, was amendable. To that we are disposed to adhere, but it cannot justify the admission of parol evidence to take the place, and perform the office of an amended return. Suppose even the figures had been omitted in the column of valuation, it would be as competent to supply that omission as this. Suppose a sheriff, in his return to an execution, should omit to describe the property levied upon and sold, could it be contended, when it was subsequently called in question, that the sheriff could testify orally that the levy was on particular property, and thus help out the defective return? This would of course be inadmissible, while by an equally familiar principle he would be allowed, by the tribunal to which the return was made, to amend his return, and thus obviate the defect which would be otherwise fatal. The evidence showed that the alteration which was made to the return, in the first case, and which would have obviated the objection, was not made by the commissioners, and was consequently not their amended return. Besides, it was not made with the leave of the common council, by whom the process was issued, and to whom the return was made.

The judgment must be affirmed.

Judgment affirmed.

The City of Chicago, Plaintiff in Error, *v.* Rosenfeld and Rosenberg, Defendants in Error.

The Same, Plaintiff in Error, *v.* L. D. Hurd, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

The intention of the legislature, in the forty-third section of the amended charter of the city of Chicago, was to allow all persons, whose interests would be affected by a sale of the property, for the assessment, to appear and contest it, whether they be the legal or equitable owners, or mere incumbrancers.

The cases of *City of Chicago* v. *Adams*, *ante*, 492, and *Pease* v. *City of Chicago*, 21 Ill. R. 500, approved.

This was a proceeding on the part of the City of Chicago to collect a special assessment, which was resisted before the Superior Court by the defendants in error, who were mortgagees of the property affected. It was insisted, that as mortgagees they had no right to contest the collection, but the court below permitted them to do so, and rendered judgment in their favor. The case is now brought to this court to reverse that decision.

E. Anthony, for Plaintiff in Error.

W. B. Scates, for Defendants in Error.

Caton, C. J. We only propose to consider in these cases the question, whether a mortgagee may appear and contest the validity of an assessment, for if he has such right, he could not be prejudiced by the stipulation of the mortgagor. The forty-third section of the amended charter provides that, "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 interest therein, to hear and determine the same in a summary way, without pleadings." This statute authorizes any person having a claim or interest in the property assessed, to appear and make objections to the assessment. These terms are of themselves very broad and comprehensive, and the reason of the law and the policy which dictated these terms, require that they should receive a liberal and comprehensive construction. It was certainly the design of the legislature to allow others than those owning the fee of the land, or even those presently entitled to the fee, to appear and contest the assessment, so that it is a matter of no moment to inquire whether the fee of the land is in the mortgagor or mortgagee. The right to contest the assessment is not confined to any one

party, but different parties holding different and even conflicting interests in the same property, may appear and contest the assessment, each independent of the other. We think it was the intention of the legislature to allow all persons whose interests would be affected by a sale of the property for the assessment, to appear and contest it, whether they be the legal or equitable owners of the property, or mere incumbrancers.

The other question as to the setting aside of the default, is disposed of in the case of *City of Chicago* v. *Adams*, *ante*, 492.

That the objections to the assessment were well taken, is settled in the case of *Pease* v. *City of Chicago*, 21 Ill. R. 500.

The judgment must be affirmed.

Judgment affirmed.

Frederick W. Burnham, Appellant, *v.* The City of Chicago, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

The Superior Court of Chicago has authority to appoint special terms.

A judgment, entered as of the January special term, instead of the regular February term, by mistake of the clerk, will not be reversed on account of such mistake.

The only reason for sending to this court a copy of the publication of the notice of the collector of an assessment, is to show, that the court had personal jurisdiction of the parties; when the record shows that they have appeared and contested the proceeding, such copy is needless.

The charter gives the common council of the city of Chicago power to assess for graveling streets. The word "pavement," as used in the charter, defined.

When the court below has found that an assessment was made fairly and in good faith, this court will not disturb such finding without great reluctance; although the valuation might be so extravagant and unjust as to furnish good ground for a reversal.

This was a proceeding to levy a special assessment in the city of Chicago, heard before the Superior Court of that city. It was resisted by the appellant and others, for the following reasons:

Because the assessment made on said lots was made in accordance with what they were deemed benefited, and not in accordance with the value of the property assessed; and without reference to the assessment being uniform in respect to persons and property assessed within the jurisdiction of the body making the assessment; and is therefore unconstitutional and void.

Said lots were assessed knowingly, fraudulently, and intentionally, upon a valuation of from two to three times the real and true value of said lots at the time of making said assessment.

Said lots were taxed for said improvement, above named, from five to ten per cent. per annum on the value of the property assessed, and of the value of said lots.

There was no assessment roll published by the city clerk upon the return of the assessment roll to him by the special assessor, as required by section 3rd of an "Ordinance concerning assessments for public improvements," showing the names of the owners of the property or a description of said lots assessed for said improvement, prior to the confirmation of said assessment by the common council.

That there was not fifty per cent. of the cost for said graveling of South street paid into the city treasury before the work was commenced.

The city charter gives no power to the common council to assess for graveling streets.

The court, after hearing the evidence, some of which tended to prove that the valuation of the property was much greater than it was really worth, gave judgment for the city, and Burnham appeals to this court, other parties who were interested in the matter, having entered into a stipulation that their cases should abide the decision of the Supreme Court in the case of Burnham.

WHITE & WILLIAMS, and JESSE B. THOMAS, for Appellant.

ELLIOT ANTHONY, for Appellee.

CATON, C. J. The legality of the special term at which this application for judgment was made, may be properly first considered. Had there been no change in the Court of Common Pleas, there would have been no question made of the right of the court to call this special term. That court was vested with express power to call special terms at its discretion, the same as the Circuit Courts. The act of the last session changed the name of the court, provided for the election of two more judges, made the judge of the Common Pleas chief justice of the Superior Court, required it to hold monthly, instead of quarterly, terms, and declared that the court should continue, with all its powers, jurisdiction and authority, with the additional jurisdiction conferred by the new act. This power to call special terms was then expressly continued to the court, unless the other provisions of the act forbid its exercise. The new law required a monthly term of the court to be held, which was authorized to continue till the last Saturday of the month, and longer, if necessary to complete a trial already commenced. This, it is insisted, practically took away the power to call special terms,

by allowing no time out of the regular terms in which they could be held. This point was substantially decided, and the objection overruled, in the case of *Mattingly* v. *Darwin*, 23 Ill. R. 618, decided at the last term in the second division. We there held, that a circuit judge, foreseeing that he could not hold the regular term of his court, as appointed by law, might appoint a special term at any convenient time after the time at which the law required him to hold the regular term, for the purpose of disposing of the business pending in court, and which he should have disposed of at the regular term. The law which requires the circuit judges to hold their courts at stated times, also requires them to continue their terms till all of the business is disposed of, but this from necessity is only directory, as many contingencies may occur which may prevent a compliance with it. A state of things might exist by which the judges of this court could clearly foresee that it would be impossible for them to hold a regular term on the first Monday of the month, but that they could hold it on the third Monday, or on some other day during the month. In such a case, if we were right in the decision of the case referred to, it would be competent for them to appoint a special term to be held at any convenient time, not however, of course, to commence on the same day of a regular term, for then the regular term would supercede the special term, and the appointment of the special term would be a nullity. This special term was good, and might continue to be held till the first Monday of the succeeding month, when, of course, it would expire, and all subsequent proceedings in the court would be of the regular, instead of the special, term. The cases referred to, where this court held that the appointments of special terms of Circuit Courts were void, had reference to special terms appointed to be held on a day when the law had appointed a regular term in another county of the same circuit—cases quite different from this. We think the appointment of this special term was valid.

The next objection is, that the clerk has entered the judgment as of the January special term, instead of the regular February term, during which it was in fact rendered. No question is or can be made, that the court, when it rendered this judgment, had not jurisdiction to hear and determine the cause, and to render the judgment; and the question is, whether we shall reverse a judgment regularly entered by a court having jurisdiction to render the judgment, simply because the clerk misnamed the term of the court. Such misnomer could not vitiate a judgment which was in itself regular, proper and binding on the parties. We are of opinion that this objection cannot prevail.

The next is the objection, that the record, as sent up, did not contain a copy of the publication of the notice of the collector that he would apply for this judgment. If this notice was designed by the law to take the place of a summons to the parties interested, the only necessity for its appearing in the record would be to show that the court had jurisdiction of the persons interested in the land, and who were authorized to appear and defend the cause. Their appearance and the defense interposed by them, gave the court personal jurisdiction, and that it had jurisdiction of the subject matter, there is no question, since that is expressly given by the law. The notice, however, has been sent up.

The next point which we deem it necessary to consider is, that this improvement was not one of those mentioned in the statute, for which the common council is authorized to levy a special assessment. This objection arises from a misapprehension of the extent of the meaning of the word *pavement*. A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but it may be as well formed of pebbles, or gravel, or other hard substance, which will make a compact, even, hard way or floor. So is the word defined by lexicographers, and so is it understood by well informed persons in ordinary intercourse. Macadamizing is one mode of paving, deriving its name from the man who invented that particular mode. We think the improvement is not only within the spirit and intention, but within the express letter of the law.

The last objection which we shall notice, has created the most serious doubts in our minds, as to the propriety of affirming this judgment. It is the high valuation, by the commissioners, of the property assessed. The proof shows that it was very greatly above its real value, and induces a very violent suspicion, that the valuation was not the result of the deliberate judgments of the commissioners, but of some ulterior influence or consideration, and had the court below found it fraudulent, we should have cheerfully approved its decision. But we have great reluctance, when the court below has found that the assessment was made fairly and in good faith, to say, from a simple excess of valuation, that it was fraudulent. We will not say that the commissioners might not put so extravagant a valuation upon the property as to induce us to reverse, for that cause alone; but we will not commence with this case. Nor can we inquire how many times the commissioners went on to the land to view it, or how much they discussed, and canvassed, and deliberated on the subject before coming to a conclusion. There must be a limit to these collateral inquiries.

The other questions presented in this case have been decided in the others, and we do not think it necessary to go over them in detail.

The judgment is affirmed.

Judgment affirmed.

SARAH ELIZABETH TRACY *et al.*, Plaintiffs in Error, *v.* THE CITY OF CHICAGO *et al.*, Defendants in Error.

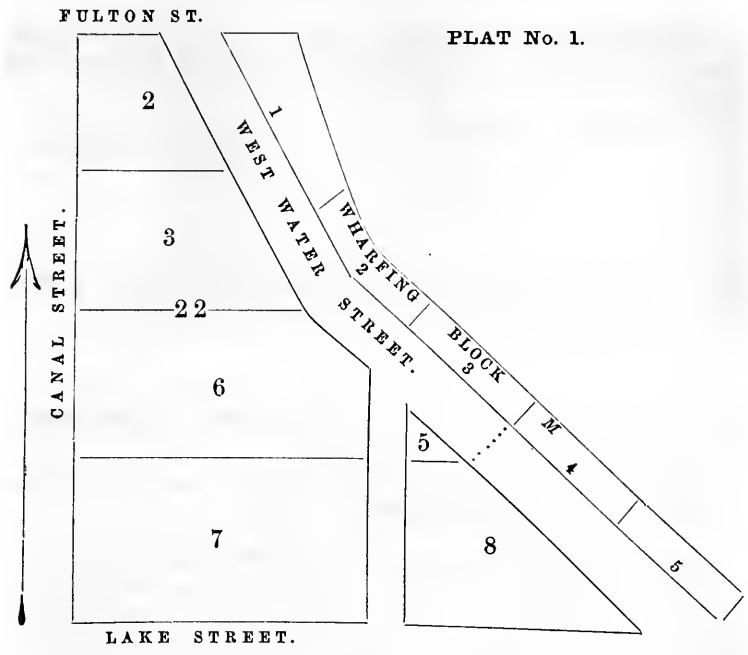
ERROR TO COOK.

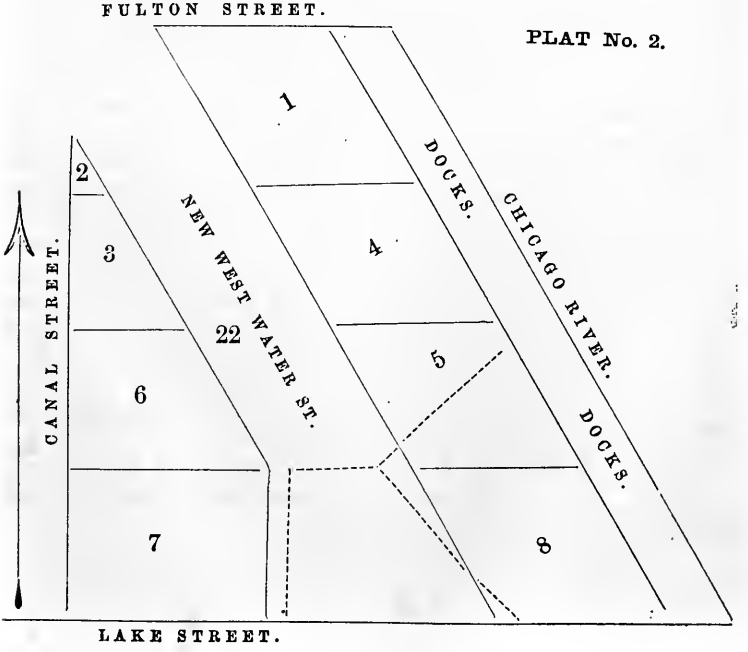
The intention of the parties to a written contract, as deduced from a fair construction of the words used by them, must govern, in deciding questions as to their rights under it.

A construction given to the words of the contract in this case, as applied to the word "front," in extending boundaries.

THIS was a bill in chancery, by Elisha W. Tracy, the ancestor of the present plaintiffs in error, against defendants in error, to compel a conveyance of certain land to him, from the City of Chicago, and to restrain the other defendants from setting up any claim or title thereto. These defendants, who were the owners of original lot 5, block 22, as shown in Plat No. 1, had received a conveyance from the city, of the new lot 5, (Plat No. 2), and were in possession, and the land claimed by complainant was a portion of said lot 5, as shown by the dotted line. The complainant was the owner of lot 8, in block 22, as laid out on the Plat No. 1, and his claim to the land in controversy was based on an agreement entered into by him and other owners of property fronting on West Water street, on the one part, and the City of Chicago on the other. The city had passed certain ordinances, containing a proposition to vacate old West Water street, and lay out a new street instead, offering to take from the owners of the property fronting on the original street, such portion of their respective lots as would be needed for the proposed street, and to convey to them in exchange, on their performance of certain conditions specified in the ordinances, "the premises in front of their respective lots."

The Plat marked No. 1, shows the condition of the property before the change. Plat No. 2 shows how the lots were bounded after the proposed change was made.


FULTON ST.
PLAT No. 1.
2
1
WEST WATER STREET.
WHARFING
2
BLOCK
3
3
22
6
5
M
4
5
8
7
CANAL STREET.
LAKE STREET.


FULTON STREET.
PLAT No. 2.
1
2
3
4
22
5
6
7
8
NEW WEST WATER ST.
DOCKS.
CHICAGO RIVER.
DOCKS.
CANAL STREET.
LAKE STREET.

The proposition was accepted, and conveyances made by the city, to the respective owners, so that they became the owners of the lots which are shown in Plat No. 2, and which are numbered in the same manner as their original lots, the city insisting that such conveyances were in accordance with the contract. Complainant, however, claimed that this construction was not the true one, and that under the contract, he was entitled to more land; that his north line ought to run, from his north-east corner, in a direction at right angles to the course of the river, till it reached the water, in the manner indicated by the dotted line in the plats, which runs from the north-east corner of lot eight, in a direction at right angles to the line of wharfing block M.

During the progress of the cause, the original complainant died, and the suit was revived in the name of the present plaintiffs in error.

The cause was tried before MANIERRE, Judge, and a decree *pro forma* entered, dismissing the bill.

The only question in this case is, as to the construction of the contract. The ordinances referred to, were as follows:

"1st. The city will cause to be dredged, to the depth of eleven feet below low water mark, so much of the west bank of the south branch of the Chicago river as lies east of a direct line drawn from a point one hundred and twenty-two and thirty-five one-hundredths feet ($122\frac{35}{100}$) east of the south-west corner of lot 9, in block 51, in the original town of Chicago, to a point two hundred and thirty feet and seventy one-hundredths of a foot ($230\frac{70}{100}$) east of the north-west corner of lot one (1), in block forty-four (44), in said original town of Chicago; and thence north, to a point two hundred and thirty feet and seventy one-hundredths of a foot ($230\frac{70}{100}$) east from the north-west corner of lot one (1), in block twenty-nine (29), in said original town of Chicago; thence to a point two hundred and thirty-nine (239) feet east of the south-east corner of lot seven (7), in said block twenty-two (22); thence to a point one hundred and forty-three feet and nine-tenths of a foot ($143\frac{9}{10}$) east of the north-west corner of lot two (2), in said block twenty-two (22); said east line to be so drawn that the same shall be seventy (70) feet at right angles from the east line of the new street hereinafter mentioned, and as laid down upon the accompanying diagram, marked Diagram of proposed excavation on West Side.

"2nd. The city will lay out a new street, extending from Madison street to Fulton street, seventy-five (75) feet in width, in such a manner that the east line of said new street shall commence on Madison street, at a point eighty (80) feet east of the south-east corner of lot ten (10), in block fifty-one (51), in said

original town; and thence run, in a direct line, to a point one hundred and sixty feet and seventy one-hundredths ($160\frac{70}{100}$) of a foot east of the north-west corner of lot one (1), in block forty-four (44), in said original town; thence north, to a point on the south line of lot nine (9), in block twenty-nine (29), one hundred and sixty feet and seventy one-hundredths of a foot ($160\frac{70}{100}$) east of the south-west corner of said lot nine (9), in block twenty-nine (29); thence north, in a direct line, to a point one hundred and sixty feet and seventy one-hundredths of a foot ($160\frac{70}{100}$) east of the north-west corner of lot one (1), in block twenty-nine (29); thence north-westerly, in a direct line, to a point one hundred and fifty feet and one tenth of a foot ($150\frac{1}{10}$) east of the south-east corner of said lot seven (7), in said block twenty-two (22); thence north-westerly, in a direct line, to a point fifty-five (55) feet east of the north-west corner of lot two (2), in block twenty-two (22), in said original town, and seventy (70) feet, at right angles, distant from the water line first herein mentioned; including in said street, also, all of the land in block fifty-one (51) west of the said east line, and between it and the west line of the alley dividing said block, and also including in said street all of that part of lot eight (8), in block twenty-two (22), which lies west of the said east line of said new street.

"3rd. The city will discontinue so much of West Water street as lies between the east line of said new street and the river, and will convey to the respective persons owning lots in said blocks the premises in front of their respective lots, in exchange for the land taken for the new street, the owners of said lots paying or securing to the city, in manner required in the proposition for the adjustment of the wharfing privileges on the south side of the Chicago river, sixty (60) per cent. of the following sums, and securing, in a manner to be approved by the mayor of said city, the other forty (40) per cent., to be paid when required by said city to pay for the dredging aforesaid."

(Here follows a list of the amounts to be paid on account of each lot.)

"*Be it ordained by the Common Council of the City of Chicago*:

"SEC. 1. That so much and such parts of West Water street as lie in front of blocks fifty-one (51), forty-four (44), twenty-nine (29), and twenty-two (22), in the original town of Chicago, and only such parts of said street as shall be mortgaged to the city of Chicago, as hereinafter provided, or the owners of which, or some other person or persons on their behalf, shall cause to be paid or secured to the city in such manner as shall be approved by the mayor or acting mayor of

said city, the amounts required to be secured to the city by mortgage or otherwise, or paid to said city as hereinafter provided, be and the same are hereby discontinued and vacated: *Provided*, that the new street, extending from Madison street to Fulton street, specified in the 2nd section of the proposition for disposing of the wharfing privileges on West Water street, contained in the report of the committee on wharfing privileges, concurred in by the common council, January 29th, 1849, shall be laid out, and the damages occasioned thereby paid without charge or expense to said city, except the expense of laying out the street and of assessing and collecting said damages within such time as shall be determined by the common council. *And provided, further*, that all persons owning lands adjoining said West Water street shall consent in writing to the discontinuance of so much of said street as is hereby discontinued and vacated; or such assent shall be dispensed with by act of the legislature of the State of Illinois.

"SEC. 2. Before the vacation and discontinuance of any part or portion of said street, as herein contemplated, shall take place, a mortgage of such parts or portions shall be executed to said city by the respective owners of the various parts or portions of land or town lots in said blocks which are opposite to or front on such parts or portions of said street as are proposed to be vacated, to secure the payment of sixty per centum of the sums set opposite the following lots respectively, or in that proportion for any part or portion of a lot fronting said street, said mortgage to be drawn and executed in such form and manner as shall be approved by the common council or the mayor or acting mayor, and to be deposited with the city clerk of said city, within such time from the date hereof as shall be determined or required by the common council, and said mortgage to be so drawn as to contain in substance the provisions of the twelfth (12) section of the proposition for settling wharfing privileges on South Water street and East Water street, north of Randolph street, passed in common council, February 11, 1848, or said sixty per centum shall be otherwise secured or paid to said city in such manner as shall be approved by the mayor or acting mayor of said city. (Here follows a list of the amounts to be paid by each lot.) And shall likewise pay or secure to said city, in such a manner as shall be approved by the mayor or acting mayor of said city, the remaining forty (40) per centum of said sums set opposite the aforesaid lots respectively, as aforesaid, to be paid when required by said city, for the purpose of dredging the west bank of the south branch of the Chicago river, as specified in the first section of said proposition for disposing of the wharfing privileges on West Water street.

"SEC. 3. In case it should be judicially determined, upon a bill to be filed under the act, entitled, 'An act to adjust and settle the title to the wharfing privileges in Chicago, and for other purposes, approved February 27, 1847,' that upon the discontinuance or vacation of said parts of said streets, the fee of the land now contained in the same is in some other party or parties than the city of Chicago, or the said respective owners of the various portions of land or town lots aforesaid, fronting the same, then this ordinance shall be null and void.

"SEC. 4. Ten feet, next and adjoining the river, of said wharves, shall be and always remain an open wharf, upon the same conditions and restrictions as contained in the settlement of the wharfing privileges on the south side of the Chicago river."

W. T. BURGESS, and C. BECKWITH, for Plaintiffs in Error.

SCATES, MCALLISTER & JEWETT, for Defendants in Error.

CATON, C. J. The question in this case is, what did the parties intend and understand by their contract, which consists, on the one side, of the proposition by the city, contained in the ordinances for the vacation of old West Water street, and the opening of the new street of the same name, and the acceptance of that proposition by the proprietors of the lots in the rear blocks. The proof does not show that the map or diagram attached to the answer, and marked A., was in Scammon's hands at the time alleged, or that Tracy ever saw it, so that we cannot say that he accepted the proposition as explained by that diagram; although, in the first section of the first ordinance, some diagram is referred to, which should have been proved and identified, in order to make it constitute a part of the contract. We must, therefore, rely upon the language of the ordinances, illuminated by the surrounding circumstances, in order to arrive at the true meaning of the parties. The ordinances propose to vacate West Water street in front of blocks fifty-one, forty-four, twenty-nine, and twenty-two, and to lay out a new street as therein proposed, and convey to the owners of lots in those blocks what remained in old West Water street in front of their lots, respectively, to a certain specified line on the margin of the river; and the question to be determined is, What did the parties intend, by the land lying in front of those blocks and of the lots, respectively? When we look at the maps, and trace out the lines of the proposed river excavation and of the new street, and apply an ordinary knowl-

edge of city property and streets, and business facilities in cities, we cannot doubt what was intended by the word "front," as used in these ordinances, and how it was understood by all parties.

And first, what did the city intend to vacate and make private property, in front of those respective blocks? Did they intend, in order to ascertain what lay in front of those blocks, to project the north and south lines of the blocks directly to the river, or did they intend to diverge those lines from the north-east and south-east corners of those blocks, so that they should strike the river at right angles to its course? A glance at the maps, as furnished by the complainant, shows, that to project the lines as last suggested, would angle or diverge the east ends of West Randolph and West Washington streets to the south, and the east ends of West Lake street and of Fulton street to the north, as they approach the river, through the property to be conveyed to the owners of the property in the rear of them. We shall not waste time to show that such could not have been the meaning of the common council in passing these ordinances, nor the understanding of the other parties in accepting the proposition which they contain. This is too patent to admit of a doubt. No change was designed to be made in the courses of these streets, and we cannot doubt that all understood that they should approach the river opposite those on the east side, as originally laid out. The symmetry of the city, facilities for bridges across the river at those streets, convenience of business, and the manifest interests of all parties, point unerringly to this, as the meaning of the ordinances and the intention of all parties. Indeed, it was not denied, or even questioned, upon the argument, that such is the meaning of the word *front*, as contained in the first section of the second ordinance.

If the meaning of this word, as here used, is such as to require a direct projection of the north and south lines of the several blocks, to the river, without regard to their courses, in order to determine what portion of West Water street was vacated, it seems to us very plain that the same word was used in the same sense in the third section of the first ordinance, and in the second section of the second ordinance, describing the property to be deeded to the owners of the property in the rear of the vacated street. This may be more apparent by quoting these several passages, and placing them together.

The first section of the second ordinance, providing for the vacating of the street, says: "That so much and such parts of West Water street as *lie in front* of blocks fifty-one (51), forty-four (44), twenty-nine (29), and twenty-two (22), in the original town of Chicago, * * * be, and the same are hereby

discontinued and vacated." As before stated, we cannot doubt that it was the intention of this ordinance, to project the north and south lines of these blocks direct to the river, in order to describe or ascertain what portion of West Water street was vacated, as lying in front of those blocks.

The language of the third section of the first ordinance is this: "The city will discontinue so much of West Water street, as lies between the east line of said new street and the river, and will convey to the respective persons owning lots in said blocks, *the premises in* FRONT *of their respective lots*, in exchange," etc.; and the language of the second section of the second ordinance, describing the same premises to be conveyed, but for another purpose, is this: "Before the vacation or discontinuance of any part or portion of said street, as herein contemplated, shall take place, a mortgage of such parts or portions shall be executed to the city, by the respective owners of the various parts or portions of land or town lots in said blocks, which are opposite to, or front on such parts or portions of said street as are proposed to be vacated," etc. Now, here the property proposed to be conveyed, in one place is described as lying in *front* of the lots, to the owners of which the conveyance is to be made, and in the other, as being the lots *opposite* to or fronting on the property. No attempt has been made to assign any reason why a different rule should be adopted for ascertaining what lies in front of or opposite to a lot, from that by which it must be determined what lies in front of a block. Manifestly, all understand the word *front* to mean the same, in both cases. If we adopt the complainant's rule for determining what lies in front of his lot, and so project a line from his north-east corner to the river, in a direction at right angles to the course of the river, for his northern boundary, we must, by the same rule, determine his southern boundary in the same way, and so he would not increase his river front, nor the quantity nor value of land to which he is entitled; but this southern line he has quite ignored in the bill, setting up no claim as to how that should be run, leaving, however, the inference, that he is quite willing to have the south line extended due east direct to the river, without regard to the course of the stream. If we could be persuaded to extend the black lines direct to the river, for the purpose of determining what is vacated in front of the blocks, and adhere to the same principle for the complainant's south line, but adopt his rule only for determining his north line, then indeed he would gather substantial fruits from this suit, but without this, his success would be valueless. Nor would he derive any valuable benefits, should we divide the premises in front of this block among the several

owners of the lots, as if it were an accretion to those lots, as it was urged, upon the argument, should be done. That rule would require us to distribute the outer front of the accretion to the owners of the lots, in proportion to their several fronts, upon the inner line of the accretion. Judging from the maps, this would give the complainant, if we run the south line of block 22 direct to the river, just about, if not precisely the land which he gets by projecting both his lines direct to the river, as is proposed by the city, and, as we think, was the intention of the parties. But, if we diverge the south line of the block, according to his rule, he would be largely the loser.

Placing this case, as we do, upon the construction of the contract, and the manifest intent of the parties, we have not deemed it necessary to review the cases cited, determining the rights of parties to salt marshes or meadows adjoining their uplands, nor to go at length into a consideration of the principles by which alluvium and accretions are distributed. In our view, these have nothing to do with this case. It depends solely upon the meaning of this contract, as expressing the intention of the parties, and of this meaning and intention, we have no doubt.

The decree dismissing the bill, is affirmed.

Decree affirmed.

John E. Cone, Appellant, *v.* Adamson B. Newkirk, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

A., acting as the agent of B., with the understanding that he was to have a reasonable sum for his services, made a contract with C. in reference to certain lands. This contract A. afterwards assigned to B. for the consideration as expressed in the assignment, of one thousand dollars. In the absence of all proof on this point, it must be held that one thousand dollars was the price agreed upon for the assignment, and B. is, in equity, liable for that sum.

This was a proceeding in chancery, by appellant against appellee, to have a certain writing of agreement delivered up, and an assignment indorsed thereon, canceled.

On the trial, the court below dismissed the bill at appellant's cost, who now brings the case by appeal to this court.

The material portions of the evidence will be found incorporated in the opinion.

John E. Cone, *pro se.*

Barker & Tuley, for Appellee.

BREESE, J. It appears, from the proofs in this cause, that an agreement was entered into between these parties on the 20th of March, 1854, by which complainant, a practicing lawyer of Chicago, agreed to give to defendant the full and exclusive benefit of all information he then had or might thereafter, during the continuance of the agreement, acquire, of the title to real property in Cook county; and for that purpose would examine the records in the office of that county, and enter in a book to be furnished by defendant, minutes or abstracts of the title of such tracts of land to which there were adverse titles and interests, as in complainant's opinion should be worth entering in such book, for the purpose and best interest of the defendant. He further agreed to do such other professional business as the defendant might require of him to do, in and about defendant's own business, and not otherwise. The defendant to pay complainant five hundred dollars per annum for such services, in monthly payments, and to pay for all disbursements made by complainant in doing the business as it might be necessary from time to time. It was further agreed, that either party might cancel the agreement by giving the other party thirty days' notice in writing.

The defendant was a practicing physician in Chicago, uniting with his business of healing the sick, that of speculating in doubtful titles. Complainant and defendant occupied the same office.

About three or four weeks after this contract was made, and complainant doing business under it, it appears by the testimony of George W. J. Cone, the brother of complainant, that complainant, through the witness, sent a written notice to defendant, notifying him, that he, complainant, had put an end to this contract. This was on Saturday evening. On the following Monday, witness was requested by the defendant to go to his office, which he did, and there the defendant told him that he had received the notice, together with a note or letter, both of which defendant took from his pocket and read to witness, and said to him, that he had not intended to hold complainant to the terms of the contract, and requested witness to say to complainant, that if he would go on with the defendant's business, he should be paid what was right and reasonable. Complainant did go on with defendant's business, and brought a suit for defendant against Rosella Chapron, for a certain tract of land. At this time, and up to the latter part of the winter of 1855, various efforts had been made by the defendant to purchase of one Charles S. Wright, of Racine, Wisconsin, certain lands in Sec. 6, T. 39 north, R. 14 east, belonging to him, which were in dispute, and which had failed, Wright declining to sell to

defendant at the price offered. In one of the conversations of defendant with Wright, he, Wright, said that he had made an agreement with the complainant to litigate the title, by which complainant was to receive one-tenth of the lands recovered, and that he could get along without selling.

Out of this agreement by the complainant with Wright, this controversy arises. It was a written agreement, and is Exhibit 6, and bears date, September 21, 1854. After the formal facts, and describing the lands, it stipulates in substance, that complainant was to recover the property from a sale under an execution, and prosecute to final judgment all suits that might be necessary for that purpose, and to use all reasonable diligence, etc., and clear the title as soon as it could be done by due course of law. The conveyance of one-tenth to be made to complainant, so soon as the title was established in Wright.

On the seventh day of October, 1854, the complainant wrote upon this agreement as follows: "In consideration of one thousand dollars, I hereby assign my interest in the above agreement to Adamson B. Newkirk, of the city of Chicago, county of Cook, State of Illinois, and said Newkirk hereby agrees to perform the agreements or covenants on my part to be performed by virtue hereof. Witness my hand and seal, etc., JOHN E. CONE. [SEAL.]"

This agreement, thus assigned, came into the possession of defendant by some means unexplained, and was placed by him on record the same day the assignment bears date.

George Cone testifies, that he knows, in September or October, 1854, after the date of this contract, there was an agreement partially concluded between complainant and defendant, by which complainant was to assign this contract with Wright to the defendant, and devote all of his time and legal knowledge to the examination and litigation of land titles which the defendant might purchase, and the defendant was to devote his time to purchasing, when he was directed so to do by the legal opinion of complainant, together with defendant's own judgment; he, defendant, to furnish money necessary for the purchases, and was to pay and cancel the indebtedness of complainant; and an agreement was reduced to writing between them for a copartnership in this kind of business, the complainant to have one-third and the defendant two-thirds of the profits. This draft of an agreement witness afterwards saw in the possession of the defendant, who said he should not execute it, as it was not written as he understood the contract, and then asked witness if he, witness, did not understand the agreement to exclude the Wright matter; that he, defendant, understood, that any subsequent purchase he might make of the Wright lands was to

be excluded from the partnership. The witness told him that he understood it otherwise. Pending this conversation, the complainant entered the office where this conversation took place, and he and defendant commenced talking; the complainant claiming that the agreement was to include all purchases made after its date, whether from Wright or any one else; the defendant said the agreement was all right, except including purchases that might be made of Wright, and that he would not sign the agreement. Before this conversation, witness had seen complainant write an assignment of his agreement with Wright to the defendant; witness cautioned complainant not to sign the assignment until the agreement between him and the defendant had been first executed, when complainant said, that he should not deliver it until the agreement between him and the defendant was "all fixed up." Did not see the assigned agreement afterwards, until he saw it at the recorder's office; the copartnership agreement was never executed, nor any copartnership entered into, nor did the defendant, to his knowledge, pay any of complainant's debts.

Complainant commenced and carried on the suit for Wright, in the Circuit Court of the United States, and recovered the land at the July term, 1856. There is no proof of any actual delivery of the agreement with Wright, by complainant to the defendant.

The defendant insists, that it was in pursuance of the original agreement with complainant, that he should have the benefit of their services; that they were rendered for him, and he was entitled to the full benefit of them, by his contract of March 20, 1854.

There is evidence tending to show that complainant was acting in his negotiations with Wright for the benefit of the defendant, and he did not hesitate to admit, on all occasions, that it was so, but the question comes up, was it in pursuance of the agreement of March 20, 1854? That agreement is of a very definite and limited character, and embraces only the business of the defendant. This arrangement with Wright was not the defendant's business, nor did he have any interest in it. He had utterly failed to make any arrangement with Wright for the purchase of any part of the property, and it was not until he had failed, that the complainant's skill and ingenuity suggested a way by which he could get an interest in the lands, which if he did obtain, he would convey to defendant. But was he to assign the benefit of his contract with Wright for nothing? Was he to pay out his labor, time and intellect in establishing Wright's title, for one-tenth of the whole, and of great value, worth twenty or thirty thousand dollars, and

bestow it upon the defendant for no consideration whatever? This does not seem reasonable, and while it is admitted he was negotiating for the defendant's benefit, it is inadmissible that he was doing so gratuitously, or under any contract. The services rendered Wright do not come under the stipulations of any contract to labor for the defendant.

There is proof of some agreement between these parties as to the terms on which complainant was to assign the agreement made with Wright to complainant. Defendant did not deny there was to be a partnership formed. He did not deny he was to pay complainant's debts, he only insisted that such purchases as he might make of Wright, particularly, were not to be entered in the agreement. There is no proof to show that at this time any purchase of Wright was contemplated. The defendant had failed, long before, to make any purchase of Wright. The assignment purports to have been for the consideration of one thousand dollars. The defendant received the assignment so written, and it must be understood, in the absence of all proof on the point, that that was the price agreed upon by the parties at the time, and the defendant ought to show that he has paid that consideration. The bill prays to cancel the assignment, and for general relief. We cannot, under the proof, allow the special prayer, but we can, under the general prayer, decree that the defendant pay to complainant the sum of one thousand dollars, being the amount of the consideration expressed in the assignment of Wright's contract with complainant, with interest from the date of the assignment, and that execution issue therefor; and this we do decree.

This will be doing equity between the parties. The decree of the court below is reversed.

The agreement of March 20 was terminated by notice, and for this service in obtaining one-tenth of Wright's land, the complainant has estimated it to be worth one thousand dollars, and the defendant has assented to it, by taking possession of, and recording the agreement and assignment.

Decree reversed.

William Moore, Appellant, *v.* George Smith, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

A contract for the sale of land, which provides for a forfeiture in case of non-payment of the purchase money, is mutually binding on the parties, even after default in payment has been made, until the vendor has done some act to terminate the contract. After such act has been done, the contract ceases to exist.

A purchaser under such a contract is held, after forfeiture, to be a tenant from year to year, or at will, and is entitled to remove trade fixtures which he may have attached to the freehold, while in possession. Such fixtures pass to the purchaser by a sale of the freehold, unless they are expressly reserved, or belong to the tenant.

Distillery pipes and machinery are trade fixtures, and may be removed by a tenant, who has erected or bought them, at any time while he is in possession.

THE record in this case shows, that on the 31st day of December, 1854, George Smith became the owner in fee of real estate described in the answers of the said Moore and Smith. On the 1st day of February, 1855, Smith made a written contract with one William Ray, to sell him the said real estate upon the following terms: Ray was to pay him $1,649.07 in five years from the 31st Dec., 1854, with interest at ten per cent., payable annually, and all taxes assessed upon the land; to keep the premises insured for $1,100, in Smith's name. If Smith paid the taxes and insurance, the same was to be charged to Ray as part of the purchase money. Smith covenanted to make a deed, upon the performance of the contract by Ray. If Ray made default, he was to be considered the tenant at will of Smith, at a rent equal to twenty per cent. interest. Payment by Ray was made a condition precedent, and time of the essence of the condition.

At some time before the defendant, Moore, made his contract to furnish machinery and fixtures for a distillery, James J. Todd and James McMahon had become interested with Ray, as partners, etc. Ray did not comply with his contract. He paid none of the principal or interest after Dec. 31st, 1858. There was, at the time of the contract with Ray, a building on the premises, which had been fitted up and was in use for a slaughtering and packing establishment.

On the 13th day of June, 1857, William Moore, one of the defendants herein, filed in the Circuit Court of Putnam county, his petition for a mechanics' lien on the premises, buildings, and machinery then situated and being on the same, which Smith had contracted to sell to Ray as aforesaid, against said Ray, James J. Todd, and James McMahon.

This petition was filed under a parol contract, made between Moore, Todd, and McMahon, about the 11th of June, 1856, under which said Moore furnished them with gearing, fixtures, materials, and machinery for a distillery, which they, the said Ray, Todd, and McMahon were erecting, or about to erect, on said premises. The petition is in due form, (as is believed,) and contains an itemized account of all the materials and machinery furnished by Moore, and which were put into the distillery, amounting in the whole to $3,061.95.

On the 9th of December, 1858, Moore obtained a decree for $2,258.95, which was adjudged and decreed to be a lien on the

premises. An order of sale was made, and upon the production of the commissioner's deed, defendants, etc., were ordered to surrender possession to the purchaser.

The property and premises were sold in February, 1859, to Wm. Moore, for $500, and a deed was executed to him by the commissioner who made the sale, all in due form, and which proceedings were approved by the court.

About the —— day of May, 1859, James J. Todd forcibly broke into the distillery, without the consent of Moore or Smith, and detached, removed, tore off, and took away from the building, the copper, lead, brass pipes, and other distillery fixtures, from the sale of which, the money deposited in court by the complainant was derived.

Todd shipped the various articles so taken by him to the complainant, Isaac N. Ash, who sold them for $610.85; and Moore and Smith both claiming the property, or the proceeds of the sale, Moore under his decree and sale under his mechanics' lien, and Smith under his title and claim as owner of the fee, Ash filed this bill to compel them to litigate and settle their respective rights and claims to the money arising from said sale, and which Ash had deposited in court, to await the judgment of the court in the premises.

The court below decided that Smith was entitled to the money, and Moore appealed to this court, and now assigns for error:

1. That the Superior Court of the City of Chicago erred in deciding and decreeing that the said money belonged to the defendant, Smith, and that the same should be paid to him.

2. In not deciding and decreeing that said money belonged to, and should be paid over to defendant, Moore.

N. H. Purple, for Appellant.

T. Dent, for Appellee.

Walker, J. The first question presented is, whether the clause of forfeiture contained in the agreement between Ray and Smith, upon default in payment of the purchase money, converted the possession by the purchaser into a tenancy at will, without any further act of the parties. The agreement contained a provision, that if Ray should make default in any payment of the purchase money or interest, the contract should be forfeited, and that he and his assigns should be tenants at will, at a rent equal to twenty per cent. on the amount of the purchase money, payable monthly. Ray and his partners failed to make the payment falling due December 31, 1858, but it nowhere appears that Smith ever did any act recognizing the occupants as tenants

at will. Moore became a purchaser of the premises under his decree, and received a deed in February, 1859, but it does not appear that Smith or Moore were in possession in May, when Todd entered and removed the lead, brass and copper pipes, and other machinery used in the distillery, the sale of which produced the money in controversy.

It is certainly true that Moore succeeded to all the rights of Ray, Todd and McMahon in the premises, by his purchase. If the contract of purchase had not then been forfeited, he acquired the right to complete the payment, and enforce a conveyance. If it had been forfeited, and converted into a tenancy at will, he succeeded to the right to possession of the property, subject to all the terms of the lease. Then did the default in payment by Ray or his assigns operate of itself to convert the agreement for a purchase, by the clause of forfeiture, into a tenancy, or did it require some act of Smith to produce that effect? In the case of *Mason* v. *Caldwell*, 5 Gil. 196, this court held, that a clause inserted in a contract for the purchase of real estate, which provided that should the purchaser fail to pay the money within ten days after it became due, he should forfeit all claim to the lands and money paid thereon, and the contract to be void in law and equity, and the title remain in the vendor as if no sale had been made, was not forfeited by a failure to make the payment. But that it must have been inserted as a penalty, which the vendor might enforce, to insure a prompt performance of the contract by the purchaser, and that the latter could take no advantage of his own failure to make payment. And that the contract was mutually binding on the parties until a forfeiture should be declared by the vendor. This principle was again recognized and applied in the case of *Hossack* v. *Caton*, *ante*, 127. It is decisive of this question. Until Smith did some act to terminate the contract of purchase, and to enforce the penalty, it must be regarded as mutually binding on the parties. He has thus far failed to exercise the right, and until he shall do so, Moore must be regarded as an assignee of Ray and as a purchaser. To have terminated the contract for the purchase and enforced the forfeiture, he should have manifested the intention by some act of his. *Chrisman* v. *Miller*, 21 Ill. R. 227. He has no right to insist, that the contract is binding or is forfeited, as he may choose. Until he has manifested a design to terminate the agreement, it is binding on the parties, but when that intention is once manifested, it then ceases to exist, and neither of the parties can insist upon its enforcement.

A purchaser let into possession may remove trade fixtures, placed upon the premises by him, at any time during the con-

tinuance of the contract. Such a purchaser, failing to make payment so as to lose the benefit of his purchase, is held to be a tenant from year to year or at will, and therefore entitled to remove fixtures which he may have attached to the freehold while in possession. *Raymond* v. *White*, 7 Cow. 321. And this class of fixtures pass by a sale of the property by the owner, unless they are expressly reserved by the conveyance, or belong to the tenant. *Hitchman* v. *Walton*, 4 Mees. & Welsb. 409; *Colgraves* v. *Dios Santos*, 2 B. & C. 76; *Steward* v. *Lombe*, 1 B. & B. 507; *Oves* v. *Ogilsby*, 7 Watts, 106. It then follows that these fixtures passed to Moore by his purchase under the decree, as no reservation was made. And this was so determined in the case of *Gray* v. *Holdship*, 17 Serg. & Rawle, 413, which was a sale under a mechanics' lien. The rule deducible from the adjudged cases seems to be, that the fixtures must be removed during the continuance of the term, or at least before possession is restored to the owner.

But if this view of the case was incorrect, and Ray and his assignees became tenants, by making default in payment of the purchase money, still they as tenants would have a right to remove trade fixtures, at any time during the continuance of the term. Moore being an assignee, and occupying Ray's position to the purchase, would undoubtedly succeed to this right as well as any other. And until that relation ceased to exist between him and Smith, he had the right to detach the trade fixtures, placed upon the premises by Ray and his partners.

It then remains to ascertain whether the articles removed by Todd fall within that class of things denominated trade fixtures, and which the law authorizes the tenant to remove. The question has undergone much discussion in the courts of Great Britain and this country, but in their decisions there is more harmony than is usually found on such questions. The larger majority of the cases hold, that all erections made for the purposes of trade, during the tenancy, such as soap vats, fire engines to work a colliery, pans used in manufacturing salt, brew-houses, furnaces and coppers, green-houses, hot-houses erected by nurserymen and gardeners, may be removed by the tenant. *Pool's Case*, Salk. 368; *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Warde*, Ambler, 113; *Lawton's Ex'rs* v. *Salmon*, 1 H. Blk. 259, in notes; *Miller* v. *Plumb*, 6 Cowen, 665; *White* v. *Arndt*, 1 Wharton, 91; *Guffield* v. *Hapgood*, 17 Pick. 301; *Van Ness* v. *Packard*, 2 Pet. R. 413. In the last of these cases, the Supreme Court held, that a two-story dwelling house, with a brick chimney and foundations, might be removed by a tenant, who had erected it during his term, for the double purpose of being employed as a dwelling and a dairy.

From these authorities, we think there can be no doubt, that the articles removed from the premises in this case, were trade fixtures, that might be removed from the freehold by the tenant, or a purchaser, when placed there by him, if removed before the possession was restored to the owner. These articles having been removed by Todd, one of the assignees of the contract, Moore had the right to affirm the act, and recover the proceeds of their sale, as they passed to him by his purchase. When they were dissevered, they were personal chattels, and Smith had no claim to anything but his real estate, and could consequently assert no right to them, or to the money arising from their sale.

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

Decree reversed.

JOHN E. SUTHERLAND *et al.*, Plaintiffs in Error, *v.* MARTIN RYERSON *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A party, to avail himself of the benefit of the statute relating to mechanics' liens, whether he be complainant or defendant, must show, by his pleadings and evidence, that his contract comes within its provisions.

Proceedings under this statute are, in all respects, governed by the rules of chancery practice, except so far as the statute has otherwise provided.

Parties defendant, to avail themselves of the lien, should set it up and claim its benefits, in their answer, or by cross-bill.

DEFENDANTS in error filed their petition for a mechanics' lien, in the Cook County Court of Common Pleas.

Petition alleges: "That petitioners are copartners, doing business at Chicago, in the firm name of Ryerson, Miller & Co., in the sale of lumber, and that July 19, 1855, they sold and delivered to Augustus F. Buschick, Washington L. Scoville, and Gustavius E. Buschick, a bill of lumber to the amount of $748.17, upon two months' credit; that said lumber was sold to said Scoville, Buschick & Co. for the purpose of being used, and was used by them, in erecting certain buildings on a certain piece of land," situate in Chicago, being south one hundred feet of south-east quarter of Block 55, School Section addition to Chicago. "And that the buildings so erected on said piece of land still remain there, and are the only buildings situate thereon." Also allege, the whole amount of said bill is due.

Sets forth, that John E. Sutherland, James B. Sutherland, and David R. H. Sutherland, the firm of Sutherland & Co., "also have a claim against said Scoville, Buschick & Co., for lumber sold and delivered to them during the year 1855, amounting in the whole to the sum of $325.03; that said Sutherland & Co. allege, that the whole of said sum is a lien upon said piece of land, and upon the buildings thereon."

And said petitioners further charged, upon their belief, "that a portion, but not all, of said last mentioned lumber was furnished to be used, and was used, for erecting said buildings, or the appurtenances thereto; that the value and purchase price of the said lumber so used, was about the sum of two hundred dollars, and not over that sum, and that said Sutherland & Co. have not any just claim or lien upon the said described piece of land or buildings, for more than the said sum of two hundred dollars."

Petition makes Alexander Siller and Francis A. Hoffmann, William S. Johnson and Charles Reisig, parties defendant, they having claims on the land, and asks an order of sale, and general relief, and that summons issue, etc.

The answer of John E. and David R. H. Sutherland admits, that they and James B. Sutherland compose the firm of Sutherland & Co., and "have a claim against said Scoville, Buschick & Co., for lumber sold and delivered to them during the year 1855, amounting in the whole to the sum of $325.03; and your defendants herein allege and claim, that the whole of said sum of $325.03, the amount of the bill for said lumber, is a lien upon the said piece of land, and the buildings thereon, mentioned and described in said petition;" and denies, "that a portion, but not all, of said lumber was furnished to be used for erecting said building and appurtenances thereto; but insists and claims, that the whole of said bill of lumber, to said amount of $325.03, was purchased for, and used in and about the construction of the building and appurtenances, on said piece of land mentioned in the petition herein, and is now a lien thereon."

And said John E. and David R. H. Sutherland, further answering, say, that they had, on the 3rd day of January, 1856, filed their petition as such firm, against said Scoville, Buschick & Co., in the Cook Circuit Court, to recover for their said bill of lumber, and asking that the same be declared a lien upon the said piece of land, etc., and "that such proceedings or suit is still pending and undetermined, and such petition was filed, and suit commenced, and defendants summoned, previous to the commencement of the proceedings herein, or the filing of the petition herein."

Jurat, etc. Subscribed and sworn to, etc.

The answer of Scoville, Buschick & Co. purports to be their joint and several answer; admits the lumber was purchased for, and used as stated in the petition; that the amount of Ryerson, Miller & Co.'s claim is correct, $748.17, and still unpaid, and that they had purchased the land in question, by contract, of William S. Johnson, Jr., as alleged in the petition, for the sum of $1,000, and had paid $500 thereon.

Decree entered, taking the petition as confessed as to the defendants, Alexander Siller and Francis A. Hoffmann. As to the rest of the defendants, the court says: "And it also appearing to the court, from said petition, and from the answers and papers on file in this suit, that the allegations and statements in said petition contained are true; on like motion, it is further ordered, adjudged and decreed, as against all of the defendants that have been served with process, or have appeared, to wit, all except James B. Sutherland, that the rights and liabilities of the petitioners, and of defendants respectively, are as stated and claimed in said petition; that said petitioners do have a mechanics' lien upon the premises in the petition set forth, and that the said petitioners do recover of August F. Buschick, Washington L. Scoville and Gustav E. Buschick, the sum of seven hundred and seventy-nine dollars and eighty-four cents; that the premises," etc., (here follows a description of premises,) be sold by the coroner and acting sheriff of Cook county; that the proceeds of such sale be applied to the payment of the sum so due the petitioner as aforesaid, and the costs of this suit; and that the petitioners are to be at liberty to apply to this court as occasion may require in the matter.

Special execution issued April 29th, 1856.

Land sold, June 2, 1856, for $750, and money paid over by sheriff to petitioners.

A. Garrison, for Plaintiffs in Error.

Farwell, Smith & Thomas, for Defendants in Error.

Walker, J. This was a petition filed against Buschick, Scoville and Buschick, by Ryerson, Miller and Morris. The Sutherlands and others were made parties, as having, or claiming to have, liens upon, or some interest in the premises, against which the mechanics' lien was sought to be enforced. The petition alleges that the complainants had furnished materials to erect a building on the premises, to the amount of seven hundred and forty-eight dollars and seventeen cents. They also allege that plaintiffs in error claimed to have a mechanics' lien, for $325.03 upon the premises, but they deny that it is a lien

for more than two hundred dollars. The Buschicks and Miller admit the lien of petitioners as alleged, but make no answer as to the claim of plaintiffs in error. Plaintiffs in error, however, answer, and allege that they have a lien on the premises for the entire sum of three hundred and twenty-five dollars and three cents, and that they have commenced proceedings to enforce it, in another court. On the hearing, the court decreed that petitioners had a lien on the premises, to the extent of their claim, and that it be sold for its satisfaction. In rendering the decree, the court does not notice the claim of plaintiffs in error, and they now seek to reverse the decree, for the reason, that their claim was not decreed to be paid from the proceeds of the sale of the premises.

The answer, filed by plaintiffs in error, does not pretend to set up, or rely upon, any contract, that would, under the statute, create a mechanics' lien. They do not allege that any time, was, by the contract, agreed upon for either the delivery of the materials, or for the payment of the money. Had this answer been a petition, there could be no pretense that it disclosed such a state of facts as could create a lien of this character; nor does the evidence in the case, show anything more than the answer. It is not the furnishing of the materials or labor alone, which creates this lien, but it is the contract of the parties, and the furnishing of the labor and materials under it, which have that effect. And a party, to avail himself of the benefit of the statute, whether he be complainant or defendant, must show, by his pleadings and evidence, that his contract comes within its provisions. In this case, the answer fails to show that the parties are entitled to a lien, and is, in that respect, totally defective. Nor is it aided by the allegations contained in the petition, which alleges that plaintiffs in error have a claim against Buschicks and Scoville, for materials furnished in 1855, which they claim to be a lien upon the premises. It likewise alleges that a portion only of the lumber furnished by them was to be used in erecting the building on the premises, and that the value of the portion so used, was not exceeding two hundred dollars, and they have not any just claim or lien on the premises for more than that sum. They do not allege that this debt was a lien, nor do they state facts from which the court can see that such a lien existed. They admit an indebtedness for lumber, a part of which was applied to the building, but do not admit that it was under such a contract as creates a lien, but only that the plaintiffs claim such. Then, as the record fails to disclose such a right in favor of plaintiffs in error, no error is perceived in the decree of the court, in not ordering the payment of their claim out of the proceeds of the sale of the premises.

Again, this court has held that this proceeding is governed in all respects by the rules of chancery practice, except so far as this statute has otherwise provided. This being the case, to have availed themselves of the benefit of their lien, they should have set it up and claimed it in their answer, or by cross-bill. The answer in this case does not insist upon the lien, nor does it pray for any relief, nor is there any indication that it was intended for a cross-bill, or that any relief was desired in this proceeding. The court was not asked to decree the relief now insisted upon, and had no authority to regard the claim of the plaintiffs in error on the hearing under the pleadings in the case. The mere admission, in their answer, that they have a claim, and their naked statement that it is a lien, is not sufficient, and does not authorize the court, on its own motion, to afford affirmative relief.

For these reasons, the decree of the court below is affirmed.

Decree affirmed.

John F. Seaman, and Ann Seaman, Appellants, *v.* Solomon A. Smith, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

The line at which the water usually stands when free from disturbing causes, is the boundary of land in a conveyance calling for Lake Michigan as a line.

Declaration in ejectment, appellee against appellants, for the following land, situate in Cook county, and State of Illinois, to wit: That part of the north-east fractional quarter of Sec. 22, T. 39 N., R. 14 E. of third principal meridian, bounded as follows: Beginning on west line of said fractional quarter section, $277\frac{20}{100}$ feet south from north-west corner thereof; thence east, to centre of Wabash Avenue; thence north, 34 feet; thence west, to west line of said fractional quarter section; thence south, 34 feet, to place of beginning. Also that part of said quarter section described as follows: beginning at a point equidistant from east line of Wabash Avenue and the west line of Michigan Avenue, and $277\frac{20}{100}$ feet south of north line of said fractional quarter section; thence east, to the centre of Michigan Avenue; thence north, 34 feet; thence west, to a point 34 feet west from place of beginning; thence south, to said place of beginning; which said premises are claimed in fee.

The plaintiff gave in evidence —

1. The patent of the United States to James Harrington, in fee for the north-west fractional quarter of Sec. 22, T. 39 N., R. 14 E. of third principal meridian, containing $106\frac{16}{100}$ acres.

2. Deed in fee from James Harrington and wife to John S. Wright, dated December 3, 1834, for part of said fractional section, being $43\frac{87}{100}$ acres off the north part, commencing at north-west corner of said fractional section, at a cedar post, east, 18 chains and 50 links, to a cedar post; thence east, to Lake Michigan, from said north-west corner, 17 chains and 82 links, to a cedar post; thence east, 18 chains and 50 links, to a cedar post; thence east, to the lake; thence north, following the course of the lake, intersecting the north line aforesaid, containing $43\frac{87}{100}$ acres, by survey, be the same more or less.

3. Deed from John S. Wright, to State Bank of Illinois, dated July 28th, 1840, in fee for last above described portion of land.

4. Deed from State Bank to Matthew Laflin, in fee, dated December 20, 1845, for the following described portion of said fractional quarter, commencing at the north-west corner of said section 22, at a stone; running thence east, 21 chains and 50 links, to Lake Michigan; thence south, 12° 45′, along the shore of said lake, 4 chains and 30 links; thence west, 22 chains and 45 links; thence north, 4 chains and 20 links, to the place of beginning; supposed to contain $9\frac{32}{100}$ acres.

5. Deed from Matthew Laflin and wife, to plaintiff, Solomon A. Smith, in fee, dated June 12, 1850, the following described portion of said quarter section, to wit: beginning at the north-west corner of said quarter section, thence south, on the centre of State street, $277\frac{20}{100}$ feet; thence east, $451\frac{28}{100}$ feet, more or less, to the centre of Wabash Avenue; thence west, $56\frac{32}{100}$ feet; thence west, $234\frac{14}{100}$ feet, more or less, to a point equal distance from the west side of Wabash Avenue and the east side of State street; thence north, $220\frac{28}{100}$ feet, to the west line of said quarter section; thence west, $217\frac{14}{100}$ feet, to the place of beginning.

Also that part of said quarter section, bounded as follows: beginning on north line thereof, equi-distant from east side of Wabash Avenue, $682\frac{45}{100}$ feet from north-west corner thereof; thence east, on said north line, $226\frac{17}{100}$ feet, to centre of Michigan Avenue; thence south, $277\frac{20}{100}$ feet; thence west, $226\frac{17}{100}$ feet, to a point equi-distant from east side of Wabash Avenue and the west side of Michigan Avenue; thence north, $277\frac{20}{100}$ feet to the place of beginning.

The defendants gave in evidence—

1. A deed from State Bank of Illinois to Augustus Garrett in fee, dated July 28, 1843, for the following portion of the said fractional quarter section, to wit, that part described as fol-

lows: beginning at south-west corner of that part thereof sold by James Harrington to John S. Wright, by deed dated December 3, 1834, and running north, along the west line of said fractional section, south and east to Lake Michigan, so as to include 33 acres of land, said land intended to be taken from the south end of north part of said fractional section.

2. A deed from said Augustus Garrett and wife, to said plaintiff, J. F. Seaman, of the undivided half of the premises conveyed by the last above mentioned deed, excepting therefrom the lot conveyed to James R. Maloney. The quantity intended to be conveyed being about 16½ acres.

It will be seen that under these deeds the true boundaries of the land sold Garrett, his being the first deed from the State Bank, depend upon the location of the line of the lake, as his tract, containing 33 acres, will be narrowed if the water line is pushed eastward towards the lake, and broadened if it is held to be farther to the westward.

The cause was tried by the court without the intervention of a jury, and judgment entered for the plaintiff.

Goodrich, Gookins, Thomas & Roberts, for Appellants.

C. Beckwith, for Appellee.

Walker, J. This record presents the question as to what answers the call for Lake Michigan, as a boundary line, in the various deeds in a chain of title, held by the plaintiff below. If high water mark is the point at which his land terminates, then this judgment should be reversed; but if, on the contrary, the line where the water usually stands when unaffected by storms and other disturbing causes, is the boundary, then the judgment must be affirmed. The question of which was the true line, was alone discussed upon the argument. The great lakes of the north, present questions affecting riparian rights, that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean, govern this case.

A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high water mark. *Cortelyou* v. *Brundt*, 2 J. R. 357. The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regular recurring periods, to the same points,

a portion of the shore is regularly and alternately sea and dry land. This being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide, is his boundary.

The principle, however, which requires that the usual high water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here, as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it be extended to the lowest point to which it may recede from like disturbing causes. But it should be at that line where the water usually stands when unaffected by any disturbing cause. The portion of the soil which is only seldom covered with water, may be valuable for cultivation or other private purposes. And the line at which it usually stands, unaffected by storms and other causes, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides.

Again, where is the lake, as called for by the deed? A fair and reasonable construction of the language, running to the lake and with the lake, would mean to that place where its outer edge is usually found. The mind would not understand that the highest point on the shore to which it had ever attained, or the lowest to which it had receded, was understood by the parties. Nor do we perceive any public necessity for adopting any other rule of construction, than the language naturally and reasonably imports.

These great bodies of water, having no currents, like rivers and other running streams, cannot present the same reasons why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water. Where such streams are called for as a boundary, the thread of the current is held to be the line, from each side. Such a rule could not, for the want of a current, be adopted in this case. It would not be sanctioned either by analogy to the rule, or by reason. And if the outer edge of the water be passed, owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed, or the shape it should assume.

We are therefore clearly of the opinion, that the line at which the water usually stands, when free from disturbing causes, is the boundary of land in a conveyance calling for the lake as a line. This was the rule upon which the court below acted, and the judgment must be affirmed.

Judgment affirmed.

William F. D'Wolf *et al.*, Appellants, *v.* Albert Haydn, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

Under a deed containing the words "grant, bargain and sell," an after acquired title of the grantor, enures to the benefit of the grantee.

Where a release of a mortgage is shown to be a forgery, purchasers can derive no benefit therefrom.

The right of redemption from judicial sales is a statutory right, and no decree of a court can take it away.

This is a cause in chancery, upon a bill exhibited by the appellee against Cyrus Adams, the appellants and others, to foreclose a mortgage. This instrument contained the words, "grant, bargain and sell."

The bill sets forth an indebtedness to complainant by the defendant Adams, and the execution by Adams to the complainant of a mortgage upon certain real estate, situate in Cook county, to secure such indebtedness, the whole of which, and some interest thereon, is alleged to be still due; mortgage is dated March 12th, 1855.

Alleges that there is on record in the recorder's office of said Cook county, a release and satisfaction of such mortgage, dated October 31st, 1855, (a copy of which is given,) which, it is charged, is a forgery, and that the complainant has never released or satisfied such mortgage; and prays for a foreclosure and sale of the premises in usual form.

The appellants and others are made defendants in the bill, as claiming an interest in mortgaged premises; which interests, it is alleged, are subsequent to complainant's mortgage, and subject thereto.

Two of the defendants thereto—D'Wolf and Eddy—make answer to said bill of complaint, denying all knowledge or information as to the indebtedness of their co-defendant, Adams, to the said complainant, or of the execution of the alleged mortgage, and requiring of the complainant strict proof thereof of its being genuine, and of the consideration that induced it; they ad-

mit the record of the release of complainant's mortgage, set forth in the bill as appearing upon the records of Cook county, and insist upon it as a full and complete bar to all the relief prayed in the bill; they deny that the release is a forgery, and insist that it is the act and deed of the complainant; also, whether it is so or not, they insist that this being upon the records without objection from the complainant, and without his having given any notice of the alleged forgery until after the respondents' right and interests in the mortgaged premises had been acquired by them, the complainant was in equity estopped from alleging the same to be a forgery, and that the complainant was bound by such release to its full extent and purport.

The respondent D'Wolf, then admitting the allegation in the complainant's bill, that he has title and interest in and to the mortgaged premises, sets forth such title and interest to be in him, as trustee for Quimby & Maclay, who, on the second day of November, 1855, loaned to his co-defendant, Cyrus Adams, twenty-six hundred (2600) dollars, and to secure the same, said Adams, on that day, executed, acknowledged and delivered to this respondent, a deed of trust of the same premises, as are described in complainant's mortgage, which deed of trust is duly recorded, and referred to; and that in pursuance of the conditions of such deed, the respondent had sold the premises to Lawrence & Sargent, who are, it is insisted, necessary parties to this action.

The respondent Eddy, admits that he has a claim and interest in the mortgaged premises, obtained in good faith and for a valuable consideration, without notice of the mortgage of the complainant, as set forth in his bill of complaint; and that such claim and interest were, by virtue of a mortgage to him executed by his co-defendant Adams, to secure a loan of $1,500, made upon May 8th, 1855; which mortgage is duly acknowledged, recorded and referred to in the answer.

These respondents in their answer further allege, that their respective claims and demands against their co-defendant Adams, are due and unpaid.

And that at the time of the making, to the said complainant by their co-defendant Adams, of the mortgage mentioned in the said complainant's bill, the said Adams had no title to the lands and premises therein described, and that the said Adams acquired title thereto afterwards, and that the aforesaid mortgage does not purport to convey an estate "in fee simple, absolute," nor does the same contain any covenants of warranty; wherefore they say, no estate or title ever passed from the said Cyrus Adams to the said complainant, by or in consequence of the said mortgage, and they insist upon these facts as a bar

to the relief prayed, as against them, and claim the same benefit and advantage therefrom as if the same were specially pleaded.

Defendant Adams was brought into court by notice of publication, and the bill of complaint was taken as confessed against him.

Complainant filed replication to the answers of D'Wolf and Eddy.

On the hearing, complainant read several depositions, showing that he was not in Cook county on the day when the release mentioned purports to have been acknowledged in that county. Also, the deposition of Nathan Allen, to the purport and effect that witness did not recollect taking the acknowledgment of complainant, to the aforementioned release of mortgage.

The testimony of Edward I. Tinkham was given, notwithstanding the objections made by defendants' solicitor to each and every interrogatory propounded by complainant's solicitor to the witness, to the effect, that on January 1st, A. D. 1853, witness sold to Cyrus Adams the lands and premises described in mortgage, as appears by the contract between the parties, and received pay as follows: January 1st, 1853, $368.31; January 3rd, 1854, $350; January 18th, 1855, 331.25. The balance was paid before the delivery of the deed.

On interrogatory by defendants' solicitor, witness says this deed was not delivered until October 31st, 1855. Numerous objections were taken to the admissibility of evidence, which fully appears upon the record.

Complainant's note against the defendant Adams was read, notwithstanding the objections of defendants.

Mortgage from Cyrus Adams to complainant was read, notwithstanding the objections of defendants.

Parties stipulated that the trust deed from defendant Adams to defendant D'Wolf, and the mortgage from said Adams to defendant Eddy, were executed, acknowledged and recorded at certain dates therein mentioned, which are the dates alleged respecting these transactions in the answer; that is, before the delivery of the deed from Tinkham to defendant Adams; from and by which alone Adams acquired a title to the lands and premises in controversy.

After which, the court rendered a decree against all the defendants, including Lawrence & Sargent, declaring the release mentioned in the complainant's bill to have been forged, and that the same be null and void, and that the aforementioned record thereof be canceled; that the mortgage be confirmed; that the mortgaged premises be sold under the order and direction of one of the masters in chancery, to pay the sum of $2,730, found due to the complainant, upon such mortgage debt; that the master execute a deed to the purchaser or pur-

chasers of the said mortgaged premises on said sale, and from the proceeds thereof, pay to the said complainant his costs in this suit, and the principal sum as aforesaid found due him upon the aforesaid mortgage debt, and interest thereon; that after such sale, the defendants and all persons claiming or to claim by, from, through or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises; that the purchaser or purchasers at such sale be let into possession thereof, and that the defendants deliver to such purchasers the possession.

Thereupon defendants prayed an appeal, which was allowed upon filing a bond as therein directed.

The points made by the appellants are, that the decree in this case is erroneous, for the reasons that—

The proofs of the alleged forgery of the release, set forth in the bill of complaint, are insufficient to establish the charge.

The court should not have admitted the testimony of Tinkham, and his contract with defendant Adams, in regard to the purchase by Adams of the lands and premises in controversy, from the witness.

If the release of the mortgage was fully proved to have been forged, the complainant against whom the forgery was committed, and not the defendants, who are purchasers of the property for a valuable consideration without notice thereof, should suffer the injury arising therefrom.

As the mortgage from defendant Adams to complainant was a mere quit-claim deed, not purporting to convey an estate in fee simple, absolute, nor containing any covenants, and as at the time of its execution Adams had no title to the lands and premises mentioned therein, his subsequently acquired title did not enure for the benefit of the complainant, but passed to the defendant D'Wolf, for the use of Quimby & Low, by the said Adams' deed of trust, and the reversion to the defendant Eddy by the said Adams' mortgage.

The decree, by ordering the lands to be sold and conveyed by the master without redemption, and immediate possession thereafter to be given to the purchaser at such sale; also, in barring the defendants from all redemption from and after such sale, is repugnant to the provisions of the statutes of this State, allowing redemption on judicial sales.

That if any interest in the land mentioned, passed by the mortgage from defendant Adams to complainant, all that could thus pass, in any view of the case, was the interest Adams had then paid for, to wit, three-fourths thereof—as the testimony of Tinkham shows that, at the time of such mortgage, Adams had only paid three-fourths of the contract price.

J. W. CHICKERING, for Appellants.

W. D. BARRY, for Appellee.

BREESE, J. We are satisfied the release and satisfaction entered of record, of the mortgage dated the 31st October, 1855, is a forgery. The proof is full to this point.

The conveyance by Adams to the complainant contains the words, "grant, bargain, and sell," which are adjudged by our statute to be an express covenant to the grantee, that the grantor was seized of an indefeasible estate in fee simple, free from incumbrances done or suffered from the grantor, and also for quiet enjoyment against the grantor, his heirs and assigns. (Scates' Comp. 961.)

The after acquired title of Adams enured, under this deed, to the complainant, by force of these covenants.

It is immaterial whether the defendants knew the release was a forgery, or not; they can derive no advantage from it, if it is shown to be a forgery.

Upon the remaining point, the court erred in not giving time for redemption after sale, as the statute provides. This right of redemption is secured by statute, and no decree of a court can take it away. (Scates' Comp. 977.) We can amend the decree here, which we do, by directing a redemption of the premises, in pursuance of the statute. The decree of the court below will be affirmed, with this modification.

Decree modified and affirmed.

WILLIAM BURKHART *et al.*, Appellants, *v.* CHARLES REISIG, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

The intention of the statute for mechanics' liens is, that the contract must have reference to some particular tract of land, or town lot, in order that the lien may take effect.

A petition for a mechanics' lien must state when the money was to be paid, in order that the court may know whether the suit is commenced within the time required by the statute.

THIS was a petition for a mechanics' lien, filed in the Cook County Court of Common Pleas, by appellee, against appellants, based on a contract which is set out in the opinion.

The case was afterwards transferred to the Superior Court of Chicago.

To this petition the defendants filed a special demurrer, and alleged, as causes of demurrer—

1. That it does not appear, by the said petition, that said contract was made with the owner of the premises.

2. The petition does not show a contract to erect said engine, etc., on the land or lot described.

3. It does not allege any contract within the meaning and spirit of the statute.

4. It does not appear that the petitioner furnished "labor or materials for erecting or repairing any building, or the appurtenances of any building," on said land or lot.

5. The case made by the petition does not meet the requirements of the statute.

6. And because the petition is in other respects informal and insufficient.

And thereafter, on argument of the said demurrer, the same was overruled, with leave to plead over, which not being done, the said petition was taken as confessed.

And afterwards, a decree was entered upon the verdict of a jury, finding the sum of $531.77 due the said petitioner for the materials and machinery constructed, furnished, and erected, by said petitioner, upon the premises as described in the petition; and thereupon the court decreed, that the said petitioner have judgment against the machinery and materials constructed, furnished, and erected by said petitioner, and that such machinery, and materials, and real estate be sold to satisfy said judgment, and that the said William Burkhart and Frederick Burkhart be foreclosed of all right and equity of redemption of the same, and all persons claiming or to claim said premises from or under them, be foreclosed from all equity of redemption from said sale.

A supplemental petition was subsequently filed by appellee, asking other and further relief against the defendants, but as the case is decided on the ground of fatal defects in the original petition, it is not thought necessary to give a more detailed statement.

WOODWARD, LULL & ABBOTT, for Appellants.

C. BECKWITH, for Appellee.

BREESE, J. To dispose of this case properly, it is only necessary to refer to the contract under which this engine and

appurtenances were furnished, and labor bestowed. It is made an exhibit, in the possession of the plaintiff, and is as follows:

"Articles of Agreement, made and entered into this twenty-second day of April, 1859, between Charles Reisig, of Chicago, Ill., party of the first part, and William and Frederick Burkhart, of the same place, party of the second part, to wit:

"The party of the first part agrees to build, for the party of the second part, one upright steam engine, of seven inch bore and twelve inch stroke, with a boiler, thirty inches diameter, ten feet long, with twenty-four flues, three inches diameter, also fire front and grate bars for same, and all the necessary pipes to connect said engine with said boiler. And said party of the first part further agrees to make the bed plate large enough to receive a second cylinder when wanted.

"In consideration of the above, the party of the second part agrees to pay the party of the first part, the sum of one thousand and ten dollars and twenty-five cents, in manner following: two hundred dollars on signing this agreement; two hundred dollars, when the work is finished at C. Reisig's shop; balance in four and eight months from the time it leaves the shop, secured by the notes of the party of the second part. The party of the first part hereby agrees to have the work complete in three weeks from date, and furnish one man to set up the same in the city of Chicago.

"Witness our hands and seals, the day and year first above written.

CHARLES REISIG. [SEAL.]

"In presence of A. SMITH." WM. & FRED. BURKHART. [SEAL.]"

No lot on which a lien could attach, is mentioned in the contract. There is no element of a lien disclosed in the case, and it is not, in any sense, within the statute.

The mechanics' lien law 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. (Scates' Comp. 156.)

It is averred in the petition, that the engine was placed and erected in the frame building of the defendants, situate on lot number 16, in block number 43, in Ogden's addition to Chicago, but there is no averment that the defendants were the owners of such lot, or claimed any interest in it, or that it was contracted the engine should be so placed and erected thereon. By the contract, the engine could be set up on any lot in Chicago.

We understand the intention of the law is, that the contract must have reference to some particular tract of land or town lot, in order that the lien may take effect. This is merely a contract to build an engine and appurtenances, and furnish aid to set it up anywhere in Chicago.

There is also another objection going to the averments in the petition, and which have been held fatal by this court, in *Cook* v. *Heald*, 21 Ill. R. 425; *Same* v. *Vreeland*, ib. 431; *Same* v. *Rofinot*, ib. 437; and in *Senior* v. *Brebnor*, 22, ib. 252. It is nowhere stated in the petition when the work was performed, nor when the money was to be paid. The contract provides for the last payments in four and eight months from the time the engine was taken from the shop, but there is no averment when that was. We cannot therefore know whether the contract is within the law, nor whether the suit was commenced within six months after the last payment became due, and this for the protection of creditors and incumbrancers. The averment that six months had not elapsed, does not answer this requirement, as the court must judge from the times given, whether it had or not.

The judgment is reversed, and the bill dismissed.

Judgment reversed.

JANE STOW *et al.*, Plaintiffs in Error, *v.* CHRISTOPHER C. ROBINSON, Defendant in Error.

ERROR TO COOK.

A court of equity has the power to execute a contract, by compelling the parties to receive what they have contracted for, and to perform what they have agreed to do, but has no power to compel a party to receive, or to do something different, from what he has contracted for.

Where one of the parties to a contract is prevented, by the other party, from performing his contract, and is in no default on his own part, an action at law, for all damages he has sustained by a breach of the contract, accrues to him; and this right of action survives to his representatives, in case of his death.

THE complainants, Jane Stow, late Jane Rattray, heir and administratrix of David Rattray, her husband, William H. Stow, and the other heirs of David Rattray, filed their bill of complaint against Christopher C. Robinson, to compel performance of the following agreement:

"Articles of Agreement, made and entered into between C. C. Robinson, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and David Rattray, of the

same place, party of the second part: Witness that the said party of the first part has purchased Block No. Forty-three of the subdivision of the Trustees of the Illinois and Michigan Canal, of Section No. Seven, Township No. Thirty-nine, Range 14 East, third P. M., and said Robinson hereby agrees that he will, in consideration with said Rattray, go on and get the said block subdivided as they shall mutually think proper, and for the interest of the parties, and said Rattray is to dispose of the same, either at private or public sale, as soon as practicable and thought proper by the parties, for one-fourth down, and the remainder to be secured by notes on one, two, and three years from the first day of May, 1849, in equal annual payments, and bearing interest from date. And the said Robinson agrees that he will, upon the payment of one-fourth in money, and secured by notes as stated above, execute his bond for a good and sufficient deed of conveyance when such notes are paid in full, provided such sale shall not average less than twelve hundred dollars in the aggregate. It is further stipulated and agreed, that the said Robinson is first to receive the amount of all money paid out for said purchase of said block or blocks, which is nine hundred and sixty-five dollars, together with interest on the same, then the balance to be equally divided between the parties; for which privilege the said Rattray is to plat, survey or subdivide the said lot or block, and advertise and sell the same at his own expense; which conditions well and truly to be made, the said parties hereto mutually bind themselves, heirs, executors, administrators or assigns.

"Witness their hands and seals this fifteenth day of May, A. D. 1849.

(Signed) C. C. ROBINSON. [SEAL.]
DAVID RATTRAY. [SEAL.]"

"In presence of
W. A. BALDWIN."

The bill alleges, that Rattray went on and subdivided the block into seventy-two lots, of which he sold nineteen for $977, and paid Robinson $866.62 of that amount.

That Robinson then stopped the sale of the lots, and refused to permit any more to be sold, or to make any more title-papers.

Bill prays for alternative relief. That defendant may permit complainants, as the representatives of Rattray, to go on and finish the said contract by selling. That complainants may proceed to sell all the lots, and pay Robinson his share of the money, with whatever interest he may be entitled to; or that complainants be permitted to pay defendant said sum of $110.38 and interest, and that the balance of the block be divided between the parties; or that a valuation be fixed on the said property

remaining unsold, and defendant be required to pay complainants one-half the value thereof, after deducting the balance of the money due defendant, of the purchase money of said block. Also for general relief.

As this cause is decided on the ground that it is not a case in which a court of equity can afford relief, the remaining pleadings are not inserted here. The master's report, to whom the matter was referred to take proofs, shows that the allegations in the bill, so far as they are given above, are true.

A decree was entered by the court below, dismissing the bill, and the complainants bring the case, by writ of error, to this court.

GOUDY & WAITE, for Plaintiffs in Error.

T. L. DICKEY, for Defendant in Error.

WALKER, J. This bill proceeds upon the supposition that Rattray, by the agreement, acquired an immediate vested interest in the land itself, and not in the proceeds realized from its sale. And the question whether the court erred in dismissing the bill, depends upon whether that is the true construction to be given to the contract. If it is, and the agreement is capable of being executed, then a specific performance of the contract may be decreed, otherwise the bill was properly dismissed. The contract expressly stipulates for the performance of labor and the exercise of skill, by Rattray, and for a compensation therefor, by a division of the profits which might be realized over and above the original cost of the land. It contained no agreement for any conveyance of any portion of this land at any time from Robinson to Rattray, or of any interest in it. But by the terms of the agreement, Robinson was to retain the title until the sale should be made and the purchase money paid. Until that occurred, it was the manifest intention of the parties that Robinson should not part with the title, and before he even obligated himself to make a conveyance, Rattray was to make the sale.

It is evident, from this agreement, that it was Rattray's skill and personal services for which Robinson contracted. And were others permitted to render that service in effecting sales, it would be to compel him to receive that for which he made no agreement. A court of equity has the power to execute a contract by compelling the parties to receive what they have contracted for, and to perform all they have agreed to do, but has no power to compel a party to receive something else, or to do other or different acts than those agreed to be performed. The

contract for Rattray's skill and services, was not confined to a sale of a sufficient amount of the property to refund the purchase money, but it extended to a sale of every portion of the premises. And so long as any portion of the property remains unsold by Rattray, his part of the contract has not been executed, and for the want of a full and complete performance by him, when the remaining portion is incapable of being performed, a specific execution of the contract cannot be decreed. The parties have failed to provide, by their contract, for the substitution of the heirs or representatives of Rattray, in case of his death, to execute his part of the agreement, by rendering their skill and labor. And although theirs might be equal or even superior, as it is not that for which the other party contracted, he cannot be required to receive it.

But it is insisted that Rattray was prevented, by defendant in error, from executing his part of the agreement by stopping the further sale of lots. If this is true, and Rattray was in no default on his part, an action at law accrued for a breach of the contract for the recovery of all the damages he had thus sustained. Or Rattray might have compelled him by bill, to permit the sale of lots to proceed, and to keep his part of the contract, as he was then able to render the service which Robinson had contracted to receive. If there was such a breach of contract by Robinson as is alleged, the action at law which then accrued, undoubtedly survived to Rattray's representatives. If there is any remedy in this case, it is at law, and clearly not in equity, and the parties must be left to seek their rights in that court.

The decree of the court below is affirmed.

Decree affirmed.

Isaac Cook, Appellant, *v.* Edwin Hunt, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

The acts depended upon to prove an estoppel *in pais*, must be of such a character as to leave no doubt that the party claimed to have been estopped, intended to assume a position inconsistent with his right, to make the claim sought to be barred.

The declarations and statements of an agent within the scope of his duties, are properly admissible in evidence against his principal.

The contents of a written contract cannot be proved, until the absence or loss of the writing has been fully and satisfactorily shown.

And when the contract has a particular place of deposit, or has been traced to the hands of a particular person, such place must be searched, or the person produced or accounted for.

The statements of a witness are admissible, when the object is to lay a foundation for impeaching him.

Persons called to sustain the character of an impeached witness, are bound to swear that they know his general character for truth and veracity, otherwise they cannot be heard on that point.

If the law is correctly laid down in instructions given to the jury, this court will not reverse the judgment simply because they were not marked "given."

SUIT commenced by Edwin Hunt against Isaac Cook, by summons. Declaration contains only the common counts for work and labor done, and materials furnished, money lent and paid, money had and received; goods, wares and merchandise sold and delivered, and labor, care and diligence bestowed. Damage, $3,500.

Plea, general issue. Cause tried before VAN H. HIGGINS, Judge, and a jury, and verdict for $1,678.83. Motion for new trial overruled, and judgment upon verdict; and appeal prayed and allowed.

On the trial, the plaintiff introduced *Carlton Drake*, who, being duly sworn, testified as follows: Knows "Young America," and knows of work being done on it by the plaintiff—rendered an account of the work done on it every week to Mr. Hunt. Witness was Hunt's foreman in the plumbing business. The work was done for Mr. Cook, on the Young America building, by Mr. Hunt. Witness superintended the sheet iron, tin and plumbing work; work was done in 1854, or commenced then, and continued in 1855. Heavy piece of work; one item was five hundred and forty-three and a half pounds of coil pipe, at one shilling per pound; three stink traps. Mr. Hunt made a large part of the entries. Mr. Cook went through with me several times, and I showed him the work. He said it was all right, go ahead. Van Osdell & Olmstead were the architects. Witness took the order from Mr. Olmstead, who represented himself as the exclusive agent of Mr. Cook. Witness usually took the orders from plaintiff in his business, in this case, from Mr. Olmstead. Knew Charles Christopher was a coppersmith. Never spoke to him about any plumbing work, nor knew of his undertaking any plumbing work, and never knew that he undertook the plumbing work at any time.

Cross-examination.—Commenced with Mr. Hunt, August 1st, 1854—left his concern three years since. I was to receive a portion of the proceeds of this work, and ten or twelve dollars a week besides. My pay depended in part upon the proceeds.

(The defendant objects to the witness as incompetent, and moves to exclude him and his testimony; the court overruled the objection, and the defendant excepts, which is noted.)

The defendant's counsel presents the witness with the archi-

tect's certificate, dated December 23rd, 1854. At the date of this, work had been done to the value of seven or eight hundred dollars. I called on Olmstead for estimate. He gave me, for Hunt, an order on Cook. He (Cook) would not pay it. I went back to Olmstead and got this order from Olmstead. Olmstead said Cook was a little notional, and he (Olmstead) would fix it all right.

(This statement by witness of what Olmstead said, was objected to by defendant; objection overruled, and exception taken to the ruling.)

Olmstead then gave me this order.

The paper writing then shown witness is as follows:

$400. *Chicago, December 23rd,* 1854.

I. COOK, ESQ.:—*This is to certify that there is due* to C. Christopher, plumber, *the sum of* four hundred dollars *for labor and materials furnished your buildings* on Young America, *as per contract, payable at sight at Chicago.*

Yours respectfully,

No. 1. VAN OSDELL & OLMSTEAD,

Couch's Block, Dearborn Street, Chicago. *Architects and Superintendents.*

(The parts in *italics* printed in original.) On which is indorsed, "CHRISTOPHER."

Chicago, December 23rd, 1854.

I. COOK, ESQ.—*Dear Sir:* Pay the within certificate to the bearer, C. Drake, and oblige

Yours respectfully, CHARLES CHRISTOPHER.

Received two hundred dollars on the within, December 23rd, 1854.

CARLTON DRAKE.

Received the within in full. CARLTON DRAKE.

Chicago, December 30th, 1854.

The other certificate produced to the witness is as follows:

$400. *Chicago, January 11th,* 1855.

I. COOK, ESQ.:—*This is to certify that there is due* to C. Christopher, plumber, the sum of four hundred dollars, *for labor and materials furnished your buildings* on Young America, as per contract, *payable at sight at Chicago.*

Yours respectfully,

No. 2. VAN OSDELL & OLMSTEAD,

Couch's Block, Dearborn Street, Chicago. *Architects and Superintendents.*

The words in *italics* printed in original.

On which is indorsed "CHRISTOPHER" (at the top.) Then below:

ISAAC COOK, ESQ.—*Dear Sir:* Please pay the within to C. Drake or order.

Chicago, January 11th, 1855. CHARLES CHRISTOPHER.

Received, Chicago, January 20th, 1855, two hundred dollars on the within.

CARLTON DRAKE.

Received, January 31st, 1855, two hundred dollars on the within.

CARLTON DRAKE.

Direct examination resumed by Judge Scates. — Ques. Was any reason assigned by Mr. Cook, if you ever went to him for payment of the order given payable to Mr. Hunt, or by Mr. Olmstead, when he substituted this as a mode of getting paid, more than Mr. Cook was notional? Ans. I do n't remember that I ever saw Mr. Cook on that first order. I am inclined to think I did not. Mr. Olmstead, in the first instance, was very particular that I should not go to Mr. Cook in that instance; says he, "they are crowding Mr. Cook," there were a great many estimates coming in. Of course there was a great deal of competition, says he.

(Burgess objected to evidence of Olmstead's statements. Argued by counsel, and objection overruled. Defendant's counsel excepted.)

Ques. State if anything was said by Mr. Olmstead in reference to Mr. Cook, at the time he was informed that Mr. Cook refused to pay the order, and gave you this order. What did he say, if anything, to show a reason why Mr. Cook would pay it in the form of an order to Christopher, or his indorsement, and would not pay it directly? Ans. I do n't remember that Mr. Olmstead gave any specific reason, anything further than he took the order and made the light remark, and said he would fix it. I took the order, and told him I did n't want any such order. Says he: "I 'll keep this order until Christopher assigns it to you." That was the first one, I judge, because I took it to Christopher and he signed it.

Ques. Did he give you any reason why he would pay it in that shape? Ans. Nothing more than I have stated.

Ques. Did he tell you that Christopher was the contractor, and you must go to the contractor? Ans. I judge not, because I never thought Mr. Christopher had anything more to do with it than you have. I never dreamed that he did, until recently. I had no knowledge in any way or manner that Christopher was in any way connected or interested in that plumbing work with Isaac Cook in the Young America building, until since the work was completed.

Mr. McAllister. It is conceded, I suppose, that Mr. Cook was the proprietor of that building.

Mr. Burgess. Oh, yes.

Ques. Have you been settled with by Mr. Hunt in full? Have you any interest in this suit? Ans. No, sir.

Ques. You have settled with Mr. Hunt and received pay in full for this matter? Ans. Yes, sir.

Ques. *By the Court.* Were you present when these several entries were made in the books, and did you compare them

from time to time? Ans. Yes, sir; very particularly; Mr. Hunt was very peculiar.

The account (bill of particulars) and the book were here produced, the witness coming down from the witness box and examining and comparing the items in the bill with the entries in the book, assisted by counsel.

Ques. Are they correct? Ans. Yes, sir; and they correspond with the journal. The balance due, is $1,678.83.

Ques. *By the Court.* How far had the work progressed when Mr. Cook spoke to you, or saw you at work on the building? Ans. I should think probably the sticks of soil pipe were in, and the pipes leading through the building for the supply of the water closets, wash room and boilers, and wash basin, were in. That is a pretty heavy amount of material. It was put in before the floors were laid.

Ques. That is, before he first saw you at work? Ans. A good share of it was done before cold weather, probably along early in the fall. The building was a great ways behind the time.

Ques. When did he first see you at work there? Ans. I don't remember distinctly.

Ques. Was it before or after these orders were made, or any of them? Ans. I think there had been one order drawn on him before he saw me. There is an order out yet, in somebody's possession. I don't remember the time distinctly.

Ques. *By Mr. McAllister.* Was he there from time to time while you were doing the work? Ans. Yes, sir; he was there several times during the progress of the work. It was not an unusual thing to see him through the building three or four times a week, perhaps every day.

Ques. Did he know you, personally? Ans. Yes.

Ques. Did he know where you worked? Ans. I think he did.

Ques. What reason have you for thinking so? Ans. From the fact that Mr. Cook has known me, personally, for ten or twelve years, and would be very apt to know. I don't know that I ever took particular pains to tell him, or that any very particular pains ever took place between us as to the work.

Ques. *By Mr. Burgess.* Nor who you were working for? Ans. No, sir. I have seen Mr. Cook at the store several times.

Ques. *By Mr. McAllister.* Do you know that Mr. Olmstead knew that you were at work for Mr. Hunt? Ans. Yes, sir; he knew that we did.

Ques. He was at the shop, was he not? Ans. A great number of times.

Ques. Was he the architect that superintended the work?

Ans. Yes, sir; superintended it in person. I don't remember ever seeing Mr. Van Osdell in the building with any appearance of superintendence. During the construction of the work, I have seen him in the Young America.

Ques. During what period of time was this work in progress from the time you commenced until you finished? Ans. I am inclined to think from August until after frost came out in February or March. August, 1854, I think it commenced.

Ques. What time do you think you got through? Ans. I am under the impression it was the next March, 1855. I recollect the circumstance of its being very difficult to get the supply in from the street, and the frost was coming out of the ground. The ground was floating a great deal.

Ques. During all this time Mr. Cook was in the habit of coming in several times a week? Ans. Yes, through the winter season.

Ques. And Mr. Olmstead superintended the work during all this time? Ans. Yes, sir.

Ques. *By the Court.* What time did Christopher run away, or go away? Ans. Well, I don't know. I am not positive; I should think probably along in February or March, 1855.

Ques. Was this man, Christopher, in the plumbing business at all? Ans. I never knew of his having anything to do with it. He carried on the copper work for the Young America. He furnished the boilers for the range and the connection; and also the pipe that took the water from the roof to the main reservoir, that supplies the works below in case of failure of the supply from the hydraulics. It was a large reservoir. That was made of copper. That Christopher made. That was the only work I knew of his doing.

Ques. That was his business? Ans. Yes, sir; he was a coppersmith. I never knew of his doing any plumbing. I never saw any more lead on his place than I could carry off on my back, I am sure.

Ques. His place was next door to Mr. Hunt's? Ans. Yes.

Second cross-examination by Mr. Burgess.—Ques. Is it impossible for a man to take a plumbing contract without having lead? Ans. Yes; he might send men out and run a shop away from his place.

Ques. That paper reads "as per contract." Do you know that Christopher has that contract, or not, from that paper? (Objected to.)

Mr. Burgess. I want to ask if he don't understand from the face of that paper, that Christopher had the contract for that work.

The Court. That is objectionable.

Ques. Did you read this paper? Ans. Yes; that is, when you handed it to me.

Ques. Did you when you received it? Ans. Yes, undoubtedly. I took it as I have taken a great many orders, or a check. I would look at the amount; I presumed it was a check, and if the amount was paid, I would be satisfied.

Ques. Do you say you took it at the time as a check? Ans. No, I took it as a draft on Isaac Cook.

Ques. In favor of Mr. Christopher? Ans. Well, I supposed—

Mr. Burgess. Never mind what you supposed.

Witness. I took it as the result in favor of Edwin Hunt.

Ques. But I am asking you what it was. It was an estimate in favor of Christopher, was it not? Ans. If I did not know any better, I should think so, perhaps.

Ques. The paper itself notifies you that it is a contract with Christopher? Ans. No, sir. (Objected to.)

Ques. Is this the book you compared the entries with? (alluding to the book before the witness). Ans. Yes, sir; I think it is.

Ques. *By Mr. McAllister.* Did you say that you took that order as made, paying Mr. Hunt for his services? Ans. Yes, sir, that was the exclusive intention.

Mr. McAllister announced that the plaintiff had several witnesses to prove the work alleged to have been done, to have been actually performed.

Mr. Burgess said, (also Mr. Cook), it was not disputed.

Lewis Wolf called, and sworn. Worked for Charles Christopher in the latter part of 1854, and beginning of 1855. He was a coppersmith. Never did any plumbing work. Worked at copper work on Young America. Do n't know about the plumbing work.

Carlton Drake recalled. Ques. State, if you please, if you presented the bill of all the work that was done for Mr. Cook by Mr. Hunt? Ans. Yes, sir.

Ques. All mixed up as it had been done, and whether Mr. Cook did not request you to have it divided? Ans. One general bill was presented, including bell-hanging and the tin work.

Ques. Did he make any request to have the bills separated?

Mr. Burgess. What did he say? Ans. There was one general bill presented, and Mr. Cook returned the bill with the request that the bill should be separated into three distinct items, which included the bell-hanging, the tin and sheet iron work, and the plumbing work.

Ques. Did he make any objection to any? Ans. I do n't remember that there were any objections made, or any remarks

made in reference to the bill, in any shape or manner, further than I returned the bill, and I supposed the items had been selected.

Ques. It was a general bill, including the items in the order in which the work had been done from week to week? Ans. Yes.

Ques. Of each character of work? Ans. Yes.

Ques. State if Mr. Hunt carried on the tin business? Ans. Yes, sir.

Ques. Is that separate from plumbing? Ans. It is rather a distinct line of business, and could not be connected very conveniently.

Ques. Did he have some tin work done in that building? Ans. Yes, sir; by the same men, orders emanating from the same source, through me.

Ques. Did you superintend the tin department? Ans. Yes.

Ques. Did Mr. Cook make any objection to the manner in which the work was done, or to the paying Mr. Hunt? Ans. He never raised any objections in my presence, or to my knowledge.

Ques. *By Mr. Burgess.* Are you certain that you would have understood them if he had made objections? Ans. It is very reasonable to suppose, if he had objected to any portion of it, I would.

William B. Olmstead, for the defendant, testified as follows:

Ques. Did you hear Mr. Drake's testimony this morning? Ans. Yes; I did.

Ques. You are the Olmstead referred to? Ans. I am.

Ques. Do you know anything of the work done on the Young America? Ans. I superintended it, by Mr. Cook's direction.

Ques. The defendant? Ans. Yes.

Ques. Do you know anything about the contract for plumbing work on that building? Ans. I made a contract with Mr. Christopher, by Mr. Cook's orders. It was in writing. I left it in my safe when I went away, and I have not found the man it was left with.

Ques. Did Mr. Hunt do the bell-hanging and some tin work? Ans. I don't know whether he did or not.

Ques. Who worked at the plumbing? how happened it to be done? Ans. I shall have to tell something of a story to get at the facts. Some time previous to the work being let, Mr. Drake called on me, and said he was prepared to do the plumbing work. He had fixed things so with Mr. Hunt, or it was so arranged with Mr. Hunt, that he was enabled to go on and do any amount of work. I told Mr. Drake I would do all

I could to get him the work. He said he would be glad to have me. It lingered along in that shape for a few days. I told him I thought Mr. Christopher would get the work. From a conversation I had with Mr. Cook, he was inclined to give it to Christopher; he was an acquaintance of his, and he wanted to help a poor man. I told him if he managed right he might get the work of Mr. Christopher, but it would have to be let to Mr. Christopher. I afterwards learned from Mr. Drake that that arrangement had been made, and that he was to do the work for Christopher. I told him under those circumstances I should be favorable to Mr. Christopher having the work. I did n't know anything about Mr. Christopher. About that time Mr. Cook and Mr. Drake and I met, and Mr. Cook ordered me to make the contract with Mr. Christopher to do the plumbing work, with the understanding between Christopher, Drake and myself, that Mr. Drake was to do the work for Mr. Christopher.

Ques. Where did you last see that contract between Mr. Cook and Christopher? Ans. In the safe.

Ques. Where was your safe? Ans. In my office on Washington street.

Ques. When did you last see that safe? Ans. About two years ago in July.

Ques. Where did you leave it? Ans. In my office. I left the safe with Mr. Jenkins, and when he went to St. Louis, he left the safe in charge of Mr. King. He is out of town. I don't know where he is. He is a money broker when he can get a chance to shave; as near as we can find out, he had the safe sold, but the papers in it we can't hear anything of. I have had a gentleman looking some months to see if he can find the safe, to try and find where the safe is. It is a Lillie's safe.

Ques. What sort of a lock? Ans. The lock was fastened with figures.

Ques. You need not state the figures. Is it one that fastens with numbers? Ans. Yes; undoubtedly the contract, if any was in the safe, has been taken out. I don't know what has been done with the papers. He can probably explain it. I thought Mr. Marshall — (Objected to.)

Ques. *Mr. McAllister.* Explain about hunting a month for it? Ans. I said I had a gentleman looking over a month for my safe, for my books. He is in the room, and I believe is a man of truth and veracity.

Ques. *By Judge Scates.* Who is the man that hunted for the paper? Ans. Capt. Cleveland.

Ques. *By the Court.* Are you sure it is in the safe? Ans. I left it in the safe.

Ques. When did you last see it? Ans. It will be two years in July.

Ques. Is it with any other papers you recollect? Ans. Yes, sir; all my other papers; I have not seen them since.

Ques. Haven't you opened that safe within two years? Ans. No, sir.

Ques. Where does Mr. King live? Ans. I don't know.

Ques. What King is it? Ans. His name was Benjamin.

Ques. Did he sell out to Mr. King? Ans. No, sir; Mr. King sold out to somebody else.

Court adjourned.

William B. Olmstead recalled. Ques. Have you found that safe you were speaking of last evening? Ans. Yes, sir; we found the safe—it had been opened.

Ques. Did you find your papers? No, sir; the safe was sold at auction, last November, and the papers taken out by Mr. King, (Ben. King). I went to his boarding-house, and found he had gone out of town. I could not get access to his papers. I called on Dr. Hathaway, and every one I knew of, I had reason to suspect would know where they were, if there were any such papers there.

Mr. Burgess. We have made pretty thorough search; I have myself engaged in the search for these papers.

Mr. Burgess proposed to prove the contents of the contract alleged by this witness. (Objected to. Objection sustained by the court. Defendant's counsel excepted.)

Carlton Drake recalled by the Plaintiff. Ques. Did you hear Mr. Olmstead's testimony in regard to a conversation between him and Christopher and yourself? Ans. Yes, I did; between Mr. Christopher himself, and myself and Mr. Cook. I never had any conversation with the three, making myself the fourth, in my life. I never remember that I did with any two of them, outside of taking Mr. Cook through the building, to show him the work, have any conversation with Mr. Cook. I never knew anything about Mr. Christopher, or that he had any claim or interest in the matter.

Ques. Did you ever negotiate or contract, or undertake to do that work under Christopher? Ans. No, sir; never.

Ques. Is the fact so or not, that you knew otherwise than by what appears on the face of these orders, that Christopher had any pretense to a contract about it? Ans. Not that I know of.

Ques. Was the fact ever communicated to you by Mr. Cook, Mr. Christopher, or Mr. Olmstead? Ans. No, sir.

Ques. Do you state that the fact is not so? Ans. I should think it would not be so; I am quite certain. He was an irrespon-

sible man entirely. I do n't think I would have entered into an agreement to the amount of $500 or $600 without knowing his business character—knowing nothing of his financial character. He was a coppersmith on a small scale; he was not a man of means. I do n't suppose he was responsible for the value of ten cents; I supposed so; I did n't know anything further than appearances. I would not have undertaken a contract from him.

Ques. (Presenting order.) Did you see that order made and given? that certificate—that top paper? Ans. I called for it and received it myself. It was signed by Mr. Olmstead; filled out by Mr. Olmstead, and not as you find it there.

Judge Scates offered the paper in evidence. (Mr. Burgess objected, as it was not a matter for which Mr. Cook was shown to be responsible. Objection overruled. Defendant's counsel excepted.)

Certificate read as follows:

$400. *Chicago, December 13th,* 1854.

I. Cook, Esq.: *This is to certify that there* is due to E. Hunt, for plumb work, *the sum of* four hundred dollars, *for labor and materials furnished your buildings,* on Young America, *as per contract, payable at sight at Chicago.*

Yours respectfully,

No. 1. VAN OSDELL & OLMSTEAD,

Couch's Block, Dearborn Street, Chicago. *Architects and Superintendents.*

The remaining evidence is all in reference to Mr. Olmstead's character for truth and veracity. It is very voluminous, as a great many witnesses were called on both sides. The only question which arises under it is, whether a witness, called to sustain one who has been impeached, must first swear that he is acquainted with the general reputation, for truth and veracity, of the person impeached. The court decided that he must do so.

The plaintiff tendered the court, to be given to the jury, the following instructions, viz.:

1. If the jury believe, from the evidence, that the plaintiff, by his employees, furnished the materials and performed the work in question for the defendant in this suit, without any special contract therefor between plaintiff and defendant, but the defendant knowing that the same were furnished and done, as aforesaid, at the time the same were being furnished and done, received and used said work and materials, the law implies a promise on the part of the defendant to pay the plaintiff the fair value of such work and materials.

Given.

2. That if they believe, from the evidence, that defendant, Cook, made a contract with C. Christopher for the materials

and plumbing work on the Young America, yet if they also believe that the architect in charge and superintendence of the building requested plaintiff to do said work, and said plaintiff did perform said work and furnish said materials, with the knowledge and assent of defendant, and without any agreement with, or employment by, said Christopher, and without any knowledge of said contract with said Christopher, but for and on account of said Cook, then he is entitled to recover the value of said work and materials.

Given.

3. If the jury believe, from the evidence, that the plaintiff's account in question in this case was presented to the defendant, Cook, and that the defendant at that time requested the same to be made out in three separate accounts, and did not object otherwise to the same, these facts are competent and proper evidence for the jury to consider in determining the defendant's liability in this cause.

4. If the jury believe, from the evidence, that Olmstead, as superintendent of the work in question, ordered the plaintiff, by or through Drake, to do the work, and furnish the materials in question in this suit, and that the defendant, with knowledge of such facts and the circumstances, paid the plaintiff for a part of said work and materials, such payment, as aforesaid, is some evidence of a satisfaction, by Cook, of the acts of said Olmstead in ordering such work and materials, and the acts of said Olmstead in that behalf will be evidence tending to bind Cook, although the jury may also believe that Olmstead had no authority from Cook, at the time such order was given, to order said work.

All of which, the court gave to the jury, the last two without writing upon them or otherwise marking them in the margin, or elsewhere, "given," or "refused."

To the giving of which instructions, the defendant then and there objected, which was noted.

And the defendant tendered the court, to be given to the jury, the following instructions, which the court refused to give as asked, and amended them by inserting the words which are in italics, and in that condition marked them "given," and read them to the jury, which are as follows:

1. That if the jury believe, from the evidence, that the defendant made a contract with one Charles Christopher, to do the labor and furnish materials for the plumbing work in his building, the Young America. That the work specified in such contract was afterwards done by an arrangement between Christopher and Hunt. That Cook refused to recognize any person other than Christopher as the person with whom he had made

the contract for such work and labor, *and that the plaintiff had notice of such refusal*, and that after he so refused, the plaintiff went on and did the work and labor in controversy in this suit, and within the terms of the contract between Cook and Christopher, they must find for the defendant, unless they find that the plaintiff and defendant did expressly make a contract for the same.

Given.

2. That if the jury believe, from the evidence, that the labor and materials which are in controversy in this suit, were done and furnished by the plaintiff in fulfillment of a contract made between the defendant and Christopher, the defendant is not liable to Hunt, and they will find for the defendant, *if the plaintiff so understood it at the time.*

Given.

3. That if the jury believe, from the evidence in this cause, that the contract for doing the plumbing work on the Young America was not let to Hunt, *and that Hunt was not employed by Cook or his agent.* That Cook, after Hunt had done some plumbing work, refused to recognize him as contractor, and did to his, Hunt's, or that of his agent, Drake's, knowledge, recognize Christopher as the contractor for the work so done, and paid money upon the order of Christopher as contractor, to either of them for such work, then, unless an express contract is shown to have been made between Hunt and Cook afterwards, about the plumbing work, the mere fact that Hunt prosecuted and completed the job, will not *of itself* entitle him, Hunt, to recover, and they will find for the defendant, *especially if they believe that Hunt had notice that Christopher had a contract with Cook to do the same work, and they believe that Hunt did the work for Christopher, and not for Cook.*

Given.

To the refusing of which as tendered, and giving them as amended, by the court, the defendant then and there excepted, which was noted.

The defendant also tendered the following instructions for the jury, which the court refused to give, and marked them "refused," to wit:

"That if the jury believe, from the evidence, that a certificate from the architect in charge of the work, in favor of the plaintiff, as the contractor for a part of the work, labor and materials in controversy in this suit, was presented to the defendant, Cook, and he refused to pay it, and, afterwards, that was surrendered, and another certificate was taken in place of it, by Hunt or his agent, in favor of Christopher, as contractor, which was transferred by Christopher, and presented by Hunt or his

agent, to Cook, and paid by Cook to Hunt or his agent, that is conclusive evidence upon the parties, that the contract was originally between Cook and Christopher, and not between Cook and Hunt. That it is incumbent upon the plaintiff to show that an express contract was made between Cook and Hunt afterwards, in the absence of such proof, the law implying that the work was finished under the contract under which it was commenced, unless such proof of an express contract has been introduced, they will find for the defendant."

Refused.

"That the certificates, No. 1, date December 23rd, 1854, and No. 2, date June 11th, 1854, contains, upon its face, a notice to any person reading it, that the contract for the work for which it was given, was between Cook and Christopher, and that the one dated December 13th, 1854, recognizes Mr. Hunt as contractor, and that that, with the exception of the dates, is the only difference between the papers."

Refused.

W. T. Burgess, for Appellant.

W. B. Scates, for Appellee.

Breese, J. We think the evidence in this case can leave but little, if any doubt, that Hunt was the real contractor for the work for which he has recovered this judgment. Leaving out of view the testimony of Olmstead, the architect, which is contradicted by Drake, and his veracity shaken by a large number of witnesses; and taking into consideration the fact that the appellant saw Hunt nearly every day at work at plumbing, inspected the work, and that Christopher worked in copper, and was not a plumber, and had the copper work to execute, we can arrive at no other conclusion than that Hunt was the contractor for the plumbing work.

The appellant insists that Hunt, by his own act, has barred himself from any such pretension. He insists that by a certain order, drawn by Olmstead on the appellant, in favor of Christopher, accepted and paid by the appellant, after he had refused to accept one drawn directly in favor of Hunt, is an estoppel upon Hunt, and that he cannot be now heard to say that the contract for doing the work was made with him.

The facts on this point are about these: The architect used printed forms of checks or orders, in which the contractor was described as plumber. On the 13th of December, 1854, the architect had filled up one of these certificates or orders, for four hundred dollars, payable to E. Hunt, the appellee, "for

plumb work," on "Young America," as per contract, payable at sight, at Chicago, which the appellant refused to pay, and it was returned to the architect, who said Cook was "notional," and that he would make it all right. Accordingly, he filled up another certificate, on the 23rd of the same month, to Christopher, as "plumber," which, being indorsed by Christopher to Drake, who was Hunt's foreman on the work, was paid by appellant. The architect swears that the plumbing work was let to Christopher, by a written contract, and that Hunt and Drake knew it, and took the job from Christopher; that they were sub-contractors under him.

This is hardly reconcileable with the architect's own act, for he made the first certificate, dated 13th December, in the name of E. Hunt, "for plumb work," and when it was returned unpaid, the only explanation he gives of Cook's refusal to pay, was, that he was "notional," not that Christopher was, and Hunt was not, the contractor for the work.

Drake, the foreman, swears, that no such reason was assigned by either Cook or the architect, for the refusal to pay the certificate. He swears positively, that the contract had been let to Hunt, and that neither he nor Hunt knew, or ever heard, of any contract with Christopher, and that Hunt was not a sub-contractor. This flat contradiction, by Drake, of the architect, Olmstead, coupled with the fact that his character for veracity was seriously impaired, to say the least, destroys any pretense of an estoppel *in pais*, by any act done by Hunt. The whole transaction seems like a plan to get some act of Hunt, by which the parties concerned might insist upon an estoppel, but it is easy to understand that Hunt, wholly unsuspicious of any such purpose, was willing to get his money through an order drawn in favor of any one, without scrutinizing the forms of the papers by means of which he was to get it.

Olmstead was the architect of this building, and the agent of appellant in its construction. His declarations and statements, therefore, as to all matters within the scope of his duties, were properly admissible in evidence. It was on his certificate, all payments were to be made. He received the bids for the work, and let a portion of it, and we recognize all declarations or statements of his, which the court suffered to go to the jury, as springing from the relation in which he stood to these parties.

By the testimony of Olmstead it would seem that the contract made with Christopher for the plumbing, was in writing. Its contents could not be proved, until its absence or loss had been fully and satisfactorily accounted for, which was not done in this case. The paper is traced to a safe in the keeping of a Mr.

King, but Mr. King is not produced and examined to give his knowledge of it.

The rule is well settled, that when a paper has a particular place of deposit, or when it is known to have been in a particular place, or in the hands of a particular person, then that place must be searched by the party setting up the loss, or the person produced or accounted for into whose hands or keeping it has been traced. *Doyle* v. *Wiley*, 15 Ill. R. 576; *Rankin* v. *Crow*, 19 ib. 626.

The statements made by Olmstead to his partner, Van Osdell, about Cook's paying him for his services — in fact, all his statements — were proper for the purpose avowed by the appellee's counsel, that is, to lay the foundation to impeach the witness. It is not only proper, but it is necessary for such purpose.

We cannot conceive that any payments made to Christopher, could affect Hunt, as their contracts were separate and distinct, and for different work. No inference could be drawn by the jury from the fact that he had paid Christopher, that, therefore, he had paid Hunt. Wilder's testimony was proper, as tending to fortify Drake's statement through admissions of the agent, Olmstead.

When a witness is impeached, and witnesses are called to sustain him, they are bound to swear that they know the general character of the impeached witness, for truth and veracity. If they cannot so swear, they cannot be heard on that point.

The instructions given by the court are all proper in a case of implied assumpsit, and though there may be some verbal inaccuracies, they substantially, taken together, declare the law.

As to those which the court neglected to mark as given or refused, as the statute requires, we have to say, this statute is directory to the court, and should be obeyed; but if, in the hurry of business, it should not be, a party who is not in fault should not be prejudiced by it, if the record shows what was done with the instructions. If the law is correctly laid down in them, we do not think a court would be justified in reversing a judgment, because they were not marked "given."

The refusal to give the appellant's instructions, as moved by him, without the qualifications made by the court, was proper, inasmuch as without the qualifications, they were calculated to mislead the jury and work injustice.

We see no error in the record to justify a reversal of the judgment, and ordering a new trial. It appears to us justice has been done in the premises, and we must affirm the judgment.

Judgment affirmed.

John Link, Appellant, *v.* The Architectural Iron Works, Appellee.

APPEAL FROM COOK.

A material and substantial amendment to a petition for a mechanics' lien, if made within ten days of the commencement of the term, entitles the defendant to a continuance, and it is error to refuse it.

There is no redemption from the sale of premises under a mechanics' lien.

Courts should fix a reasonable time within which the defendant is to pay the money, under a mechanics' lien, taking into consideration the amount required to be paid, and in no case should it be less than ninety days.

This was a petition for a mechanics' lien, by appellee against appellant. The facts necessary to a full understanding of the case, are stated in the opinion. The jury found a verdict for the petitioner, for $3,119.

Motion for new trial overruled. Exception taken.

Judgment and decree for petitioners, for $3,119, against John Link; that petitioners have a mechanics' lien upon the premises and real estate described in plaintiff's petition.

That L. C. P. Freer, master in chancery, sell said real estate and premises, described in said petition, with the buildings and appurtenances thereon situated, after publishing the hour, day, and place of sale, for twenty days prior thereto, in a daily newspaper published in Chicago, to the highest bidder for cash, at the time set for the sale; make proper conveyances of the premises sold to such purchaser, and apply the proceeds as follows:

1. To pay all costs of sale, including the master's commissions, also the costs in this cause.
2. To pay plaintiffs the sum of $3,119, with interest from date of decree to the day of sale.
3. To pay the surplus, if any, into court to await its further order.
4. That said Link, his personal representatives and assigns, be forever barred from having or maintaining any claim against said premises.
5. That if said premises shall not sell for enough to pay said costs, expenses, judgment and interest, as aforesaid, that said complainant have an execution against said defendant for any balance remaining unpaid.

From this decree defendant appeals to this court.

A. W. Windett, for Appellant.

George A. Ingalls, and Van Buren & Gary, for Appellee.

WALKER, J. When this case was being tried in the court below, leave was granted to amend the petition. The defendant then entered a motion for a continuance, which was overruled by the court, and that decision of the court is assigned as error. All material amendments in the declaration or bill, by the uniform practice of our courts, entitles the defendant to a continuance of the cause. The practice act has secured this privilege to the defendant, by requiring the declaration or bill to be filed ten days before the first day of the term to which it is entitled, and requires the cause to be continued for want of that length of time. When a material amendment is made, the first cause of action is abandoned, and a new one is relied upon for a recovery. Unless the change in the cause of action is made with the leave of court ten days before the term, the defendant is deprived of the length of time allowed him by the statute to prepare his defense.

The question then presented, is, whether this change was in matter of substance or only in form. The petition, as filed, alleged that by the contract, petitioners were bound to deliver the material for the last story of the building, in New York, by the tenth day of July, 1857. The amendment changed the allegation to an obligation to ship the material on board, in New York. Under the allegation that they were to be delivered in New York, proof that they were delivered at the factory of petitioners, or at any other point in the city, would have fully sustained it. But under the amended petition, any evidence which failed to show that these materials were delivered on board, would not have entitled the petitioners to a recovery. The contract set out in the petition as it was filed, imposed upon the plaintiff in error, the trouble, the expense, and the risk of the shipment, while that set up in the amended petition imposed it upon the defendants in error. Thus it is seen the two contracts were substantially different. The amendment was substantial and material, and when made, entitled the defendant below to a continuance, and it was error to refuse it.

It is also urged that the decree should be reversed, because the appellees were allowed the price of one of the front columns, as extra work. This, in point of fact, is untrue. The evidence abundantly shows, that the parties settled the entire matter, except the price claimed for this column, which was by agreement left for future adjustment. There was found by the parties, to be then due appellees, the sum of $2,850.24. This settlement was had on the 24th day of September, 1857, and the trial occurred on the 23rd of April, 1859, one year and seven months afterwards, and the interest on the sum found to be due by the parties, for that period of time, would amount to the sum

of $270, which, added, would make the aggregate sum of $3,120.24, one dollar more than was found by the verdict. Thus it is apparent that the price claimed for this column entered into and formed no part of the verdict or decree.

This court has held, that when premises are sold under a decree, to enforce a mechanics' lien, it is without redemption. *Armsby* v. *The People*, 20 Ill. R. 155. This being the case, the decree should fix a reasonable time within which the money is required to be paid, and in default of payment within the time, decree the sale of the premises, or a sufficient portion to pay the money for which the decree is rendered. When the amount is large, the time should be longer than when it is small. In no case should the sale be ordered at a shorter period than the life-time of an execution at law. The law gives the sheriff ninety days within which to make the money, or the sale, and this, when the defendant has a year to redeem his land, when sold. It would, therefore, seem no more than equitable and just, that the defendant, in a proceeding of this nature, should at least have the time an execution runs, to pay the money, and save his lands from an irredeemable sale.

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

Decree reversed.

Nelson Tuttle *et al.*, Plaintiffs in Error, *v.* John L. Wilson, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

An affidavit of a plaintiff in execution to obtain a *ca. sa.*, which declares that the debtor has refused, and still does refuse, to surrender his "property and estate" in satisfaction of an execution, is insufficient.

The case of *Fergus* v. *Hoard*, 15 Ill. R. 361, examined and modified. Held, that the affidavit should aver that the defendant had estate, lands and tenements, goods or chattels, liable to be seized and sold, specifying them, and that he refuses to surrender them after a personal demand made; if a demand is practicable.

An averment that a party has refused to surrender his property, does not imply that he has it. A demand should be made, when practicable.

A judgment debtor has a right to offer real estate in satisfaction of an execution, before his personal property can be levied upon.

Although an officer executing a *ca. sa.* upon an insufficient affidavit, may protect himself by pleading the process, yet if he should refuse to execute it, he would not be liable; nor is he liable for an escape under it.

An officer is not liable for an escape under a void process, or for a refusal to execute it; otherwise, if it is only voidable.

THE declaration in this case, which was an action of debt for an escape, contains two counts, both of which, substantially, state that the plaintiffs in error, on the 10th day of April, 1857, recovered a judgment in the Cook County Court of Common Pleas, against one Anthony A. Thiele, for the sum of $733.09, damages, and $6.60, costs; and that for the having of execution of the said judgment, the plaintiffs, on the first day of June, 1857, issued a writ of *capias ad satisfaciendum*, and delivered the same to the defendant in error, who was sheriff of Cook county; that the said sheriff arrested the said Thiele, who afterwards escaped, through the negligence of the said sheriff.

To this declaration the defendant filed seven pleas:

1st. *Nil debit.*

The 2nd and 5th pleas allege, that the affidavit upon which the *ca. sa.* issued was insufficient, and set out the same in full. This affidavit is copied at length in the opinion of the court.

The 3rd, 4th, 6th and 7th pleas allege, that the affidavit was untrue, and that the plaintiffs knowingly made and contrived the same for the purpose of wrongfully imprisoning the said Thiele.

To the 2nd, 3rd, 4th, 5th, 6th, and 7th pleas, the plaintiffs filed a demurrer, which, upon argument, was sustained to the 3rd, 4th, 6th, and 7th, and overruled as to the 2nd and 5th.

The plaintiffs elected to stand by their demurrer, and judgment was given thereon for the defendant.

The plaintiffs in error assign for error,

That the said Superior Court erred in overruling the demurrer of the said plaintiffs in error to the said second and fifth pleas of the said defendant in error.

That the court erred in not sustaining the said demurrer, as to said second and fifth pleas.

That the court erred in rendering judgment against the plaintiffs in error, on said demurrer, instead of against the defendant in error.

HELM & CLARK, for Plaintiffs in Error.

FARWELL, SMITH & THOMAS, for Defendant in Error.

BREESE, J. The right to personal liberty is one of the most valuable and most cherished rights appertaining to man in society, and one of which he cannot be deprived, except by the judgment of his peers, or by the law of the land. In the barbaric age of the law in this country, the unfortunate debtor could be deprived of this inestimable right, if he failed to pay an honest debt. His creditor could keep him in *arcta custodia*

for the misfortune of being poor. This was so in all the States of this Union, whose organic laws had been established prior to the year eighteen hundred and eighteen, except Tennessee. In that year the constitution of this State was adopted, which contained, as one of its fundamental principles, alike beneficent and just, this provision: "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." Art. 8, Sec. 15, (Scates' Comp. 54.)

In looking back to our earliest legislative records, it will be perceived that the first General Assembly which met under this constitution, failed to observe this then novel provision, for, at the second session, they passed the act entitled, "An act regulating the practice in the Supreme and Circuit Courts of this State, and for other purposes," which was approved on the 22nd March, 1819, by the first section of which the process by capias was the only process recognized or provided, in all actions of debt, or upon the case, founded upon any writing obligatory, bill or note in writing, for the payment of money, and in all actions of covenant and detinue, and appearance bail required. The officer taking the bail was required, if demanded, to deliver to the person or persons acknowledging the recognizance, a bail-piece, in the words and form following:

——— County, to wit — C. D., of the County of ———, aforesaid, is delivered to bail, on a *cepi corpus*, unto E. F., of the County aforesaid, at the suit of A. B., the —— day of ——, in the year ——.

Thus did E. F. become the jailor of C. D., and thus early, at the threshold of our existence as a State, was the constitution of the State violated, an apology for which may, and will, be found in the fact, that like legislation prevailed in all, or most, of the States by which we were then surrounded. Few, if any of them, at that early day, save Tennessee, had abolished that odious practice, which came down to them from the mother country, and is there still practiced, of arresting the unfortunate debtor, and committing him to the four walls of a prison, or placing him in the custody of his bail, as at the common law. The special bail was required to be a householder, resident within the State, and, if the writ issued out of the Circuit Court, of the county in which the court was held, and of sufficient property. In some cases, if an affidavit was not made to hold to bail, a summons issued, as now practiced. The act was very stringent, providing, "if, upon a *capias*, the sheriff shall take the body of the defendant, he shall commit him to the common jail of the county, or take a bond to himself from the

defendant, with sufficient surety or sureties, conditioned that the defendant, if judgment be given against him, shall pay and satisfy the costs and condemnation of the court, or surrender his or her body," (for females had no exemption,) in execution for the same, or that the sureties will do it for him. The bail, on becoming uneasy, could surrender his principal by applying to the sheriff or clerk for a bail-piece, under which he could arrest the defendant, and surrender him to the custody of the sheriff, who, for his own security, incarcerated him. All the rigor known to the common law marked all the preliminary proceedings, and when judgment was obtained, if the property sold on the *fi. fa.*, or extended by a *levari facias*, did not satisfy it, the plaintiff could have execution for the residue against the defendant's body, lands or goods, without any affidavit and on his own motion.

The same General Assembly, however, did provide, by an act passed at the same session, for a discharge from arrest, and for the surrender of the debtor's property. In the first section of that act it is declared, that no person shall be imprisoned for debt, who shall deliver up his or her estate, in the manner pointed out in that act.

And the same act permitted any person who was, or might thereafter be in confinement in any of the jails of the State on final process, and who was willing to give up all his estate, real and personal, for the benefit of his creditors, to present a petition to the Circuit Court, setting forth the causes of his imprisonment, with a list of his creditors, with the amounts due to each, and a schedule of his property, real and personal, and if found that he had acted fairly, an order for his discharge was granted, and his property passed into the hands of an assignee appointed by the court.

To incarcerate a debtor at that day, no affidavit was required, but to our credit be it said, the law did not so remain but for a short time, for at the first session of the second General Assembly it was declared, by an act then passed, " that from and after the passage of that act (January 5, 1821,) appearance bail should, in no case, be required, but in all cases where it had been required, special bail was to be taken," which was merely this indorsement on the writ: "I do hereby acknowledge myself to be special bail for the within named defendant in this action; witness my hand and seal," etc.; but in no case could this bail be required, unless the plaintiff should first make affidavit before the clerk of the Circuit Court, to be filed in his office, that he verily believed that he would be in danger of losing his demand, or the benefit of whatever judg-

ment he might obtain. No change was made in proceedings on final process, as regards the person of the defendant.

At the third session in 1823, by an act approved February 17, it was enacted, that no person should thereafter be imprisoned for debt, except for the causes set forth in that act. That when any execution shall issue upon any judgment obtained before any justice of the peace or judge of the Circuit Court, it should be the duty of the officer serving it, to levy upon and sell all the property, real, personal, or mixed, or so much of it as might be necessary to satisfy the execution, that might be subject to execution; and if it appeared by the return of the officer that the defendant had no property, his body could not be arrested by any process whatever, unless the plaintiff, or his agent or attorney, should swear before some justice of the peace or judge of the Circuit Court, that he verily believed that the defendant intended, or was about to remove or abscond out of the county in which the judgment was obtained, or in which the defendant resides; in which case, it was lawful to issue a *ca. sa.* against the body of the defendant, and commit him to jail, there to remain until he took the oath of insolvency, as prescribed by the act of 1821; or gave sufficient security that he would not depart from the county for two years—which might be renewed biennially, at any time thereafter, upon a similar affidavit. The security might, at any time, be released by surrendering the body of the defendant in execution. It was further provided, that if the plaintiff, his agent, or attorney, should make affidavit before a justice of the peace, the truth thereof to be ascertained by a jury of not less than six householders, nor more than twelve, to be summoned and sworn by the justice, or if before the Circuit Court, the clerk should issue a *venire* to the sheriff, to summon a jury to appear at the next term, on the first day of the term, that he verily believes that the defendant had hid, concealed or transferred any equity, chose in action, or any species or description of property whatever, for the purpose of defrauding the plaintiff, the body of the defendant could be arrested and committed to jail, there to remain until he should be released by taking and subscribing the oath of insolvency, as described in the act above referred to.

At the fourth session, in 1825, it was provided that no execution should issue against the body of a debtor, except in the manner pointed out in the act of 1823, above quoted.

Thus the law remained, with slight alterations, until the revision of the statutes in 1845, with which the profession is familiar. The affidavit to hold to bail, required by the first section of chap. 14, (Scates' Comp. 236), does not differ essentially from the act of 1821. The bail has the right to arrest

and surrender his principal, and no civil suit can be commenced on a bail bond until a *ca. sa.* shall have issued against the principal, and returned not found.

By chapter 52, (Scates' Comp. 582), under which the *ca. sa.* in this case issued, it is provided "whenever any debtor shall refuse to surrender his or her estate, lands, tenements, goods or chattels, for the satisfaction of any execution which may be issued against the property of any such debtor, it shall and may be lawful for the plaintiff in such execution, or his or her attorney or agent, to make affidavit of such fact before any justice of the peace of the county; and upon filing such affidavit with the clerk of the court from which the execution issued, or with the justice of the peace who issued such execution, it shall be lawful for such clerk, or justice of the peace, as the case may be, to issue a *ca. sa.* against the body of such defendant in execution."

The affidavit in this case, which was held insufficient, is as follows: "Nelson Tuttle, being duly sworn, says, that he is one of the plaintiffs in the above suit, and further says, that on the tenth day of April, A. D. eighteen hundred and fifty-seven, at the April term of the said court, the said plaintiffs recovered a judgment against said defendant, Anthony A. Thiele, in said cause, for the sum of seven hundred and thirty-three dollars and nine cents, with the costs of suit, taxed at six dollars and sixty cents, and execution was issued on said judgment on the thirtieth day of May of said year, directed and delivered to the sheriff of said county, which execution said sheriff, by John H. Dart, his deputy, has returned wholly unsatisfied, and this affiant says that said Anthony A. Thiele has refused, and still does refuse, to surrender his property and estate in satisfaction of said execution, and further says not."

A marked departure from the statute will be perceived in this affidavit. It does not allege that the defendant in the execution has refused to surrender "his estate, lands, tenements, goods or chattels," in satisfaction of the execution, but only his "property and estate."

These terms do not necessarily include lands, tenements, goods or chattels, or any other species of property liable to be taken in execution. A person's property and estate, may consist entirely of mere choses in action, which cannot be seized and sold upon a *fi. fa.*

In the case of *Fergus* v. *Hoard*, 15 Ill. R. 361, the affidavit was in strict compliance with the statute in this regard, and the majority of the court held it was sufficient to authorize the *ca. sa.* We have examined the ruling in that case, critically, and are disposed to think it should be somewhat modified—that

something more should be required to make the affidavit sufficient. It should in the first place aver that the defendant had estate, lands and tenements, goods or chattels, liable to be seized and sold on execution, specifying them as near as may be, and that he refused to surrender them in execution, after a personal demand upon him so to do, if a demand be practicable. We do not think the averment that he has refused to surrender his property, necessarily implies that he has property liable to execution, nor do we think he should be considered so in default, as to justify seizing his body, until a demand has been made upon him to produce or show property, or some excuse given for not making a demand, as that he had absconded, or concealed himself, so that a demand could not be made.

How can he be said to refuse, until a demand is made? Such averments in the affidavit, would make a case contemplated by the constitution. Having property liable to execution, and a personal demand being made to turn it out to be levied on, and a refusal, or an excuse shown for not making a demand, makes out one case specified in the constitution, and they would make out the other also, as raising a strong presumption of fraud. A party can hardly be said to refuse to deliver up his property, until a demand has been made upon him, where it is practicable to make a demand. It is quite possible he may not know of the writ being in the hands of the officer, so that he could answer to it. Nor is it exactly fair to infer in such a case that a defendant in execution has estate, lands and tenements, goods or chattels, from the simple averment that he refuses to deliver up his "property and estate." It is true, he could not refuse to deliver it up, unless he had it, but the allegation is all important, that he actually had property liable to be seized and sold on execution. It cannot be presumed, and a mere implication is insufficient.

We have said, at this term, in the case of *Pitts* v. *Magie*, and *Pitts* v. *Seiter*, that it is the right of a judgment debtor to turn out real estate upon an execution against him, before his personal property is taken, and the sheriff who seizes his personal property without giving him an opportunity to turn out realty, when that is practicable, exceeds the line of his duty, and the court will sternly rebuke the conduct of an officer who conceals from the debtor the existence of the execution in his hands for the purpose of preventing him from turning out real estate till he can seize his personal property, and that it is the first duty of an officer having an execution against a party, to apply to him personally for payment whenever that is practicable, and the officer should be held responsible to the party aggrieved for a neglect of this duty, whenever special damages result from it.

If so, in such case, how much more important it is, that, before the body can be seized, and the debtor deprived of his personal liberty, that a personal demand should be made upon him, whenever practicable?

We do not think the case of *Stafford* v. *Low*, 20 Ill. R. 152, decides this case. That was an action against Stafford as one of the sureties on a bail bond, for the appearance of his principal, to answer in an action of assumpsit.

To defeat the bond, Stafford pleaded, that the affidavit on which the *capias* issued, was not in compliance with the constitution, as expounded by this court in the case *ex parte* Jesse N. Smith, 16 Ill. R. 349, and was therefore void. That being void, avoided Stafford's bond.

We deem the case of *Gorton* v. *Frizzel*, 20 Ill. R. 291, more in point. That was an action, like this, for an escape on final process on a *ca. sa.* There the writ itself, showed that it was void. There is no pretense in that writ, for the affidavit on which it issued is set out in the writ, that the defendant had lands and tenements, goods and chattels, liable to execution, and that he had refused to surrender them on demand made, where a demand is practicable, to satisfy the execution, or any circumstances raising the presumption of fraud.

This affidavit is destitute of those necessary averments, and we cannot consider "property and estate," as found in it, equivalent to the terms used in the statute—"estate, lands and tenements, goods and chattels,"—so that there was no foundation for the *ca. sa.* The clerk had no legal authority to issue it, and it was void on its face. Though it might protect the officer, he still might refuse to execute it, or having executed it, he would not be liable in an action for an escape, for he would not have the right of recapture. He could not justify his act, under a void writ, nor acquire any rights under it, or make it the foundation of an action in any form. It is hardly necessary to cite authorities upon this point. In *Shirly* v. *Wright*, 3 Salkeld, 700, it was held by Holt, C. J., If a writ of execution bear *teste* out of term, the sheriff is justifiable, and yet shall not be liable to an action of escape, for it is a void writ.

In an action against a sheriff for an escape, he may defend himself by showing that the process under which the arrest was made was void. *Howard et al.* v. *Crawford*, 15 Georgia, 424.

In the case of *Abbee* v. *Ward*, 8 Mass. 79, the court held, in an action on the case against a sheriff for neglecting to serve an execution issued by a justice of the peace, in the plaintiff's favor, upon a recognizance taken under a statute of that State, by which the plaintiff lost his debt, that the sheriff might avail himself of a misrecital in the recognizance, both as to the sum,

and as to the time of entering into it, and had judgment accordingly. The court say, "It may be laid down as universally true, that whenever the process, by virtue of which a party is arrested, is void, no action can be supported for an escape."

In the case of *Loder* v. *Phelps*, 13 Wendell, 48, it was held that a justice of the peace was not authorized to issue a warrant against an inhabitant having a family, or against a freeholder, unless the applicant for the warrant states the facts and circumstances showing the grounds of his application; the mere allegation that he believes there will be danger of losing his debt unless a warrant issue, was not deemed sufficient, and the officer arresting the defendant upon such warrant, was held liable, the warrant being adjudged void.

The rule that a ministerial officer is protected in the execution of process issued by a court or officer having jurisdiction of the subject matter and of the process, if it be regular on its face, and does not disclose a want of jurisdiction, is a rule of protection merely, and beyond that confers no right; it is held to be personal to the officer himself, and affords no shelter to the wrong-doer, under color of whose process, if it be void, the officer is called upon to act.

Such an officer may stop in the execution of process regular on its face, whenever he becomes satisfied there is a want of jurisdiction in the court or officer issuing it; and if sued for neglect of duty, may show in his defense such want of jurisdiction. *Earl* v. *Camp et al.*, 16 Wend. 562. He can, if he chooses, take the responsibility of determining the question of jurisdiction, or any other question to which the process may give rise.

To the same effect is the case of *Horton* v. *Hendershot*, 1 Hill, (N. Y.) 119. The void process is a shield, not a sword—he can defend under it, but he cannot build up a title upon it.

The whole question is, is the process *void* or *voidable?* If the former, then no rights can be claimed under it except as here stated, and it is not amendable. If voidable, it is good for all purposes until set aside, and may be amended.

We regard this *ca. sa.* issued upon the affidavit set forth in the plea as void, and though protecting the sheriff in making the arrest, it cannot justify him in detaining the defendant, or make him liable in an action for an escape. He can pause in his career, and determine for himself the jurisdiction of the officer or court issuing it, at any stage of his proceedings, he taking the responsibility.

The judgment of the court below is affirmed.

Judgment affirmed.

The Joliet and Chicago Railroad Company, Appellant, *v.* John Barrows, Appellee.

APPEAL FROM COOK.

Where the statute gives an appeal from an assessment, for a right of way, a certiorari will be sustained; it appearing that petitioner had not notice of the assessment, or an opportunity to appeal.

A certiorari in such a case, is in the nature of an appeal from the decision of a justice of the peace, and governed by the same rules; therefore, the railroad company had a right to dismiss its proceeding for a condemnation, in the Circuit Court; but by doing so, any steps previously taken would not protect the corporation.

On the 23rd day of November, 1857, John Barrows filed, in the Circuit Court of Cook county, his sworn petition for a certiorari, stating,

That he is and was, on the 24th June, 1857, the owner of N. W. qr. Sec. 22, T. 37 north, R. 11 east, in Cook county.

That said railroad company, before that day, had located their line of road over said land diagonally.

That he had a dwelling and two out-houses on said land, and on the line of said railroad so located, and they must be removed to construct the road.

That on the 24th June, 1857, the company applied to a justice of the peace to appoint commissioners to assess damages, and that he did on that day appoint three commissioners, and that said commissioners did, about the 15th of August, 1857, make and leave with said justice their report in writing, wherein it is stated that they had assessed the damages which the petitioner would sustain by construction of said road, over and above the enhancement of said premises, at $250.

That the petitioner is, and for the last six months has been, residing on said land, and that he was wholly uninformed, until about the 1st day of October, 1857, by any person, of the appointment of said commissioners, nor was he advised by whom such appointment was made, nor that said commissioners had or were to assess said damages, or that they had made any report of such assessment, when the agent of said company told him that persons had been appointed to assess, and had assessed the damages of petitioner in that behalf, and that the amount of said assessment was at the office of Mr. DeWolf in Chicago, ready to be paid to him, but he did not state by whom such persons were appointed.

That petitioner has never been notified by said corporation of any of said proceedings, and that all of said proceedings were had without his knowledge, and that, for the reasons aforesaid,

he could not take his appeal from the assessment within the time limited by law in such cases.

That said assessment is unjust, and that his damages are more than $1,000, as deponent believes, etc.

A *certiorari*, allowed by Judge MANIERRE, upon petitioner entering into bond in the penal sum of $200, with good sureties.

The *certiorari* was issued Nov. 23rd, 1857, and was returned by the justice, setting out the petition, order of appointment, and report of assessment of commissioners, with the map attached.

The cause was docketed in said court thus: "Joliet & Chicago Railroad Company *vs.* John Banons, Appeal," and the record recites, that plaintiffs moved to dismiss the appeal, because, 1st, The petition is insufficient; 2nd, The bond is insufficient. The court gave leave to appellant to amend his bond, and overruled the motion to dismiss the appeal; and appellant then introduced his testimony.

After appellant closed his proof, the appellee asked leave to dismiss, without prejudice, the proceedings for the condemnation of this property, and that a judgment should be entered against the appellee in the nature of a non-suit. This the court refused to permit, and decided that appellee had no right to dismiss the proceedings in that way.

There was conflicting evidence on most of the points.

The jury rendered a verdict as follows: "We, the jury, find for the plaintiff, and assess the damages at twelve hundred dollars. A. PIERCE, Foreman."

The court modified the language of the verdict so as to make it read, "We, the jury, find for Barrows, the owner of the land, and assess the damages at twelve hundred dollars."

Thereupon the appellant moved for a new trial, which motion for a new trial was overruled; to which decision the appellant, by its counsel, excepted, and brings the cause by appeal to this court. There was a judgment on the verdict.

T. L. DICKEY, for Appellant.

HOYNE, MILLER & LEWIS, for Appellee.

WALKER, J. The petition for a writ of *certiorari* in this case alleges, that the application to the justice of the peace, for the appointment of commissioners, and the assessment of damages for the right of way, were without the knowledge of the petitioner. That these facts did not come to his knowledge until long after the expiration of twenty days from the assessment of the damages. While this petition may not be drawn with per-

fect accuracy and formal precision, it clearly shows that the appellee had no notice of the proceeding, or any opportunity to be heard on the assessment of the damages, or to perfect an appeal from the finding of the commissioners. The statute gives an appeal in this proceeding in the same manner as from judgments of justices of the peace in ordinary cases. And we think, that this petition discloses such facts as render it substantially sufficient, and the court below committed no error in overruling the motion to quash the petition and dismiss the *certiorari*.

By whatever name this proceeding may be called, it is only another mode of perfecting an appeal from the judgment of a justice of the peace, when the party has been prevented from doing so in the usual time, and ordinary mode. When it is perfected in this mode, it is in all respects governed by the same rules in the trial of the case in the appellate court as if it was an ordinary appeal. By it the judgment from which it is prosecuted is vacated, and the cause stands for trial *de novo*, as other appeals from the judgment of justices of the peace. This being the case, the railroad company had the right to pursue the same course with the cause in the Circuit Court, which they would, had it been an ordinary appeal. And it has been held that the plaintiff after the appeal is perfected and the case is pending in the Circuit Court, has the right to dismiss his suit, as though it had originated in that court. *Shaffer* v. *Currier*, 13 Ill. R. 667. This proceeding having been instituted by the company, after it was legally pending in the Circuit Court, it was under their control, and they had the right either to dismiss it, or to proceed to trial. They asked leave to dismiss the suit and the motion was overruled by the court. This was error, as they might exercise that right at any time before the jury retired to consider of their verdict. But they by doing so would leave themselves in the same situation as though the proceedings had never been instituted. The steps already taken, would form no protection to acts of the company. The judgment of the court below must be reversed, and the motion of the appellants to dismiss the proceeding is allowed, and it is dismissed. The appellee will pay the costs of this court, and the appellants the costs of the court below.

Judgment reversed.

Cornelius Donoghue *et al.*, Appellants, *v.* Freeland B. Gardner, Appellee.

APPEAL FROM COOK.

By taking issue on a plea, the plaintiff admits that it is correctly filed in the court where the cause is pending.

In this case, the similiter was in the handwriting of the plaintiff's attorney. Held, that while the similiter remained, the plaintiff recognizes the plea as a plea in the cause, although it was entitled of another court, and before striking the plea out, he should have obtained leave to withdraw the similiter.

This was an action of assumpsit, in the Circuit Court of Cook county, against appellants, as indorsers of a note. Plea of the general issue, entitled of the Cook County Court of Common Pleas, with affidavit of merits. Similiter not signed, but in the handwriting of plaintiff's attorney. On motion, the plea was stricken from the files, and judgment taken by default, from which judgment defendants appealed to this court.

A. W. Windett, for Appellants.

B. C. Cook, and R. J. Winslow, for Appellee.

Breese, J. By taking issue on the plea, the plaintiff admitted it was correctly filed in the Circuit Court. The record shows the plea was on file nearly two months before the motion was made to strike it out, and no reason is shown or alleged why it should be stricken out. It appears, on inspection, that the similiter was added by the plaintiff's attorney, it being in his handwriting, as appears by comparison with other papers in the cause, confessedly in his handwriting.

Whilst the similiter remained, the plaintiff recognized the plea as a plea in the cause, and before striking the plea out, he should first have obtained leave to withdraw the similiter. There was an issue made up on the plea, and we see no reason why it should have been disposed of in this summary way. The judgment is reversed, and the cause remanded.

Judgment reversed.

Thomas Hicks, Appellant, *v.* Anson Rising, Appellee.

APPEAL FROM LEE.

Where, in an action of slander for words used charging false swearing, the defendant, by his pleas, has based his defense on the fact that the plaintiff was guilty of perjury, he will be required to prove the fact of the perjury. He is bound to make out the defense which he has chosen, even though he was not obliged to impute perjury in order to justify the words spoken.

The facts of this case and the pleadings, on which the decision is based, are sufficiently stated in the opinion.

Leland & Leland, for Appellant.

Glover, Cook & Campbell, for Appellee.

Walker, J. This was an action of slander, instituted in the Jo Daviess Circuit Court, and tried in Lee county. The declaration contained five counts, the first four of which alleged that Hicks had charged Rising with swearing falsely in a matter material to the issue in a certain legal proceeding previously had, thereby intending to accuse him of perjury. The fifth count avers that Hicks charged Rising with swearing falsely, without any allegation that he designed to accuse him of having committed perjury. To this declaration the defendant pleaded the general issue. Also, a second plea, justifying the speaking of the words, and alleging that there was an issue joined in a suit in the Jo Daviess Circuit Court, in which the president and trustees of the town of Warren were plaintiffs, and John D. Platt, defendant, in which it was material to ascertain the time at which the polls of an election for trustees were closed. That plaintiff was a witness on that trial, and swore that he was present at the election, and that the polls were closed at five o'clock in the afternoon; that upon the comparison of time pieces, they were found not to agree, and five minutes were allowed on account of the difference, and that the polls were then closed. When, in fact, the polls at that election were not closed at or after five o'clock, but were closed at five minutes after four o'clock in the afternoon. Whereby the plaintiff did falsely, wickedly, willfully and corruptly commit, willful and corrupt perjury, wherefore, the defendant did speak the words in the declaration mentioned, as he lawfully might. The third plea was substantially the same as the second. To these pleas, plaintiff filed replications that he did not commit perjury as alleged in the pleas; upon which, issues were joined, and a trial had before the court and jury. A verdict was found for the

plaintiff, for one thousand dollars damages. Defendant entered a motion for a new trial, which was overruled, and judgment rendered upon the verdict. From which, he prosecutes this appeal.

The appellant was not bound, in justifying the charge contained in the fifth count, to impute perjury to the appellee. But as false swearing does amount to perjury, when it is corrupt, willful, and to a matter material to an issue, in a legal proceeding, or in an authorized oath, the person making the charge of false swearing must know the sense in which he made the charge. As he has gone further than the import of the language, and by his plea says, he did use the language, and that the appellee did swear to facts which were not true, and that in doing so he committed perjury, he places on this language the constructions that he designed to, and did charge, that appellee had committed perjury. If this was not the sense in which he used the language, he should not have so justified the speaking of the words. It was his own choice to undertake to prove more than was required, had his pleas been drawn with that view, to justify the speaking of the words, and having made his choice, it is now too late to retract. By his pleas he could not maintain his defense, unless he proved that the appellee was guilty of perjury as alleged. The jury have found that he failed to establish that fact, and were warranted in so finding. The judgment of the court below must be affirmed.

Judgment affirmed.

John Marks *et al.*, Appellants, *v.* Oliver M. Butler, Supervisor, etc., who sues for the use of the Township Treasurer of the town of St. Charles, Appellee.

APPEAL FROM KANE.

A party to the record in a common law case is incompetent as a witness on the trial.

The same rule applies to the party for whose use the suit is brought, or who has a beneficial interest in it, by increasing his per centage.

No recovery can be had on a town collector's bond, until after a warrant has been issued to the sheriff, requiring the delinquent sum to be levied on the property of the collector.

This was an action of debt, commenced by Oliver M. Butler, for the use of the township treasurer of St. Charles, against the plaintiffs in error, on a town collector's bond, Marks being the

collector, and the other defendants sureties. The cause was tried before I. G. Wilson, Judge, and a jury.

One of the principal witnesses on the part of the plaintiff, was the township treasurer, James T. Wheeler, whose testimony was objected to, on the ground that he was a party to the record, and was interested in the result of the suit. Objection overruled, and testimony admitted.

There was no proof that any warrant had issued to the sheriff to collect the money withheld by the collector, by levy on his property.

Verdict and judgment for plaintiff. Motion by defendants for a new trial and in arrest of judgment, which was overruled, and judgment entered. Appeal by defendants to this court.

Plato & Harvey, and B. C. Cook, for Appellants.

Eastman & Botsford, and J. L. Beveridge, for Appellee.

Walker, J. There is no question better settled than that a party to the record in a common law cause, is incompetent as a witness on the trial. The exceptions to this rule are rare, and independent of statutory enactment, it is believed but few exist. The rule is so inflexibly established, that it is wholly unnecessary to refer to principles, or to adduce authorities in its support. And when the witness is the beneficial party, the same reason applies as if he were the nominal party. He has the entire beneficial interest, reaps the fruits of the recovery, and is the only person who has the right to control the action and the recovery. When the nominal plaintiff declares upon the record, that the suit is instituted for the use of another person, he is thereby fully authorized to receive, and to discharge the claim before or after judgment. He is thereby declared to be the owner of the demand. He has the same interest in a recovery as any other plaintiff, and is equally incompetent to give evidence.

But were this not true, the treasurer of schools is entitled to a per cent. on all moneys received and paid out by him for the use of the fund. (Scates' Comp. 457, Sec. 72.) And he, on the trial of a cause instituted for the recovery of township funds, which by law must pass into his hands, has a direct interest in increasing the fund, thereby increasing his commissions. The court below, therefore, erred in permitting Wheeler, the beneficial plaintiff and treasurer, into whose hands the money recovered would go when collected, to testify in the case.

It is also urged, that this action is prematurely brought, and that no recovery can be had on a town collector's bond until a warrant shall have been issued to the sheriff, requiring the delinquent sum to be levied on the property of the collector. The 13th section of the Revenue Law, (Scates' Comp. 345–6,) provides, that if any collector shall refuse or neglect to pay the several town officers or the county treasurer, the sums required by his warrant to be paid to them, or to account for the same as unpaid, that the county treasurer shall, upon proof being made, issue his warrant against such collector to the sheriff of the county, commanding him to levy the amount of the property of the collector. The 77th section requires the sheriff to proceed to execute the same, and make return thereof within the time specified, and pay over the money. The 78th section provides, that if the whole sum is due from the collector, or if no portion thereof shall be collected, the sheriff shall note the fact and certify that the collector has no goods or chattels, lands or tenements, in his county, from which the money can be made. The 79th section requires the bond to be put in suit, and the moneys, when collected, to be paid in the same manner in which it was the duty of the collector to apply the same. That the school treasurer of the township is a town officer, there can be no question. He is appointed by the trustees of schools for the township, acts within and for the township, and must have been contemplated by the legislature as a town officer who is entitled to receive the school tax from the collector.

The town collector's office is created and his duties are imposed by the statute. His liability grows out of a violation of those duties, and when violated, the statute has pointed out the remedy. That the legislature, in creating an office, may impose duties and regulate remedies for a breach of duty, is certainly true. And by these enactments we are of the opinion that the legislature intended that the warrant provided for in the seventy-sixth section, should issue as a pre-requisite to the institution of a suit, on the collector's bond, against him and his sureties. This the sureties have a right to insist upon, as when they sign his bond they have a right to expect, that in case of a default in his duty, his property will be first subjected, and that the preliminary requirements of the statute shall be complied with before they are subjected to a recovery. The statute has made the requirement, and we have no power to dispense with it.

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

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, for the use of John Kedzie, Plaintiffs in Error, *v.* ANDREW WARDLAW *et al.*, Defendants in Error.

ERROR TO PUTNAM.

It is erroneous to sustain a demurrer to a declaration in debt, on a sheriff's bond, which is properly drawn, and wherein the breaches are well assigned.

THIS was an action of debt, commenced by plaintiffs in error, against the defendants in error, in the Circuit Court of Putnam county, on a sheriff's bond. The Judge of Putnam Circuit Court sustained a demurrer to plaintiffs' declaration, and gave leave, on application of plaintiffs' attorney, to file an amended declaration. And afterwards the the plaintiffs filed a declaration in said court, in the words and figures following, to wit:

Andrew Wardlaw, Shepherd Moore and Robert W. Moore, defendants in this suit, were summoned to answer unto the People of the State of Illinois, plaintiffs herein, for the use of John H. Kedzie, of a plea that they render to the said plaintiffs, for the use aforesaid, the sum of ten thousand dollars, which they owe to and unjustly detain from said plaintiffs, for the use aforesaid, whereupon the said plaintiffs, by D. P. Jenkins, their attorney, in a plea of debt, complain of defendants, for that whereas, heretofore, to wit, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty, at Hennepin, to wit, at the county of Putnam aforesaid, by their certain writing obligatory, commonly called an official bond, sealed with their seals, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged themselves held and firmly bound unto the People of the State of Illinois, in the penal sum of ten thousand dollars, current money of the United States of America, to be paid to said plaintiffs, and for the payment of which well and truly to be made, the said defendants thereby bound themselves, their heirs, executors and administrators, jointly and severally, which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, that, whereas the above named Andrew Wardlaw had been duly elected sheriff of the county of Putnam and State of Illinois, aforesaid, it was provided in and by said condition, that if the said Andrew Wardlaw should faithfully discharge all the duties required, or to be required of him by law, as sheriff of the county of Putnam aforesaid, then said obligation to be null and void, otherwise to remain in full force and virtue. And which said writing obligatory, with the condition aforesaid there-

under written, was then and there received by the People of the State of Illinois, as the official bond of the said Andrew Wardlaw, as sheriff of the county of Putnam aforesaid, with the said Shepherd Moore and Robert W. Moore as his sureties in the premises, and then and there lodged with the clerk of the Circuit Court of said county, by the defendants. And there being no term of the Circuit Court to be held in said county within thirty days after said clerk gave notice to the said Andrew Wardlaw of the receipt of his commission as sheriff of said county, the said clerk of said court, on the reception of said writing obligatory, with the condition thereunder written as aforesaid, then and there approved of the same as the official bond of said Andrew Wardlaw, as sheriff of the county aforesaid, and thereupon the said Andrew Wardlaw then and from thenceforth, until and at and after the misconduct of the said Andrew Wardlaw, as sheriff of the county aforesaid, hereinafter complained of, took upon himself to discharge the duties of, and was then and there sheriff of said county, and so continued to be sheriff of said county until the expiration of two years from the fifth day of November, in the year aforesaid, and until his successor was duly elected and qualified. Yet the said plaintiffs in fact say, that the said Andrew Wardlaw did not faithfully discharge all the duties required of him as sheriff of said county of Putnam, according to the condition of said writing obligatory, but during the time for which he was elected to fill said office of sheriff, as aforesaid, wholly neglected and refused so to do. For that whereas, heretofore, to wit, on the thirteenth day of December, A. D. eighteen hundred and fifty, at the county of Putnam aforesaid, the said John H. Kedzie sued and prosecuted, out of the clerk's office of the Circuit Court in and for said county, a certain writ of execution in due form of law, directed to the sheriff of said county, by which said writ the said sheriff was commanded that of the goods and chattels, lands and tenements of one William Ray, in his county, he should cause to be made the sum of one thousand dollars debt, and six hundred and seventy-seven dollars and fifty cents damages, which the said John H. Kedzie, on the eighth day of October, in the year eighteen hundred and fifty, before the Circuit Court of Putnam county, recovered against him, the said William Ray, for his debt and damages, together with lawful interest thereon from the eighth day of October, A. D. eighteen hundred and fifty, until paid; also the sum of four dollars and forty-three and one-half cents, which was by the said court adjudged to the said John H. Kedzie, for costs and charges by him expended about his suit in that behalf, whereof the said William Ray was convicted, as appears of record; and that he, the said sheriff, should

have the money at the clerk's office of said court within ninety days from the date thereof, to render unto the said John H. Kedzie the debt, interest and charges aforesaid, and should have then and there said writ. And plaintiffs aver that the said writ of execution, and the judgment on which it was issued, were in due form of law and in full force and effect, not reversed, and was unsatisfied in whole or in part, and whilst said judgment was so in full force and effect and not satisfied, either in whole or in part, to wit, on the fourteenth day of December, A. D. eighteen hundred and fifty, at Hennepin, to wit, at the county aforesaid, the said writ of execution being in due form of law, as aforesaid, was delivered to the said Andrew Wardlaw, to be by him, as sheriff of said county, executed in due form of law, he then being sheriff of said county and from thenceforth until his said term of two years, as aforesaid, expired, and his successor elected and qualified, continued to be sheriff of said county, and so being and continuing to be sheriff, as aforesaid, he, the said Andrew Wardlaw, afterwards, by virtue of the said writ of execution, to wit, on the fourteenth day of December, A. D. eighteen hundred and fifty, at the county aforesaid, did levy upon a lot of corn in the crib, being a large amount of corn, to wit, five thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof; and afterwards, to wit, on the eighth day of January, A. D. eighteen hundred and fifty-one, at the county aforesaid, by virtue of the execution aforesaid, did levy upon another lot of corn in the crib, being a large amount, to wit, three thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof, all of the said corn being then in a crib near said Ray's pork-house, near the town of Hennepin, in the county aforesaid, and being the property of the said William Ray, to satisfy the said writ of execution; which said goods and chattels so levied upon, plaintiffs aver would have been amply sufficient to satisfy said writ of execution, if the same had been exposed to sale and sold by virtue of said writ of execution, and the levy made under and by virtue of the same; yet the said Andrew Wardlaw, continuing to be sheriff as aforesaid, during the lifetime of said writ, continually neglected, from the time said writ was delivered to him to execute as aforesaid, until the return day of the same, and has ever since neglected and willfully omitted to advertise or offer for sale the said goods and chattels so levied upon by him as sheriff, as aforesaid.

And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, further

say, that afterwards, to wit, on the thirteenth day of December, A. D. eighteen hundred and fifty, at the county aforesaid, said John H. Kedzie sued and prosecuted out of the Circuit Court in and for the county of Putnam aforesaid, a certain writ of *fieri facias*, commonly called an execution, directed to the sheriff of said county, by which said writ the said sheriff was commanded, that of the goods and chattels, lands and tenements of one William Ray, in his county, he should cause to be made the sum of one thousand dollars debt, and six hundred and seventy-seven dollars and fifty cents damages, which the said John H. Kedzie, on the eighth day of October, A. D. eighteen hundred and fifty, before the Circuit Court of Putnam county, recovered against him, the said William Ray, for his debt and damages, together with lawful interest thereon from the eighth day of October, A. D. eighteen hundred and fifty, until paid; also the sum of four dollars and forty-three and one-half cents, which was by the said court adjudged to the said John H. Kedzie, for costs and charges by him expended about his suit in that behalf, whereof the said William Ray was convicted, as appears of record, and that the said sheriff should have the money at the clerk's office of said court, within ninety days from the date thereof, to render unto the said John H. Kedzie the debt, interest and charges aforesaid, and should have then and there said writ, and which said writ and the judgment on which it was issued were in due form of law and in full force and effect; and which said writ, afterwards, to wit, on the fourteenth day of December, A. D. eighteen hundred and fifty, at Hennepin, to wit, at the county aforesaid, was delivered to the said Andrew Wardlaw, he then being sheriff of said county, to be by him as sheriff as aforesaid, executed in due form of law. And afterwards, to wit, on the fourteenth day of December, A. D. eighteen hundred and fifty, at the county aforesaid, the said Andrew Wardlaw, sheriff as aforesaid, by virtue of the said writ of execution, and of the authority vested in him by virtue of his office of sheriff of said county, levied upon a lot of corn in the crib, being a large amount of corn, to wit, five thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof. And afterwards, to wit, on the eighth day of January, A. D. eighteen hundred and fifty-one, at the county aforesaid, levied upon another lot of corn in the crib, being a large amount of corn, to wit, three thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof, all of the said corn being then in a crib near said Ray's pork-house, near the town of Hennepin, in the county aforesaid, and being the property of the said William Ray, to

satisfy the said writ; which said goods and chattels so levied upon as aforesaid, plaintiffs aver would have been amply sufficient to satisfy the said writ of execution, if the same had been exposed to sale and sold under and by virtue of said writ; yet the said Andrew Wardlaw, then being sheriff as aforesaid of the county aforesaid, willfully, carelessly and negligently permitted and suffered the said goods and chattels so levied upon, to become wholly lost and destroyed; wherefore, and by reason of the said carelessness, negligence and misconduct of the said Wardlaw, sheriff as aforesaid, the amount of the said debt, damages and costs, so adjudged to the said John H. Kedzie, has been wholly lost to the said John H. Kedzie.

And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such cases made and provided, further say, that afterwards, to wit, on the fourteenth day of December, A. D. eighteen hundred and fifty, and whilst the said Andrew Wardlaw was sheriff of Putnam county, as aforesaid, did, by virtue of a certain writ of execution, which was in due form of law and in full force, to wit, on the fourteenth day of December, A. D. eighteen hundred and fifty, in the cause wherein John H. Kedzie was plaintiff and William Ray was defendant, levy upon a lot of corn in the crib, being a large amount of corn, to wit, five thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof. And afterwards, to wit, on the eighth day of January, A. D. eighteen hundred and fifty-one, the said Wardlaw, being sheriff as aforesaid, did, by virtue of the same writ, levy upon a certain other lot of corn in the crib, being a large amount of corn, to wit, three thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof, all of the said corn being then in a crib near said Ray's pork-house, near the town of Hennepin, in the county aforesaid, and being the property of the said William Ray, to satisfy the said writ. And afterwards, to wit, on the eleventh day of August, A. D. eighteen hundred and fifty-four, the said John H. Kedzie caused to be issued out of said Circuit Court in and for said county, upon the judgment obtained in said cause against the said William Ray, which said judgment was in due form of law and in full force and effect, a certain writ of *venditioni exponas* execution, in substance as follows, to wit: (Here follows a copy of the *venditioni exponas* at length.)

And the plaintiffs aver, that afterwards, to wit, on the eleventh day of August, A. D. eighteen hundred and fifty-four, at the county aforesaid, the said writ of *venditioni exponas* was delivered to the said Andrew Wardlaw, to be executed by him

in fulfillment of his duties as late sheriff of the county of Putnam aforesaid, and by reason of his having made the levy, set forth as aforesaid; and plaintiffs further aver, that the said goods and chattels, lands and tenements, so levied upon as aforesaid, by the said Andrew Wardlaw, at the time of the delivery of the said last mentioned writ to the said Wardlaw, as aforesaid, had not been sold by said Wardlaw, as sheriff of said county of Putnam, nor by any person having lawful authority so to do, and that the same were amply sufficient to satisfy said writ if the same had been exposed to sale and sold by said Wardlaw, as he was by said writ commanded; yet the said Andrew Wardlaw, then and there continually during the lifetime of the said writ of *venditioni exponas*, and from the issuing and delivery to him of the same as aforesaid, and thence hitherto, willfully omitted and neglected to advertise or offer the said goods and chattels, lands and tenements, so levied upon by him as sheriff as aforesaid, for sale, and has thence hitherto willfully omitted and neglected to make return of the said last mentioned writ, as he was thereby commanded, but the same to do still doth neglect and refuse.

And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, further say, that on, to wit, the 13th day of December, A. D. 1850, at the county aforesaid, said John H. Kedzie sued and prosecuted out of the clerk's office of the Circuit Court, in and for the county of Putnam aforesaid, a certain writ of execution, being the same writ of execution referred to in the second breach assigned in this declaration, and which said writ of execution was in due form of law and in full force and effect, directed to the sheriff of Putnam county aforesaid, to execute, by which said writ the said sheriff was commanded, that of the goods and chattels, lands and tenements of one William Ray, in his county, he should cause to be made the sum of one thousand dollars debt, and six hundred and seventy-seven dollars and fifty cents damages, which the said John H. Kedzie, on the eighth day of October, A. D. 1850, before the Circuit Court of Putnam county aforesaid, recovered against him, the said William Ray, for his debt and damages, together with lawful interest thereon from the eighth day of October, A. D. 1850, until paid; also the sum of four dollars and forty-three and one-half cents, which was by the said court adjudged to the said John H. Kedzie for costs and charges by him expended about his suit, in that behalf expended, whereof the said William Ray was convicted, as appears of record, and that the said sheriff should have the money at the clerk's office of

said court within ninety days from the date thereof, to render unto the said John H. Kedzie, the debt, interest and charges aforesaid, and should have then and there said writ; which said writ, afterwards, to wit, on the fourteenth day of December, A. D. 1850, at Hennepin, to wit, at the county aforesaid, was delivered to the said Andrew Wardlaw, he then being sheriff of said county, to be by him as sheriff as aforesaid executed in due form of law, and which said writ was in due form of law, and in full force and effect. And afterwards, to wit, on the fourteenth day of December, A. D. 1850, at the county aforesaid, the said Andrew Wardlaw, then being sheriff of said county as aforesaid, by virtue of the said writ of execution, and of the authority vested in him by virtue of his office of sheriff of said county, levied upon a lot of corn in the crib, being a large amount of corn, to wit, five thousand bushels, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof; and afterwards, to wit, on the eighth day of January, A. D. 1851, at the county aforesaid, levied upon another lot of corn in the crib, being a large amount of corn, to wit, three thousand bushels of corn, of great value, to wit, of the value of thirty-five cents for each and every bushel thereof, all of the said corn being then in a crib near said Ray's pork-house, near the town of Hennepin, in the county aforesaid, and being the property of the said William Ray, to satisfy the said writ; which said goods and chattels so levied upon as aforesaid, plaintiffs aver were sufficient to satisfy said writ of execution, if the same were exposed to sale and sold under and by virtue of said writ; yet the said Andrew Wardlaw, sheriff as aforesaid, has willfully, carelessly and negligently omitted and neglected to make any legal return of said writ of execution; by reason whereof, the said John H. Kedzie has been deprived of the benefit of the levy made upon the goods and chattels aforesaid by the said Wardlaw, as sheriff as aforesaid, and the said John H. Kedzie has not been paid his said debt, damages or costs, or any part thereof.

And so the People of the State of Illinois in fact say, that the said Andrew Wardlaw did not faithfully discharge all the duties required of him by law as sheriff of the county of Putnam aforesaid, and that he, the said John H. Kedzie, has been injured by the neglect and misconduct of the said Andrew Wardlaw, as sheriff as aforesaid, and by reason of the non-performance by him, the said Wardlaw, of his duties in that behalf, whereby an action hath accrued to the People of the State of Illinois, to demand and have of and from the defendants to this suit the said sum of ten thousand dollars for the use of the said John H. Kedzie; yet have not the said defend-

ants, nor hath either of them, paid the same or any part thereof, to the damage of the said plaintiff of ten thousand dollars, and therefore they bring this suit, etc.

To this declaration the defendants filed their demurrer.

The court having considered the demurrer to the amended declaration, held that said declaration is insufficient in law, and therefore ordered and considered that said demurrer be sustained; and the plaintiffs not asking leave to further amend their declaration, it was adjudged that said defendants go hence *sine die*, and recover of the said John H. Kedzie their costs herein expended, to be taxed, and have execution therefor.

Error assigned: The sustaining of the defendants' demurrer to plaintiff's declaration, by the court below.

D. P. Jenkins, for Plaintiffs in Error.

B. C. Cook, and W. H. L. Wallace, for Defendants in Error.

Breese, J. This is an action of debt on a sheriff's bond, to which a demurrer was filed and sustained, and the case brought here by writ of error.

We have examined, with some care, the declaration, and the several breaches assigned, and are of opinion that the declaration is good in form and substance, and the breaches well assigned.

The judgment of the Circuit Court is reversed, and the cause remanded, with leave to the defendants to withdraw the demurrer and plead to the action.

Judgment reversed.

Samuel P. Baily, Appellant, *v.* Martha and Mary Doolittle, and Isabella Sampson, Appellees.

APPEAL FROM TAZEWELL.

A tax deed cannot be admitted, as evidence of title, until the foundation is laid by the production of a judgment and precept, regular and sufficient on their face.

The absence of any words or characters to show what is the meaning of the figures used in the judgment or precept, or what is the amount of the sum intended to be represented thereby, is a fatal defect.

A party to a contract for the purchase of land by which he has agreed to pay al taxes thereon, is not permitted to apply such payments of taxes on a tax title and thereby defeat the title of his vendor.

Baily *v.* Doolittle et al.

THIS was a petition for a partition of the land in controversy, filed by appellees against appellant and one Isabella Sampson. On the trial in the Tazewell Circuit Court, before HARRIOTT, Judge, and a jury, appellees proved title to two undivided thirds of the land. Appellant claimed under a tax deed from the sheriff, given in 1847 for the taxes of 1845. The precept and judgment adduced as the foundation of the deed, had no dollar mark or other indication to show what the figures in the lists were intended to represent. He also proved payment of taxes from 1847 to 1856 inclusive, and possession of the land for a part if not all that time. Appellees then called on Baily to produce a contract, one made concerning said land, between him and Doolittle, which was done, and the plaintiff then offered the same in evidence; to the reading of which, the defendant objected, which objection was overruled by the court. The contract is as follows: "This day sold S. P. Baily, forty acres of land, it being north of S. P. Baily's tract which his house is on, and the same is west of a tract owned by John King, of Peoria, or his assigns; the same is to be paid for by said Baily in notes on good and responsible men, to the amount of $200; said Baily is to pay all taxes, and they are to be deducted from the amount of $200, and R. S. Doolittle is to make said Baily a deed, on the delivery of said notes.

Pekin, Feb. 16*th*, 1847. R. S. DOOLITTLE."

Baily admits the land described in Doolittle's agreement, is the land in controversy.

It was admitted by the petition that appellant was entitled to one undivided third during the life of R. S. Doolittle, he having purchased Doolittle's interest as tenant by the courtesy.

Verdict and judgment for plaintiffs, that they are entitled to two-thirds of the land, and Isabella Sampson to one-third, all subject to Baily's interest in one undivided third during the life of R. S. Doolittle. Appeal by Baily to this court.

B. S. PRETTYMAN, for Appellant.

JAMES ROBERTS, for Appellees.

WALKER, J. It appears from the evidence that petitioners were the owners in fee of two undivided third parts of the premises, and Isabella Sampson one-third, in fee, unless the appellant has shown a better title. For that purpose he introduced in evidence a sheriff's deed on a sale of this land for taxes in April, 1845, dated on the 7th day of May, 1847, the certificate of purchase given on that sale having been previously assigned to him. Also, receipts for the payment of all taxes for the years

1847 to 1856, inclusive, on the land in controversy. He also introduced evidence showing a possession of the premises a portion if not all of the time from the fall of 1849 to commencement of this proceeding, by tenants or otherwise. The petition admits that appellant owned an undivided third of the premises during the life of R. S. Doolittle, and the decree so finds.

The tax deed read in evidence, although made by the statute *prima facie* evidence of the listing and assessment, the nonpayment of the taxes, that it was not redeemed, etc., cannot be admitted as evidence of title until the foundation is laid, by the production of a judgment and precept, regular and sufficient on their face. In this case, no such judgment and precept were adduced. Neither the judgment or precept was for any sum of money. The figures used have no words, characters, marks or letters, indicating the sum intended to be represented. This defect, we have repeatedly held, is fatal to the validity of a tax sale.

But this deed, although not title, was color of title under the first section of the limitation act of 1839, and if all the requirements of that act have been complied with, it affords a bar to a recovery. This depends upon the effect of the contract for the purchase of these premises by appellant, from R. S. Doolittle, on the 16th day of February, 1847, in which he was to pay the sum of two hundred dollars, and to pay all future taxes on the land, which were to be deducted from the purchase money, and he was to receive a deed upon payment of that sum. This agreement was in the possession of appellant, was produced by him on the trial, and there is no evidence that it was ever rescinded, or in any way released or discharged. The fact that he held this contract for the purchase of this land, is evidence that he assented to, and was bound to comply with its terms. That when he received it, he undertook, on his part, to pay the purchase money and the taxes, on the land. To have relieved himself from that obligation, he should have offered to perform his part of the agreement, and if Doolittle had failed to comply on his part, then he should have rescinded the contract, or in some other mode have relieved himself from its performance. But as it was never rescinded, when he made the payment of these taxes, it must be held, that it was under the contract, for the benefit of Doolittle, and not for himself, under his tax title.

Having purchased of Doolittle, he thereby admitted his title, and having agreed, under that purchase, to pay all taxes, under that agreement he has no right to refer their payment to his tax title, and thereby defeat the title of his vendor. He is bound to keep his agreement in good faith. And to permit him to apply the payment of these taxes, under his tax title, to create

a statutory bar, would be to permit him to perpetrate a fraud upon his vendor. He takes the agreement, holds it as a valid and subsisting contract against his vendor, proceeds on his part to comply with his part of the agreement by paying the taxes, as a part of the purchase money, and to allow these payments to be otherwise appropriated, would doubtless be contrary to the design of the parties. The petitioners had the right to rely upon his payments as being made under this purchase, and not as having been made to acquire a bar to their recovery.

This view of the case renders it unnecessary to examine the question, whether the possession of appellant was of that character required by the statute, as the payment of taxes did not concur with the tax title.

We perceive no error in this record for which the judgment below should be reversed. It is therefore affirmed.

Judgment affirmed.

James H. Karr, and Michael B. White, Appellants, *v.* Hiram E. Barstow, Appellee.

APPEAL FROM IROQUOIS.

A party who recovers in replevin, and gets a return of the goods from one party, cannot afterwards sue the same and another party in trespass for the same transaction; no matter whether the damages awarded in replevin had been recovered, or not.

If all the goods described in the plaint in replevin were not found, a count in trover, for the residue, was authorized.

Suit was commenced in trespass, for taking goods, etc., by Hiram E. Barstow, against James H. Karr, Cyrus R. Brown, and Michael B. White, on 2nd of April, 1858, in the Circuit Court of Iroquois county, returnable on the 19th day of April, 1858.

Defendant pleaded, 1st, not guilty; 2nd, special pleas, alleging that plaintiff, at the April term of said court, 1857, commenced an action of replevin against James H. Karr, one of the defendants, for the recovery of the same goods, the taking of which are the same supposed trespasses in the declaration in this suit mentioned. That the writ of replevin was returned served, and delivering the goods and chattels to Charles O. Barstow, agent of Hiram E. Barstow. To the declaration in that suit, James H. Karr pleaded *non cepit*, and title of the property in Karr. Issue was joined, and the cause was tried, and a verdict was found for the plaintiff, Barstow, and the jury

assessed his damages at $1,800. The defendant, Karr, moved for a new trial; thereupon Barstow, the plaintiff, entered a remittitur of all the damages, except five cents. The court then overruled the motion for a new trial, and a judgment was entered upon the verdict for the property, and for five cents damages, which judgment is still in full force.

The commencement and prosecution of the action of replevin, substantially as in the first special plea, and that in that suit defendant pleaded *non cepit*, also property in John Barstow and Charles O. Barstow, also property in Andrew J. Fuller; that issue was joined, and cause tried in October term, 1859; verdict for plaintiff, and damages assessed at $1,800. Motion for new trial; remittitur by plaintiff, of all damages, except five cents. Motion for new trial overruled, and judgment perfected for plaintiff, for the property and for the damages.

Fourth plea alleges, that the plaintiff did, on the 30th of March, 1857, by suit in replevin, recover from defendant, Karr, all and every the goods and chattels in plaintiff's declaration mentioned, and did then and there accept said goods, in full satisfaction and discharge of said trespass.

Fifth plea alleges, that after the committing of the supposed trespasses, and before the commencement of the suit, to wit, on the 30th of March, 1857, it was agreed that Karr should deliver over to plaintiff the goods and chattels, in satisfaction, etc., of the trespass, and that the goods were delivered, in pursuance of such agreement, in full satisfaction, etc.

General demurrer to the second and third pleas, which was sustained. There was a replication to the fourth and fifth pleas.

On the 19th of November, 1858, an additional special plea was filed, alleging, as to the taking of said goods, *actio non*, and setting up the replevin suit, the pleadings, trial and verdict of the jury for plaintiff, and assessing the plaintiff's damages at $1,800, which were remitted to five cents, and that judgment was rendered for plaintiff, and for the damages and costs; and as to the residue of said trespass, *actio non*, because plaintiff did not sustain damages other than have already been awarded to said plaintiff in the replevin suit, etc.

To the last plea plaintiff interposed a general demurrer, which was sustained.

Cause tried by jury, November term, 1859. Verdict for plaintiff; damages assessed at $600.

Motion for a new trial overruled, and judgment for plaintiff below.

Appeal prayed and allowed.

The appellants assign for error: the sustaining the demurrer to the second plea; the sustaining the demurrer to the third

plea; the refusing of the instructions asked by defendants; the giving of instructions asked by the plaintiff; and the rendering judgment for the plaintiff.

Van Burens & Gary, for Appellants.

Gookins, Thomas & Roberts, for Appellee.

Caton, C. J. This was an action of trespass for taking and carrying away certain goods. The defendants pleaded that the plaintiff had previously brought an action of replevin against the defendant, Karr, for the same goods for the taking of which this action was brought, in which he recovered the goods taken, and five cents for their detention. To the second and third pleas setting up this defense, the court sustained a demurrer, which is now assigned for error. The principal upon which this demurrer is attempted to be sustained is, that a plea by several defendants must be good for all, and that a party may bring a separate action against each trespasser, and recover separate judgments against each, but that he can only collect one satisfaction. These principles are admitted, but they will not sustain this demurrer. The plaintiff did recover satisfaction in his action of replevin. He got his goods back, and whether he ever collected the five cents damages or not, is no matter. Suppose the first had been an action of trespass against Karr, in which he had recovered five thousand dollars and five cents damages, and he had realized the five thousand dollars but not the five cents, could he sue the other tort feasors, and recover ten thousand dollars more against them? And yet he could do that, if this demurrer was well taken. The proposition will not bear argument. If he selected the form of action in which he was not entitled to recover vindictive damages, he must be content with the remedy which that form of action has afforded him. The pleas aver that he recovered all the goods taken. If his plaint did not go for all the goods taken by the defendants at the same time, that was his own folly. He could not sue in replevin for a part of the goods, and bring trespass for the balance taken, at the same time. If the officer could not find all the goods mentioned in the plaint, our statute authorized him to insert a count in trover for the balance, but there is nothing in this case to show that he did not get all the goods taken, and really the only complaint is, that the pleas do not show that he had recovered his five cents damages. We think the demurrer should have been overruled.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

Michael Rodgers, Appellant, *v.* John H. Kavanaugh *et al.*, Appellees.

APPEAL FROM WILL.

In order to hold a party to notice of a recorded deed, the description of the land must be such as to refer to the same premises.

A purchaser has a right to suppose his grantor has a title and a right to convey, although his title may not be recorded.

It appears by the record, that on the 15th day of December, 1856, Michael McEvoy and wife, conveyed to appellant, by a deed of trust, to secure an indebtedness of $1,000, the following described real estate, to wit: Lots one (1) and two (2), in block twenty (20), in West Joliet, Bluff street; also, forty-five (45) feet of the rear of lots one (1) and two (2), running easterly to the canal tow-path; being all the lands I own in block twenty (20), West Joliet.

It further appears, that on the 27th day of April, A. D. 1857, said McEvoy and wife, for the purpose of indemnifying the appellees, Kavanaugh, Dempsey and Ingoldsby, for having become security for McEvoy, to one Rease, for $412.90, executed and delivered to them a mortgage, with power of sale, upon the following described real estate, to wit: All that part of lot 5, in block 16, in West Joliet, and more particularly described as follows: Beginning at a point southwardly on the west line of said lot 5, 74 feet from the north-west corner of said lot 5; from that point run southwardly, along the said west line, to the south-east corner of lot 2, in said block 16, supposed to be forty-five feet; thence easterly, on a range of the south line of lot 2, to land appropriated by the State of Illinois for the construction of the Illinois and Michigan Canal; thence northwardly, along the west line of land so appropriated for said canal, to the south-east corner of a certain part of said lot, conveyed by one Jas. McKee and wife to John Curry, supposed to be forty-five feet; thence westwardly, on a line parallel with Oneida street, to the place of beginning.

Kavanaugh, Dempsey and Ingoldsby, in consequence of the default of McEvoy, were compelled to pay the note to Rease; and, to reimburse themselves, advertised the forty-five feet described in their mortgage, and sold the same on the 6th day of January, 1858, which was purchased by Eugene Daly, for the benefit of the mortgagees. Upon the filing of the bill, a writ of injunction was issued, restraining Daly from conveying or incumbering the forty-five feet purchased, till the cause should be heard.

The answers deny all notice of the pretended claim of appellant, that any mistake was made in describing the property in the deed of trust, or that McEvoy and Rodgers intended to embrace the forty-five feet in question, in the deed of trust. The appellees claim that they were subsequent *bona fide* mortgagees, without notice, either actual or constructive.

It is not contended that appellees had actual but constructive notice by reason of the registry of the deed of trust, but that the misdescription was so palpable as to put appellees upon inquiry when they took their mortgage from McEvoy and wife.

The Circuit Court of Will county, NORTON, Judge, presiding, at a special term in June, 1859, dismissed the bill.

PARKS & ELWOOD, for Appellant.

MCROBERTS & GOODSPEED, for Appellees.

WALKER, J. It is not insisted, that appellees had actual notice of the intention of McEvoy to convey a part of lot five, in block sixteen, by the deed of trust executed to appellant, at the time they received their mortgage. But it is urged, that when that deed was placed on record, notwithstanding the description of the property was wholly insufficient to indicate that it had been conveyed, by deed of trust, to appellees, it became notice of the execution of the deed of trust, or was at least sufficient to put the appellees upon inquiry, that would have led to full notice. The description adopted in the deed of trust, executed by McEvoy to appellant, is this: "Lots one (1) and two (2), in block twenty (20), in West Joliet, Bluff street—also, forty-five (45) feet of the rear of lots one (1) and two (2), running easterly to the canal tow-path; being all the lands I own in block (20), West Joliet." And the description of the property conveyed by the mortgage, subsequently made by McEvoy to appellees, is this: "All that part of lot five, in block 16, in West Joliet, and more particularly described as follows: Beginning at a point southwardly, on the west line of said lot five, 74 feet from the N. W. corner of said lot five; from that point run southwardly along the said line, to the S. E. corner of lot two, in block 16, supposed to be forty-five feet; thence easterly, on a range of the south line of lot 2, to the land appropriated by the State of Illinois for the construction of the Illinois and Michigan Canal; thence northwardly along the W. line of the land so appropriated for said canal, to the S. E. corner of a certain part of said lot, conveyed by one Jas. McKee and wife, to John Curry, supposed to be 45 feet; thence westerly, on a line parallel with Oneida street, to the place of beginning."

We have only to contrast these two descriptions to see they are not for the same premises. In the mortgage, it is described as part of lot five, in block sixteen, in West Joliet. In the deed of trust, the description embraces three tracts, all in block twenty, in West Joliet. The property in dispute is there described as forty-five feet in the rear of lots one and two, in block twenty. In the two instruments, the premises conveyed, are located in different lots and different blocks. Who could ever suppose property described as lying in the rear of lots one and two, in block twenty, was designed to embrace a part of lot five, in block sixteen? But it is urged that as McEvoy had made a conveyance of property for which he had no recorded deed, that when appellees came to examine the record, and found he had conveyed property for which he had no recorded deed, they were bound to inquire whether he had title to it, and to ascertain whether it was made in mistake. When they found no deed on record to McEvoy, for the property described in the deed of trust, they were at liberty to suppose he had such a claim as authorized him to make the conveyance, and that his title, whatever it might be, was in his possession unrecorded, and that his grantees, when they received the conveyance, had examined it, and were satisfied to receive it as security for the indebtedness. There was nothing in the fact that no deed was recorded, conveying this property to McEvoy, which was calculated to make them suppose that a mistake had occurred in the description. Sales are not unfrequently made by owners, who have no deed on record, and appellees had the right to suppose, in the absence of notice to the contrary, that such was the fact in this case. The fact that he was in the occupancy of the property could make no difference, as the deed of trust makes no reference to that fact, and the appellees were not bound to believe that the grantor had no other property, but that he was occupying, unless they had been notified of the fact.

Nor is there anything in the description adopted in the deed of trust, by which the land there described could, by any possibility, be located upon that described in the mortgage. There is nothing in the two descriptions that refers to the same thing, unless it be the west city of Joliet, and the canal. These objects may readily be referred to in the description of every piece of property in the city, as they are prominent and leading subjects of that locality. But if any portion of the description employed in the deed of trust may be rejected, still it will not describe or refer to the property embraced in the mortgage. To produce that result, a new description must be substituted, and courts have no power to make deeds for the parties. It may be true, as contended, that where several par-

ticulars are referred to, some of which are true and some false, that the latter may be rejected, and the conveyance be thereby sustained, but in this case, the particulars of the description all point to, and identify other and wholly different property from that sought to be brought within its operation.

The appellees not having had notice, either actual or constructive, at the time they received their mortgage, that the property embraced in it was designed to have been conveyed by the deed of trust, the court below committed no error in dismissing the bill, and the decree must be affirmed.

Decree affirmed.

Palmer Gallup, Appellant, *v.* Lorenzo M. Smith, Appellee.

APPEAL FROM LEE.

Where the proof, though slight, has a tendency to support the verdict, and is not contradicted by other evidence, this court will not disturb the finding of the jury.

Where one person procures board and lodging furnished for another, he is liable for what it is reasonably worth.

This was an action of assumpsit by appellee, against appellant, for board and lodging furnished to one Austin Gallup, at appellant's instance and request. The evidence adduced on the trial, and the instructions given, are stated in the opinion.

Judgment was rendered for plaintiff below, and appeal taken to this court.

James K. Edsall, for Appellant.

Glover, Cook & Campbell, for Appellee.

Breese, J. It must be admitted, that the evidence on which this verdict was rendered was not of the strongest character to charge the defendant. It consists, for the most part, in these facts: When L. M. Smith kept the house, appellant's brother, Austin, was a regular boarder there, and before L. M. Smith took the house, and while boarding there, he was employed a portion of the time by Judd & Gallup, and another portion by the appellant. When Alvah Smith took the house, Austin continued to board there, and about the time he gave up the house, he says he had a conversation with the appellant with regard to settling the previous board bill for Austin; that he

declined settling at that time, giving as a reason that he might want to have more boarding done at the house.

When called upon for the board of Austin, he did not deny his liability to pay it, but tacitly admitted it, and this the jury might well infer. If he owed no liability, he would certainly have protested against the call upon him. This evidence tended to show that the appellant had procured the boarding for his brother, and the law would imply a promise to pay what it was worth, and therefore the court properly modified the instruction asked for by the appellant, so as to make it read—"That unless the evidence shows that defendant, P. Gallup, promised to pay plaintiff, L. M. Smith, for the board of Austin Gallup, before or at the time such board was had by said Austin, *or that he procured such board to be furnished*, the jury should find for the defendant."

This instruction, given on the part of the plaintiff, and excepted to, was quite proper: "If the plaintiff has proven that he, through the concurrence of the defendant, furnished board and lodging to Austin Gallup on the credit of the defendant, the jury should find for the plaintiff such amount as said board and lodging is proven to be worth."

Though the evidence is slight, it has a tendency to prove the issue, and to sustain the verdict. We cannot say the verdict is contrary to the evidence, and therefore it ought not to be disturbed. The judgment must be affirmed.

Judgment affirmed.

The Central Military Tract Railroad Company, Appellant, *v.* William Spurck *et al.*, Appellees.

APPEAL FROM KNOX.

The measurement of the amount of work done under a contract by the person to whom it was referred by the parties, is, in the absence of fraud, conclusive, and neither party is permitted to show it to be erroneous.

Parties to a written contract are bound by the terms of their agreement, unless fraud is shown.

This was an action of assumpsit by appellees against appellant, to recover for work and labor performed under a contract.

The facts are fully stated in the opinion.

Walker, Van Arman & Dexter, for Appellant.

H. M. Wead, and John J. Weed, for Appellees.

WALKER, J. This was an action of assumpsit, instituted by Spurck and Hurton, against the Central Military Tract Railroad Company, for work and labor performed under a contract. The declaration contained two special counts on the agreement, and the common counts. The first special count sets out the agreement, and alleges that the appellees had entered upon and performed part of the labor, and that they were ready and willing to have performed the remainder of their part of the contract, according to its terms, but that the appellant, contrary to the agreement, had refused to pay them eighty per cent. of the contract price on the monthly estimates, and refused to allow them to proceed and to finish the work, but hindered, prevented, and discharged them from the same. The second special count, after setting out the agreement, in substance, avers, as a breach, that although the plaintiffs performed a portion of the work, amounting to 21,000 yards of excavation, and were entitled to have it approved and estimated by defendant's engineer, yet the defendant would not, nor did their agent or engineer, approve, accept or estimate the work, but fraudulently refused to do so, at the instance of the defendant. And that the defendant refused to pay 80 per cent. of the monthly estimates, and on the first of April, 1853, discharged plaintiffs from the work, and refused to pay them the contract price for the work performed by them. To this declaration there was filed the general issue, a plea of payment, and a plea that the work was performed under a special contract, alleging its performance by the defendants, and its breach by the plaintiffs, in not performing the required amount of work in each month, and in quitting and abandoning the work before its completion. To these pleas issues were formed, and a trial was had before the court and a jury, which resulted in a verdict in favor of the plaintiffs, for the sum of $939.16. Thereupon defendants entered a motion in arrest of judgment and for a new trial, which were overruled, and judgment entered upon the verdict, from which defendants appeal to this court.

The right of recovery, in this case, by the appellees, depends upon whether the appellants have violated their part of the agreement. If they have performed the agreement on their part, then the appellees have no right to abandon the contract, and sue for the price of the labor performed under it. But if, on the contrary, the appellants have failed to make payments, as stipulated in the contract, or if they discharged appellees, and, without sufficient cause, prevented them from completing their contract, they had the right to abandon it and recover damages for its breach. There was no evidence that the appellants discharged the appellees, but it is contended that the evidence

shows a failure to pay the amount due upon the contract. The evidence shows that appellees were paid the sum of $2,774.40. The evidence of the engineers of the road, showed the excavation, by the appellees, of 18,227 yards, while the testimony of their engineer shows an excavation of 21,000 yards of earth. The appellees' engineer testifies that he made no allowance for washing out of earth at the place from which it was taken, nor for the earth that was misapplied by making the grade wider than the contract called for, or for waste by too great a height. In making the estimates by the engineers of the company, they made these deductions, which accounts for the difference in the estimates. This whole case depends upon the accuracy or binding effect of these estimates, as, if that made by the road is accurate, then the amount paid to appellees was fully as much or more than the eighty per cent. upon all the labor performed; while if the other estimate is to be regarded as correct, the company have not paid that amount, and were in default, and the appellees were justified in abandoning the contract, and were entitled to recover.

The contract contains this stipulation: "If the work is not carried on as fast as contract required, company may enter and take possession, if it shall think fit, and in such case, parties of the first part shall lose the retained (20) per centage." It also contains this provision: "Parties of the first part will do all the work expressed in contract, under direction and to the approval and acceptance of engineer of company, who is to measure work, and upon whose measurement the work is to be paid for by the cubic yard, measured in excavation only." There is no evidence in the case by which it appears that the appellees were progressing with their work according to the agreement; on the contrary, it does appear that they were in arrear with it 49,000 yards on any estimate that was made, when they ceased to carry on the labor. This unquestionably gave the company the right to enter into and take possession of the work, and to retain the twenty per cent. upon the estimates unless they were themselves in arrear in payments, or had failed to perform some other portion of their agreement.

Then what is the effect of the agreement, that the engineer of the company shall measure the work upon which payments are to be made? This agreement, that the engineer of the company shall measure this excavation, is the same as that in the case of *McAvoy* v. *Long*, 13 Ill. R. 147, where it was held, that the measurement by the person to which it was referred, by the parties, is, in the absence of fraud, conclusive upon the parties, and neither is permitted to show it to be erroneous. This doctrine is sustained by the case of *Canal Trustees* v. *Lynch*, 5

Gilm. 521. There is nothing to show that this contract was not fairly and understandingly entered into by the parties. They have, by their agreement, designated the person who shall measure the work, and the court has no power to change their contract, and impose that duty upon any other person. Nor do we discover any evidence tending to show any fraud or unfairness in the measurement of the work, by the engineer of the company. We are also of the opinion that his measurement was the most accurate, as it was made as the work progressed, and before the excavations were enlarged, by the wash occasioned by rains, and before the successors of the appellees had commenced work. There was no authority to estimate excavations produced by the weather, and yet the engineer of appellees included this in his estimate.

It was objected, that the measurements were made by the assistant engineers, and not by the chief engineer of the road. While this is true, the evidence shows that the chief engineer approved and adopted their measurement, and this without any objection on the part of the appellees, so far as appears from the record. If they were dissatisfied with it, they should have objected, or required the chief engineer to make the measurement in person, and the evidence fails to show that they did either. As they received their pay upon the estimates made on these measurements without objection, it would seem that they regarded the measurements as having been made in conformity with the terms of the contract, and they by those acts seem to have given the construction to the contract that a measurement by any engineer of the company, was in compliance with its terms. Had they lacked confidence in the skill or integrity of those who did make the measurement for the company, they would have most unquestionably objected at the time.

Then if the estimate of the engineer of the company was correct, and there had been excavated 18,227 cubic yards of earth, that amount, at nineteen cents per yard, would make the sum of $3,463.13. Then if we deduct $692.62, twenty per cent. of that amount, from it, it leaves $2,770.51, which shows an over-payment by the road, of $3.96 on their contract, at the time appellees abandoned the work. It then follows, that as the appellants had kept and performed their contract, the appellees were not justified in abandoning the work, and consequently had no right to recover; and the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

JOEL B. KETCHUM, Plaintiff in Error, *v.* MICHAEL WATSON, Defendant in Error.

ERROR TO TAZEWELL.

To pass the title to personal property, as regards third persons, there must be a change of possession, so that others may not be deceived and defrauded by the apparent ownership of one, while the title is really in another.

THIS was an appeal, from a trial of the right of property before a justice of the peace, which was tried before HARRIOTT, Judge, in the Circuit Court of Tazewell county.

It appears, from the evidence, that the property in question, a horse, was levied on by the constable, as the property of one George Outlaw, in whose possession it was, under an execution against him, in favor of Ketchum, the plaintiff in error.

Watson, the defendant in error, claimed the horse as his property. It appears further, that Watson sold the horse to Outlaw for $80, took his note for the amount, and delivered the property. That afterwards, Outlaw not being able to pay the note, it was agreed that the sale should be rescinded, that Watson should destroy the note, and Outlaw should keep the horse, and if he paid Watson $80 by the first of February, following, then Outlaw was to own the horse, but if he did not pay by that time, then it was to be Watson's property, and at his risk. Judgment in favor of Watson.

S. D. PUTERBAUGH, for Plaintiff in Error.

ROBERTS & IRELAND, for Defendant in Error.

BREESE, J. The sale to Outlaw, of the horse in question, made in August, 1859, was perfected by delivery to him. His title was then complete. The resale by Outlaw to Watson, in October following, was not perfected by delivery, nor was there any change of possession; the title, therefore, did not pass. To pass the title as between third persons, there must be a change of possession, so that others may not be deceived and defrauded by the appearance of ownership in one, while the title is really in another. *Thompson* v. *Yeck*, 21 Ill. R. 73. The whole transaction is in fraud of the chattel mortgage act. The judgment is reversed, and the cause remanded.

Judgment reversed.

Joel B. Ketchum, Plaintiff in Error, *v.* Joseph Watson, Defendant in Error.

ERROR TO TAZEWELL.

Where a person is in possession of personal property, and receives credit from another who has no notice, at the time of the credit, that he is not the owner, a third person will not be permitted to claim the property.

A. claimed a horse as his property, which had been levied on as the property of B., while it was in B.'s possession, under an execution in favor of C. Held, that A. could not support his claim, as against C., unless C. had notice of A.'s claim at the time he gave credit to B.

The facts of this case are the same as those of the preceding case; except the instructions which are stated in the opinion, and the evidence of *Michael Watson*, called by plaintiff, who said, that he is son of plaintiff; knew the horse in question; plaintiff had owned the horse for four or five years; he sold the horse to George Outlaw on the eleventh day of August, 1859, conditionally; that Outlaw was to take the horse and take good care of him, and if he paid for it by the twenty-fifth of December, 1859, the horse was to be Outlaw's, but if he failed to pay for the same, the horse was to remain the plaintiff's. Outlaw never paid for the horse. In the latter part of September, 1859, I told Ketchum of the condition which the horse had been sold upon; Ketchum then held the note upon which the judgment against Outlaw was obtained, upon which execution in question issued; I had made a conditional sale for my horse, and took Outlaw's note, and which contract was rescinded onthe tenth of October, when Outlaw made a conditional contract, like the one my father and he had made.

S. D. Puterbaugh, for Plaintiff in Error.

J. Roberts, for Defendant in Error.

Breese, J. This case, in its principal features, does not differ from the case of *Ketchum* v. *M. Watson*, *ante*, 591, and must be decided in the same way. There are, however, some instructions necessary to be noticed.

The plaintiff asked this instruction, which the court gave: "If the plaintiff sold Outlaw a horse, conditioned that it should not be his property until paid for, and that Ketchum was cognizant of such contract, they will find for the plaintiff, unless the property was in the possession of Outlaw, and the indebtedness accrued to Ketchum before such notice, and while Outlaw had said horse in possession; and if such be the case, you will find for the defendant."

We think the court erred in giving it without this material qualification, namely, that Ketchum was cognizant of the contract, before he gave credit to Outlaw.

This view rendered it necessary that the court should have given the third instruction asked by the defendant, that unless they believe, from the evidence, that Ketchum had notice of the sale to Outlaw before he purchased the notes, they will find for the defendant. It was error to refuse this instruction.

The judgment is reversed, and the cause remanded.

Judgment reversed.

William K. Wear, Appellant, *v.* The Jacksonville and Savannah Railroad Company, Appellee.

APPEAL FROM KNOX.

The obligee in a conditional contract is bound to perform his agreement, if the conditions specified have been complied with.

When the payee or obligee, by the terms of the contract, has the right to determine the time of the payment, or performance, he must give notice of the time to the payor or obligor, before an action can be maintained.

A demurrer to a plea, when carried back to the declaration, is joint and not several, to the different counts, and cannot be sustained unless all the counts are defective.

The defendant, after pleading the general issue, is estopped from carrying a demurrer, which the plaintiff has interposed to his other pleas, back to the declaration.

This was an action of assumpsit, by appellee against appellant, on the following contract:

"Farmington, August 28, 1856. We, the undersigned, do each for himself, hereby subscribe for the number of shares of the capital stock of the Jacksonville and Savannah Railroad Company, set opposite our respective names, and do hereby severally agree to pay to the order of the Directors of said Jacksonville and Savannah Railroad Company, the installments hereafter assessed thereon, as they respectively become due, and to be governed by the charter and by-laws of said company. It is conditioned, that no payment shall be required of the stockholders until the road is contracted for its grading. It is also conditioned, that no payment will be required unless said railroad shall cross the Peoria and Oquawka Railroad not less than two miles west from Elmwood.

"Shares one hundred dollars.

"Subscribers' names.

"W. K. Wear, - - - - 20 shares."

The declaration contained three counts, the third being the common money count.

Defendant interposed plea of non-assumpsit, and also a special plea as follows: "And for further plea, etc., defendant says *actio non*, because he says that at the time the defendant is alleged to have subscribed, and did subscribe, twenty shares to the Jacksonville and Savannah Railroad Company, as is alleged in first count of plaintiff's declaration, it was by parol expressly agreed, by and between said plaintiff, by their agent, and defendant, that defendant should pay no part of said subscription until the Jacksonville and Savannah Railroad Company should build and complete said railroad in and through Knox county, Illinois, and have the cars running upon said road, and that defendant subscribed twenty shares to said railroad company, upon that condition and understanding, and in no other way, or manner, or agreement; and defendant avers that said Jacksonville and Savannah Railroad Company have not, by themselves or otherwise, built and completed said railroad through Knox county, Illinois; that said Jacksonville and Savannah Railroad Company have not the cars running upon said road in Knox county, Illinois, and this the said defendant is ready to verify, wherefore he prays judgment, etc."

To this plea there was interposed a demurrer, which demurrer, upon argument, was by defendant urged against the declaration, but the court overruled the demurrer as to the declaration, and sustained it as to said plea. The defendant did not plead over.

On the trial, before THOMPSON, Judge, the plaintiff proved the contract as above set out, that contracts had been made and executed for the grading, bridges, masonry, etc., of the road, and that "this road crosses the Peoria and Oquawka Railroad two miles and $109\frac{4}{10}$ feet west of Elmwood."

The plaintiff also proved, that after the execution of the contracts for grading, etc., the following order, as shown by the books of the company, was passed by the board of directors:

July 26, 1858, it was ordered that an assessment upon all the stock subscribed, or to be hereafter subscribed, to the capital stock of said company, and on which an assessment has not heretofore been made, be payable at the office of the secretary, as follows: that all stockholders who have not been included in previous calls for payment, be required to pay on the several shares respectively subscribed by them, ten per cent. on the first of September, 1858, and ten per cent. on the first day of each and every month next thereafter; and that all persons who may subscribe stock hereafter, shall pay ten per cent. on the first day of the month succeeding the time of such subscription, and ten

per cent. on the first day of every month next thereafter; and whenever, by any stipulation, condition or agreement, the stock shall not be payable according to this or previous orders for assessment, the same shall be paid at the rate of ten per cent. on the first day of every month after the said stockholders shall be liable to pay the same according to such stipulations, conditions or agreements.

To the reading of which, defendant objected; which objection was overruled, and exception taken.

Defendant did not offer any evidence.

Verdict and judgment for plaintiff, for $1,800.

Motions for a new trial, and in arrest of judgment, overruled. Defendant appeals to this court.

MANNING & MERRIMAN, for Appellant.

GOUDY, JUDD & BOYD, for Appellee.

WALKER, J. The subscription to the capital stock of this road, upon which this suit was instituted, was not payable until it became due on an assessment to be thereafter made by the directors, and not then, unless the grading of the road was under contract. The subscription also contains a condition that no money should be paid, unless the road should cross the Peoria and Oquawka Railroad not less than two miles west from Elmwood. The evidence shows that the grading of the entire road had been contracted, and the contract partly executed, previous to any assessment on this subscription. This, we think, fully meets this condition of the subscription. The evidence also shows that the road, as located and as contracted to be constructed, crosses the Peoria and Oquawka road more than two miles west from Elmwood, and there is nothing in this record which indicates any design, by the appellees, to cross that road less than that distance west from that point. This condition, we think, refers to the final and permanent location of the road, and not to its completion, as one of the conditions was, that the money should not be payable until the grading was placed under contract. If this condition requires the completion of the road before payment, why insert the other condition? It would be wholly useless. This then fully disposes of these objections.

It is also urged, that the judgment of the court below should be reversed, because the evidence fails to show that appellant had any notice of the time when the installments, as assessed by the directors, became due. In all cases in which the parties have fixed, by the agreement, a time for its performance, the payor or obligor must take notice of the time of payment or

performance. But when the payee or obligee, by the terms of the contract, has the right to determine the time of the payment or performance, by the payor or obligor, it is necessary that he should have notice of the time, before an action can be maintained to recover on the contract. When the fact or circumstance upon which the performance depends, lies more particularly in the knowledge of the promisee than the promisor, the former must give the latter notice. Chit. on Cont. 556. In this case, the times when, and the amounts in which, this subscription was to be paid, depended upon the action of the payees, and the evidence of their determination, fixing the amounts and times of payment, was recorded in their books, under their contract, and in their possession, and that fact lay particularly in their knowledge, and they should have given notice to the appellant. *Spangler* v. *Indiana and Illinois Central Railroad Company*, 21 Ill. R. 277; *Barrett* v. *Alton and Sangamon Railroad Company*, 13 Ill. R. 504. For the want of evidence of notice of the calls, in conformity to any rules adopted by the road or otherwise, the verdict and judgment were not warranted, and were therefore erroneous.

It is likewise objected, that the court erred in not carrying the demurrer to the special plea back, and sustaining it to the declaration. The demurrer was joint, and could not be several to the different counts of the declaration, even if it could have been carried back to that pleading, and as the common counts were clearly good, the demurrer could not have been sustained unless all were defective. Again, when this demurrer was interposed, the general issue had been filed to the entire declaration, thereby traversing every material fact in its several counts. It is contrary to the rules of practice, both in courts of law and equity, to permit a party to plead and demur at the same time, to the same pleading. When a plea is filed and an issue formed to any precedent portion of the pleadings, it waives all right to demur to it, unless the plea shall be first withdrawn. There was therefore no error in refusing to sustain the demurrer to the plaintiff's declaration, as the defendant, by filing the general issue, had estopped himself from questioning its sufficiency by demurrer.

But for the error indicated, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

Nicholas C. Flood, Plaintiff in Error, *v.* Benjamin S. Prettyman, Defendant in Error.

ERROR TO TAZEWELL.

It is erroneous to refuse to allow a party to prove, that the personal property of a defendant in execution was sold *en masse*, collusively, with the intent to defraud creditors, against the remonstrance of the attorneys of the plaintiff in execution.

This was an action of replevin, brought by Prettyman against Flood, to recover a horse which had been levied upon by Flood, as constable, under an execution against William Trent. The suit was tried at the September term, 1859, of the Tazewell Circuit Court, before Harriott, Judge, and a jury.

Declaration contained only one count, for taking one bay horse.

Defendant pleaded: 1. *Non cepit.* 2. Property in William Trent. 3. Property in Trent, and that defendant was a constable of Tazewell county; and that, by virtue of an execution in his hands in favor of S. W. Fuller, to the use of Calhoun, Sterling & Co., against William Trent, he levied upon the horse on the twenty-fifth of May, 1859, as the property of William Trent.

Issue joined on the pleas.

Trial by jury. Judgment for plaintiff. Motion for new trial overruled.

S. D. Puterbaugh, for Plaintiff in Error.

H. M. and J. J. Wead, and C. C. Bonney, for Defendant in Error.

Caton, C. J. Upon the trial below, the defendant offered to prove by the sheriff, who made the sale of the horse to the plaintiff on an execution against Trent, "that the personal property of the said William Trent was sold *en masse*, and that there was collusion between the said Trent and plaintiff to defraud the creditors of the said Trent; and that said sale was made contrary to the orders of the attorneys of said Durkee & Bullock; and that the sale was made at the request of said Trent and the plaintiff; and that the property was sold *en masse*, and for a nominal sum. All of which the court refused to allow; to which ruling the defendant then and there excepted." This evidence the court refused to admit, and we think erroneously. If it were possible for that sale to have been collusive and fraudulent, so as to render it void as to

creditors, it was the right of the defendant to be allowed to introduce proof to establish such fraud. Whether the circumstances detailed in the offer were sufficient to establish the fraud in point of law, it is not necessary for us to say, but if they tended to prove the fraud, they should have been admitted. That they would have tended to, and even would have gone far to establish the fraud, we can have no doubt.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

Gordon N. Roundy, Assignee of William S. Atcherson, Plaintiff in Error, *v.* Bela T. Hunt, Defendant in Error.

ERROR TO KANE.

Affidavits in support of a motion should be set out in the bill of exceptions.

The statute regulating judgments by confession in vacation in the Kane Circuit Court, requires the plaintiff to file with the clerk a declaration, a warrant of attorney to confess judgment, with an affidavit of its execution, and a plea of confession. The clerk has no judicial authority to pass upon their sufficiency.

If papers purporting to be in conformity to the practice are filed, he must enter the judgment, and if they are insufficient to warrant the confession, the defendant may apply to the court, when in session, to have the order vacated, and from the decision of the court on that application, the parties may prosecute error to this court.

When such judgments are confessed in a court, it is evidence that the authority to confess the judgment was judicially passed upon by the court, but a judgment confessed in vacation creates no such presumption.

When a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note, before it is due, the record must show that the specified contingency had happened, otherwise a judgment is unwarranted.

Pleas in the Circuit Court of Kane county, in vacation, after the May term, 1858.

Sept. 21, 1858, there was filed in said court a note, warrant of attorney, affidavit, declaration, and cognovit.

Copy of note, as follows:

St. Charles, Dec. 16, 1857.

$1,824 41-100.

One year after date I promise to pay to B. T. Hunt, or order, at his office in St. Charles, eighteen hundred and twenty-four 41-100 dollars, for value received, with interest.

(Signed) W. S. ATCHERSON.

Copy of warrant of attorney: "Know all men by these presents, that whereas, the subscriber is justly indebted to B. T. Hunt, upon a certain promissory note, bearing even date herewith, for the sum of eighteen hundred and twenty-four 41-100 dollars,

made payable to the said B. T. Hunt, or order, and due one year after date, at six per cent. interest.

"Now, therefore, I do make, constitute and appoint W. D. Barry, or any attorney of any court of record, to be my true and lawful attorney, for me and in my name, place and stead, to appear in any court of record, in term time or vacation, in any of the States and Territories of the United States, at any time after the said note may have become due, or before the said note becomes due, if the said B. T. Hunt or his assigns shall believe there is danger of losing the said sum secured by said note, waive service of process, and confess judgment," etc.—concluding with the usual form, dated Dec. 16, 1857, signed W. S. Atcherson.

The following is a copy of the affidavit:

STATE OF ILLINOIS, } ss.
KANE COUNTY, }

Adam S. Vanvorst, being duly sworn, on oath says, that he has seen William S. Atcherson write, and knows his handwriting; and this affiant further says, that the signatures to the within note are the genuine handwriting of the said William S. Atcherson.

(Signed) A. S. VANVORST.

Subscribed, etc.

Declaration and cognovit in the usual form.

Sept. 21, 1858, judgment entered in said cause for $1,930.50.

The record recites, that the execution of the power of attorney was duly proven, and judgment was confessed by an "attorney in fact."

At the November term of said Kane Circuit Court, Gordon N. Roundy, assignee of Wm. S. Atcherson, enters his motion, supported by affidavit, to quash said execution and to set aside the said judgment.

Dec. 24, 1858. This motion being heard, it is ordered by the court that said judgment be opened, and the defendant be allowed to file his pleas, and defend said suit, upon condition that he file his bond, in penal sum of $1,800, with security, etc., conditioned for the payment and satisfaction of whatever judgment may be obtained by plaintiff against him upon trial of the suit.

The following are the errors assigned:

1. It was error to enter up judgment by confession against the said William S. Atcherson and in favor of said Bela T. Hunt, on said note, without its appearing affirmatively of record that the execution of the power of attorney to said note attached was first duly proven.

2. The attorney named in said power of attorney had no authority to confess judgment on said note before the same became

due, only in case the said Hunt should believe there was danger of losing the sum secured thereby; and it was error to enter judgment as aforesaid upon said note before the maturity thereof, without an averment in the said Hunt's declaration that he believes there was danger of losing the sum secured by said note.

3. Upon the motion of the plaintiff in error to quash the execution, and to set aside the said judgment, the court, in allowing the said motion, erred in affixing the condition that the defendant should file his bond to the plaintiff, with security, conditioned for the payment and satisfaction of whatever judgment might be obtained by the plaintiff against him upon the trial of said suit.

EASTMAN & BEVERIDGE, for Plaintiff in Error.

W. D. BARRY, for Defendant in Error.

WALKER, J. The affidavits used on the hearing of the motion in the court below, are not embodied in a bill of exceptions, and therefore form no portion of this record, and will not be considered. The assignment of errors is upon the whole record, and questions the regularity of the confession of the judgment. There was filed in the clerk's office, an affidavit proving the signature to the note, but none proving the execution of the warrant of attorney to confess judgment, although the order of the clerk, rendering judgment, recites that it was duly proved. The question is then presented, whether the clerk may hear evidence and determine the sufficiency of the proof of the execution of the power of attorney.

The 2nd section of the act of 16th February, 1857, (Scates' Comp. 637,) regulating the practice in the Kane Circuit Court, provides that judgments by confession, may be entered at any time in the vacation before the clerk, by filing the proper papers with him, and that such judgment shall have the same effect as if rendered at a term of court. As a condition to the right to confess a judgment in vacation, the proper papers must be filed with the clerk. This requirement of the statute, could have referred alone to the established practice in cases of confession of judgments, in courts of record. That practice requires the plaintiff to file a declaration on his cause of action, that he shall file the warrant of attorney with proof of its execution, and a plea of confession. These, under the practice, constitute the proper papers to authorize the confession of a judgment. And the legislature has not conferred upon the clerk the power to hear evidence, and determine whether the warrant of attorney was duly executed. Nor does the act make him the judge of

the sufficiency of the papers when filed. It only authorizes him to require papers to be filed which purport to be in conformity to the practice. If the plaintiff should fail to file a declaration, a warrant of attorney, with an affidavit of its execution, and a plea of confession by the attorney, the clerk should refuse to enter the judgment. But when these papers are filed, he should enter the judgment, and if they are insufficient to warrant its confession, the defendant has his remedy by applying to the court, when in session, to have the order vacated, and from the decision of the court on that application the parties may prosecute error to this court.

As the clerk cannot, under our constitution, exercise any judicial power, he cannot determine the legal sufficiency of the papers required by the statute, to be filed before the judgment is confessed. This being the case, the legislature must have designed that the defendant should have the right to have their sufficiency passed upon by the court, if he should feel himself aggrieved. They must, therefore, have intended that when the papers required by the statute, were filed with the clerk, that they should thereby become a matter of record. The statute only authorizes the filing of proper papers, and as the clerk has no power to make a bill of exceptions, to have them passed upon by the court, they must be regarded as matter of record. If they were not intended to become a matter of record, the warrant of attorney could not be shown to justify the confession of the judgment. When such judgments are confessed in a court, it is evidence that the authority to confess the judgment was judicially passed upon by the court, but a judgment confessed in vacation creates no such presumption, as the same intendments are not indulged to sustain ministerial, as are in favor of judicial acts.

It is a rule of general application, that all powers not coupled with an interest, must be strictly pursued in their execution. Here was a power to confess a judgment before the maturity of the debt, upon the happening of a specified contingency. The judgment was confessed before the note fell due, and the record fails to show that the contingency had happened, which authorized the entry of the judgment. The declaration on its face shows no cause of action, but sets out a note not then due by its terms, and it contains no averment to show that a judgment was authorized. The warrant of attorney, it is true, contains a provision that in case Hunt should believe that there was danger of losing the sum mentioned in the note, then a judgment might be confessed before the note fell due. But it is nowhere averred, nor does it appear, that Hunt had become apprehensive of such loss, or that he even knew that the judg-

ment was confessed. Before the judgment could be legally confessed, Hunt must have feared the loss, and that should have appeared in the record. There were no other conditions upon which the judgment could be confessed, before the maturity of the note. We are, therefore, of the opinion that the judgment was unwarranted, and should have been vacated, and the execution and levy quashed.

The order of the court below, conditionally setting aside the judgment, is reversed, and the cause is remanded, with leave to plead.

Judgment reversed.

Alexander Cruikshank, Appellant, *v.* James Comyns, Appellee.

APPEAL FROM RECORDER'S COURT OF THE CITY OF LASALLE.

If an action is brought by James Comeyns, upon a certificate of deposit given Jas. Cummins, proof should be made that the certificate was issued to the plaintiff. The words are not *idem sonans*.

If such certificate was to bear interest after notice, before interest could be recovered, proof of prior demand or notice should have been given.

A certificate, signed by A. B., teller, requires proof that A. B. was teller in the bank from which the certificate purports to have been issued.

This was an action upon a certificate of deposit, by appellee against appellant, brought before a justice of the peace. September 19th, 1859, and taken to the Recorder's Court of the city of LaSalle by appeal.

The transcript of the magistrate, filed with the clerk of Recorder's Court, shows the issuing of summons by magistrate, September 19th, 1859; service and return of summons by constable, September 20th, 1859; judgment before magistrate rendered September 24th, 1859, in favor of appellee, against appellant, for $53.75; issuing of execution by magistrate same day, on oath of appellee; delivery of execution to constable; appeal allowed to appellant, by magistrate, to Recorder's Court of the city of LaSalle; appeal bond with security approved; execution recalled; and that the transcript of judgment, papers, and certificate of deposit, were delivered to clerk of Recorder's Court, city of LaSalle.

Summons issued October 17th, 1859, to appellee, by the clerk of LaSalle Recorder's Court of the city of LaSalle; service, return, and filing same.

At January term, 1860, of the Recorder's Court of the city

of LaSalle, by agreement of parties, the cause was submitted to the court for trial without the intervention of a jury; the court, CHUMASERO, Judge, found in favor of appellee, for the sum of $64.50.

Motion for new trial by appellant was overruled by the court. Appeal prayed by appellant to Supreme Court, and allowed.

The errors assigned are, that the court erred in permitting certificate of deposit to James Cummins to be read in favor of James Comyns.

The court erred in permitting said certificate to be read in evidence, without proof that the person executing the same was authorized by plaintiff to do so.

Court erred in permitting certificate of deposit to be read in evidence without proof of demand for money.

Court erred in finding issues in favor of defendant.

Court erred in overruling motion for new trial.

Court rendered judgment for too much upon the proof adduced.

E. F. BULL, for Appellant.

D. L. HOUGH, for Appellee.

BREESE, J. The record in this case shows a suit brought, and a recovery had, on the following paper:

$53.75. BANKING OFFICE OF ALEXANDER CRUIKSHANK, *Peru, Ill., September 5th*, 1859.

Jas. Cummins, Esq., has deposited in this office the sum of fifty-three 75-100 dollars, currency, to the credit of himself, and subject to his order on return of this certificate, payable in like funds, with interest, at six per cent. per annum, if ten days' notice is given. F. GUNTHER, *Teller.*

The suit is in the name of James Comyns, and no proof that he is the person to whom and for whom the certificate was issued. The words are not *idem sonans*, and therefore proof should have been made that they are one and the same person. It may be that the jury could infer that Comyns is the same name as Cummins, from the pronunciation.

There was no proof that a prior demand of the money, and an offer to surrender the certificate, had been made ten days before suit was brought, or that ten days' notice was given that the money would be demanded.

It is the contract of the parties that this notice should be given, and no right to sue arose until such notice was given.

As to the objection that the certificate, signed by Gunther, teller, is not evidence against Cruikshank, we have to say, that it should have been proved that Gunther was teller of the bank,

and his authority to issue such certificate would then be presumed.

The amount of the recovery is greater than the plaintiff would be entitled to, calculating interest upon the deposit for the whole time, up to the time of rendering the judgment. Six per cent. interest only could be claimed, but to recover that, ten days' notice should have been given. The judgment is reversed, and the cause remanded.

Judgment reversed.

Samuel B. Buckley, Plaintiff in Error, *v.* Edwin D. Lampett, Defendant in Error.

ERROR TO TAZEWELL.

A mortgagee under a chattel mortgage who endeavors to take possession of the property mortgaged on the next day after default in payment, and continues his efforts till he is successful, is not chargeable with laches.

The facts of this case are stated in the opinion.

James Roberts, and S. D. Puterbaugh, for Plaintiff in Error.

B. S. Prettyman, and H. M. and J. J. Wead, for Defendant in Error.

Caton, C. J. It is difficult to see how the court could have found differently, from the evidence as exhibited in this record. The chattel mortgage matured on the first of January, and was not paid. On the next day, the mortgagee went to the premises of the mortgagor, to take possession of the mortgaged property. He learned that it had been driven into the country, and he could not get it. On the next day early, he again went for the property and got it, and regularly sold the property on the mortgage, and under that sale the plaintiff claims title. On the twentieth of January, the defendant caused his execution against the mortgagor to be levied on the property in the hands of the plaintiff. And the only question is, whether the mortgagor lost his lien under the mortgage by unreasonable delay in taking possession of the property after the mortgage was forfeited. Waiving the question, whether the lien would not be saved if the mortgagee takes possession at any time before the levy of the execution against the mortgagor, in this case we have no

hesitation in saying that the mortgagee was guilty of no laches in taking possession under the mortgage. On the very next day after the note fell due, he endeavored to, and did all he could to get the possession, and on the day following, renewed his efforts, and succeeded in getting it. It is difficult to say what more he could have done. The mortgagor had the whole of the first of January to pay the debt in. The mortgagee was not entitled to the possession till the next day, when he used all reasonable efforts to get it, and repeated his efforts till he did get it, on the third. This was all the law required. The judgment must be affirmed.

Judgment affirmed.

Franklin Parmelee *et al.*, Appellants, *v.* Joseph W. Hambleton *et al.*, Appellees.

APPEAL FROM KANE.

Where parties have entered into a written contract for erecting a building, which provides that the architect shall give a construction to the contract, and in case of a dispute as to his decision, arbitration shall be had, the owners of the property cannot, by preventing such arbitration, deprive the contractor of any rights which he could insist on before the arbitrators. He will be protected by the courts.

Parties are bound by the terms of their contract under a fair and reasonable construction of the whole instrument, and their acts may be used to show what their understanding of the agreement was.

This was an action of assumpsit, brought by the above appellees against the appellants, to the January term, A. D. 1859, of the Cook County Court of Common Pleas. After the organization of the Superior Court of Chicago, a change of venue was taken from that court to the Kane Circuit Court.

The action was based on a contract for building, of which the parts referred to in the opinion were as follows:

Superintendents, and their duties:

Boyington & Wheelock, or assistant architects, are declared to be the superintendents of the work for the owner. Their duties will consist in giving, on demand, such instruction, either in language, writing or drawing, as in their judgments the nature of the work may require, having particular care that any and all work done, and materials used for the work, be such as is hereinafter described, 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 material used, and work done.

The contractor being bound in all cases, to remove all improper work or materials, upon being directed so to do by the superintendent.

But if the contractor, after being directed as above, to remove the same, should refuse or neglect so to do, he shall not only suffer a deduction from the contract price, of the difference in value of proper and improper work and materials, but shall also be liable for all damages of whatever nature or kind, that may result from such cause. The above provisions to apply in the same way to all materials or work used, made or fixed, without the knowledge of the superintendent.

And it is hereby expressly provided, that, in case the contractor should feel aggrieved by the decision of the superintendent, an appeal may be taken from such decision to an arbitration, chosen indifferently, and whose decision in the matter shall be final, and binding on all parties.

The owner reserves the right to alter or modify the design, and to add to or diminish from the contract price, the difference to be adjusted as provided above.

The owner being bound, in all cases, to recognize the acts of his superintendent, not only as regards extra work, but also to the sufficiency of the design, the contractor being in no case responsible for any accident resulting to the work from a defective design, which fact must be determined by an arbitration of three disinterested men, chosen indifferently, and if found that the damages resulted from a want of proper care on the part of contractor, then, and in such case, the damages and loss shall be paid for and made good by him. But if found that the accident or damage resulted from an improper design, then, and in such case, all damages shall be sustained by owners; which, in all cases, must be real, and in no case constructive damages to be allowed.

All payments made on 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.

There were also clauses requiring the contractor to "set all stone and iron window caps and sills in a thorough manner," and stating the manner in which the iron anchors and straps were to be made and fastened.

After the completion of the building, the appellees being dissatisfied with the decision of the architect, notified appellants

that they wished an arbitration, and suggested the names of three persons as arbitrators. These the appellants refused to accept, and suggested others, but they were not agreed to, and the effort to arbitrate was abandoned at the instance of the appellants, who declined to select any other persons, stating that they would "rather leave the matter to the decision of the court and twelve men, than to any arbitrators they could get."

The other material facts are sufficiently stated in the opinion.

SCATES, MCALLISTER & JEWETT, for Appellants.

FARWELL, SMITH & THOMAS, for Appellees.

WALKER, J. The contract under which the labor was per formed, provides that the architect is the superintendent of the owner, and by its terms, requires him to give interpretation to the contract, and certificates which the contractor might be entitled to receive, to make estimates of the amount to be added to or deducted from the contract price, occasioned by any change in the plan of the building or from any other cause. By it he had the power to require the contractor to remove all improper materials or work placed in the building. The contract also contains this clause: "And it is hereby expressly provided, that in case the contractor should feel aggrieved by the decision of the superintendent, an appeal may be taken from such decision to arbitrators, chosen indifferently, and whose decision in the matter shall be final and binding on all parties." By a subsequent clause, it is provided that the owner in all cases shall be bound to recognize the acts of his superintendent, not only as regards extra work, but also the sufficiency of the design, the contractor being in no case responsible for accident resulting from a defective design, which fact is also to be determined by arbitrators, chosen in the same manner as previously provided; and if they determine that the damage resulted from a want of proper care on the part of the contractor, the same shall be made good by him, but if from a defective design, all damages to be sustained by the owner.

It is insisted by appellant, that the agreement to arbitrate provided for in the first clause, only refers to the requirement to remove improper work, and the assessment of damages for extra work, and the second, as to questions whether the design is sufficient. These provisions are not, we think, so limited in their terms, nor is that the true construction. The contract had previously provided that the superintendent should give interpretations to the contract, and empowered him to give all certificates to the contractor which he might be entitled to

receive, to fix all deductions from or additions to the contract price, growing out of alterations of the design, to determine the amount of damages which might accrue from any cause, and particularly to decide on the fitness of the materials used and work performed. Also to require the removal of all improper materials furnished, or labor done. Why the arbitration first provided for, should be limited to his decision on any one of these various questions, and the others to be excluded from its operation, we are at a loss to perceive. A decision on any of them, seems to be equally embraced in its provisions. The language fails in terms to exclude any portion of these questions, nor does any other portion of the contract manifest such a design.

The second clause, providing for an arbitration, seems intended to submit the question to arbitrators without any decision of the superintendent, when a difference arose as to the plans furnished by him. This clause referred to the question of the sufficiency of the design adopted by the superintendent, and it would be useless to leave him to determine its sufficiency, as he had already determined that question when he furnished it. So this clause provides for an arbitration in the first instance. This explains the reason why this clause was adopted. It can hardly be supposed, that any person in making a contract involving so large an amount as this does, would be willing to submit all questions of construction or dispute under the contract, to be determined by the agent of the opposite party, without any appeal, and give to his decision the conclusive effect contended for by appellants. We perceive no such intention of the parties manifested by the agreement, and they seem not to have so understood it, as they each selected a set of arbitrators, to settle and decide the questions litigated in this case. When the effort to arbitrate fell through, appellants notified appellees that they would prefer to have the differences litigated, and declined to proceed with an arbitration. This clearly manifests that both parties understood, that under the agreement all questions were to be arbitrated, and they, we have no doubt, gave the contract its true construction. This court, in the case of *Mills* v. *Weeks*, 21 Ill. R. 561, and *McAuley* v. *Carter*, 22 Ill. R. 53, held that the decision of the architect is conclusive on the parties. This is unquestionably true where no objection is made to, or steps taken to avoid or reverse his decision. In these cases no question was made as to whether the parties were bound to arbitrate, and there was consequently no occasion to qualify what was then said. As no objection was taken to his decision when it was made, it was held to be conclusive on the parties. If the contracts in those

cases were similar to this, and any question had been raised as to the power to appeal from the decision of the architect to arbitrators, different language would have been employed. This disposes of the question raised on the pleas to which the demurrer was sustained, as well as the instructions based upon the construction that the decision of the superintendent was, under all circumstances, final.

It cannot be held, because the contract provides that the decision of the superintendent may be reviewed by arbitrators, that the contractor shall be bound by his decision, when the other party has prevented or declined an arbitration. To hold such a doctrine, would place it in the power of the owner under this contract to escape all liability by the erroneous decision of his own agent. The law has not clothed parties with such power to commit wrong. It will not tolerate such injustice.

It is urged, that appellees were not delayed by appellants in the completion of the work within the stipulated time, and that the damages assessed by the superintendent for delay should have been deducted by the jury. This question depends upon who, under the contract, was to furnish the iron caps for the windows, and the iron belt-courses, and the cut stone for sills and belt-course of the towers. The evidence shows, that the delay was occasioned either in whole or in part by the delay in procuring these materials. It further shows that the appellants furnished and paid for a portion, if not all of them. And we nowhere find, from the evidence, that they ever claimed that appellees were to either furnish or pay for them. Again, the architect told appellees' hands that they should be paid for the time they lost, by delay in furnishing these articles, and we find that appellants did pay to appellees' foreman eighty-five dollars for the delay. Now when it is remembered that the superintendent was fully empowered to give a construction to the contract, and when we see that the appellants, under that contract, furnish materials and pay for them, without any explanation, and see that the superintendent promises the hands that they should be paid for the loss of time occasioned by this delay, and the appellants so paying them, the conclusion is irresistible, that the superintendent had given the contract the construction that appellants were to furnish these articles. If this be true, the appellees are not chargeable for the delay in not furnishing them in proper time, and the jury were fully warranted in not deducting the sum found by the superintendent for the non-completion of the building, on that account. The evidence was properly before the jury, and it was their province to determine whether the delay was occasioned by appellants, and we see no reason for disturbing their finding.

Nor do we perceive that they were probably misled by the instructions given by the court. Upon the whole of this record we perceive no error for which the judgment of the court below should be reversed, and it is therefore affirmed.

Judgment affirmed.

Hiram A. Pitts, Plaintiff in Error, *v.* William H. Magie, Defendant in Error.
Same *v.* John V. Leiter, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

When, on the application of a defendant to open a judgment by confession, and permit him to defend, the affidavits show that his defense, if substantiated, would be a good one, and that a question is presented which should be submitted to a jury, the court should set aside the judgment, and permit the defense to be made.

The judgment debtor, under our statute, has the right to turn out real estate, upon an execution against him, before his personal property can be taken.

A sheriff who seizes personal property without giving the debtor an opportunity to turn out real estate, when it is practicable to do so, exceeds his duty, and the court, on proper application, should set such a levy aside.

It is the first duty of an officer having an execution, to apply, if practicable, to the debtor personally, for payment of it, and he is responsible to the party aggrieved for neglect of his duty, whenever special damages result from it.

November 18th, 1859, judgment was entered up by the clerk of the Superior Court, Chicago, *ex parte*, in favor of Leiter, on the following judgment note:

$700. *Chicago, October* 25, 1858.

Eight months after date, for value received, we jointly and severally promise to pay to the order of Cleveland and Russell, the sum of seven hundred dollars, with interest after due at ten per cent. per annum, payble at the office of Greenbaum Brothers, Chicago.

REUBEN CLEVELAND.
J. K. RUSSELL.
HIRAM A. PITTS.

Also, on the same day, judgment was entered up *ex parte*, by said clerk in favor of Magie, against said Pitts, for $695.47, on a judgment note, of which the following is a copy:

$700. *Chicago, October* 25, 1858.

Nine months after date, for value received, we jointly and severally promise to pay to the order of Cleveland and Russell, the sum of seven hundred dollars, with interest after due at ten per cent. per annum, payable at the office of Greenbaum Brothers, Chicago.

REUBEN CLEVELAND.
J. K. RUSSELL.
HIRAM A. PITTS.

Nov. 21, 1859, said Pitts moved the said Superior Court to open said judgments as to him, and permit him to plead to and defend against the same, on the ground that said judgments were entered up without his knowledge, by confession under the power of attorney accompanying the same. That the holders thereof had, without the knowledge of said Pitts, extended the time of payment of each for ninety days, each upon the consideration of $49, paid for the extension of each by said Cleveland. That said Pitts was a mere security on said note, which fact, that said Pitts had signed the same as a mere security, was known to said Magie and Leiter, and each of them, and their agent, Greenbaum, when such extension was granted.

In support of which motion, said Pitts, on said last named day, filed his own and Reuben Cleveland's affidavits, which state positively the facts relied on as his defense, and that Greenbaum professed to be and was the agent of Magie and Leiter in giving the extension.

There was an agreement of counsel, that all affidavits filed in support of or in opposition to said motion should be read in both of said cases, and that, as the facts were identical in both cases, but one set of affidavits should be required to be filed, and but one record made, to avoid expense and cumbering the record.

Henry Greenbaum swears, that he sold the notes to Magie and Leiter, and did not communicate to them that Pitts was a security; that Magie and Leiter did not consent to extend the notes only on condition that new notes should be taken.

That the payments made by Cleveland were to be credited simply on notes as part payment.

States that plaintiff in error ratified the extension, and promised to pay the notes after knowledge of the extension.

This last is all denied *in toto* by the subsequent affidavits of Pitts, Cleveland, George and Joseph L. Pitts.

Leiter swears he is a *bona fide* purchaser; that he did not authorize the extension, except by giving of new notes.

Magie swears to substantially the same as Leiter.

The court overruled plaintiff's motion, to which plaintiff excepted, and filed his bill of exceptions in due form, etc.

From which rulings of said court, said plaintiff prayed an appeal, which was refused. Exception taken.

Agreement of counsel in these words:

"It is agreed that the foregoing bill of exceptions shall apply to and be used in, and be determinative of both of said causes, and be copied in and form part of the records of each thereof.

E. H. BRACKETT, *Att'y for Pitts.*

MATHER, TAFT & KING, *Plaintiff's Att'ys.*"

Plaintiff in error moves the court to direct its officer, the sheriff of Cook county, to desist from selling the personal property of plaintiff in error, for the reason that said Pitts had real estate situate within said county of Cook, of the value of twenty thousand dollars, over and above all incumbrances thereon.

In support of which motion, said plaintiff in error filed the affidavit of Joseph L. Pitts.

Which affidavit states the fact, that plaintiff in error was possessed of real estate situate on Randolph and Jefferson streets, in Chicago, of the value of twenty thousand dollars, over and above all incumbrances; that plaintiff in error has given no consent that a levy should be made on his personal property; that he is very infirm and feeble, and attends to no business; that affiant is his son, and attends to his business; that plaintiff in error had given no direction respecting turning out property upon which to have the executions levied, except that he had directed affiant to have it levied on his real estate, in case the motions for setting aside the same should be overruled.

That the sheriff has levied upon and is about to sell a large amount of personal property of plaintiffs in error, etc., etc.

Motion overruled, and exceptions taken.

Errors assigned on record:

1. That said Superior Court erred in overruling the motion of said Pitts to set aside said judgment.

2. That said court erred in refusing to allow the said Pitts to come in and defend on the merits thereof.

3. That said court erred in refusing to grant or allow the prayer of said Pitts for an appeal to the Supreme Court.

4. That said court erred in overruling the motion of said Pitts, to direct the sheriff to desist from selling the property of said Pitts, or proceeding on the execution in said cause.

5. That said court erred in refusing to set aside the levy of said sheriff on personal property, or to direct the sheriff first to levy on real estate.

6. That said judgment was given in favor of said defendant when it should, by the law of the land, have been given in favor of said Pitts.

E. H. Brackett, for Plaintiff in Error.

Mather, Taft & King, for Defendant in Error.

Caton, C. J. We think the court should have set aside these judgments, and allowed Pitts to set up the defense pro-

posed in his affidavit. There is no question that the defense, if established before a jury, would be a good one, and the only question is, whether such a case was presented by the affidavits read on both sides, as should be submitted to the decision of a jury. The affidavits presented in support of the motions, are positive and unequivocal to the fact of the extension of the time of payment by the agent of the holders of the notes, and without the consent or knowledge of the surety. The affidavits on the other side, are in some respects contradictory of those, and in others explanatory, but on the whole they leave such an impression on our minds, as to convince us that those questions of fact should be inquired of and determined by a jury, where all the witnesses may be cross-examined.

A remark may not be improper as to the complaint of the levy by the sheriff upon the personal property of the defendant, while he had real estate which it was his duty first to levy upon. It is the right of the judgment debtor under our statute, to turn out real estate upon an execution against him, before his personal property is taken, and the sheriff who seizes his personal property, without giving him an opportunity to turn out realty when that is practicable, exceeds the line of his duty, and the court will set aside such a levy, upon a proper application made by the debtor, showing that he has real estate subject to the execution. Such an application should specify the property, give an abstract of the title, and show its value, with the incumbrances upon it, if any. Upon a proper showing, on such an application, the court would not hesitate to set aside the levy upon the personal property and direct the levy upon the realty, so as to fairly give to the debtor the benefit of the provisions of the statute. It will sternly rebuke the conduct of the officer who conceals from the debtor, the existence of the execution in his hands, for the purpose of preventing him from turning out real estate till he can seize his personal property. Indeed it is the first duty of an officer having an execution against a party, to apply to him personally for payment, wherever that is practicable, and the officer should be held responsible to the party aggrieved, for a neglect of this duty, wherever special damages result from it.

These judgments are reversed, and the causes remanded.

Judgments reversed.

Isaac Cook, Appellant, *v.* Elias Shipman, Appellee.

APPEAL FROM THE COOK COUNTY COURT OF COMMON PLEAS.

A bond given to influence an alderman to a particular course in the discharge of his duties, is illegal and void, and it makes no difference to whom it was executed. It is bribery.

The facts of this case are stated in the opinion. The instructions mentioned, as having been refused by the court below, were as follows:

5. That if the jury believe, from the evidence, that there was, before the execution of this bond, any understanding between Granger, then an alderman of the said city, and the plaintiff and defendant, that Shipman should be employed by the defendant to procure the passage of certain ordinances touching the lands of the defendant, and that the said Granger at the time promised to use his influence or exert himself to secure the passage thereof, and if they further believe that such understanding had any influence upon Cook in giving said bond, and that Shipman was aware of it, then the law is for the defendant.

6. That if the jury believe, from the evidence, that Granger promised to use his endeavors to procure the passage of ordinances, mentioned in the bond, as alderman of the city, and that such promise was any part of the considerations or inducements that led Cook to make the bond, and those facts were known to Shipman, then the bond is illegal, and no recovery can be had thereon.

W. T. Burgess, for Appellant.

Farwell, Smith & Thomas, for Appellee.

Walker, J. This was an action of debt, instituted by Shipman against Cook, on a bond given by the latter to the former, for the sum of two thousand dollars. It was conditioned for the payment of one thousand dollars to the obligee, when the common council of the city of Chicago should pass an ordinance which, should in effect, change the location of so much of the dock line recently established by the common council, as lay in front of a lot of land therein described, and which was owned by Cook, and to so establish the dock line that it would run parallel, or nearly so, with, and at a distance of forty feet from the south line of the lot, thereby giving to the lot a water front. To the declaration, defendant filed a plea of *non est factum*. A plea that the bond sued upon was illegal and void, because, at the time it was given, one Elihu Granger was a

member of the common council of the city of Chicago, to whom, with others, the subject of wharfing privileges and the establishment and alteration of dock lines of the Chicago river, including such privileges and lines appertaining to the lot mentioned in the bond, had been referred for settlement and adjustment by the common council, and was pending and undetermined before them as such committee. That Granger was then an alderman of the city, and the plaintiff was a clerk of the committee, and employed by the city, to render the committee the identical services in the bond mentioned, and to be paid therefor by the city. And for the purpose of procuring the services of Granger and plaintiff, to influence the committee in its action in the matter, in a manner more favorable to defendant's interests than they would otherwise have done, and in violation of the duty of plaintiff, and of Granger as an alderman of the city, it was agreed between plaintiff and defendant, Granger being advised thereof and consenting thereto, that if ordinances were passed, of the character mentioned in the bond, that then defendant should pay plaintiff two thousand dollars, and Granger should use his influence as a member of the committee, and plaintiff, as the employee of the city, to procure the passage of such ordinances. That the bond was made and delivered in pursuance of such corrupt agreement, and for the purpose of illegally procuring action by the common council, by means of a favorable report by the committee, and that there was no other consideration for making the bond.

Also a plea, alleging that Granger was a member of the common council of the city of Chicago, to whom, with other members, the subject of wharfing privileges, and of establishing and altering dock lines on the Chicago river, including the privileges and dock lines of and to a certain lot of defendant, had been referred by the common council, the establishment of which was then pending before the committee, and that Granger was then an alderman of the city, and to procure the assistance of Granger in influencing the action of the committee, upon the matter so referred to them, in a manner more favorable to defendant's interests as the owner of the lot, than they would have otherwise done, and in violation of his duty as an alderman of the city, it was agreed between defendant and Granger, that in the event ordinances should be passed by the city, of the character set forth in the writing obligatory sued upon, that Cook should pay to Granger the sum of two thousand dollars, and that Granger should use his influence, both as a member of the committee and of the common council, to procure the passage of such ordinances, but to cover up the agreement and give it the appearance of legality, the contract was made in the name

of plaintiff and defendant. That the bond was made and delivered in pursuance of such corrupt agreement, and for no other consideration. Issues were joined to the country, a trial was had, and a verdict found for the plaintiff below for $1,000 debt, and $155 damages. A motion for a new trial was entered and overruled, and judgment rendered on the verdict, from which defendant appeals to this court.

If the truth of these pleas was established, it is believed no one would for a moment contend, that either of them did not present a full and complete bar to a recovery. No court, it is believed, has ever held that the use of means to influence an officer to adopt a particular course in the discharge of his duty, constitutes a sufficient consideration to uphold an agreement. And money paid, or agreed to be paid, to an officer, to influence him in the discharge of his official duty, has, in all, even the most corrupt conditions of society, been justly denominated bribery. It is not necessary to refer to authority, or resort to any process of reasoning, to establish such a proposition. The mere statement of the proposition establishes the fact of its corruption, and its monstrous injustice, to all minds not blunted in their moral perceptions, by an indulgence in wrong, and in perverting the principles of justice. When official corruption can go unwhipt of justice, and when it may with impunity stalk forth in open day, with its hideous and monstrous form appearing through its transparent covering, and when courts shall cease to employ every power that the law has conferred upon them, to inflict the severest penalties it has denounced against such crime, then organized society is ready to dissolve, and governments cease to exist. Whenever such crimes against society and government shall be tolerated by courts or juries, all good citizens may well feel that they have lost all security in their rights, designed to be protected when government was organized. If the very officers who were elected to make or execute the laws, become the oppressors of the people, where are the latter to look for protection, or to seek their legal rights? No court in a civilized community can ever tolerate such monstrous iniquity, let it be found where it may. The law should be a terror, to hold in check such depravity.

The first plea alleges, that the bond was given to procure the efforts of Shipman, to influence and change the action of the committee in Cook's favor, and that Granger should employ his influence to accomplish the same end. Now if it is true that by giving the bond, plaintiff in error procured the efforts of one of the members of the committee, who was an alderman, to serve his interest in the decision of the matter then before them for determination, it was bribery, and nothing less, and it is none

the less so, if given to the clerk for the same purpose, and it can make no difference to whom the bond was executed. The second plea alleges, in substance, that Granger, as a member of the committee, and of the common council, in consideration of two thousand dollars, to be paid to him upon his procuring the committee and common council to do the acts specified in the bond, undertook to serve plaintiff in error, by accomplishing the performance of the acts. And if he, as therein alleged, did so undertake to control the action of the committee and of the common council, it was in direct violation of his duty to the public, was official corruption, and a perversion of justice, that cannot be sanctioned either in morals or in law.

The fifth and sixth instructions asked by the defendant below asserted these principles, and, if the evidence tended to establish the truth of the pleas, should have been given. That the evidence in the case does tend to show, that the obligation was given to procure the influence of both plaintiff below and of Granger, to procure the ordinances, we think there is no doubt. Its sufficiency to establish the fact, in view of all the evidence in the case, was a question for the consideration of the jury, and, as we think it strongly tended to prove the truth of the pleas, the jury should have been permitted to consider it under those instructions. Had they been given, the jury would have been directed to consider the evidence, to ascertain whether the bond was given to procure the services of the plaintiff and Granger, for the corrupt purposes alleged in the pleas, and they would have been informed by the instructions that if the evidence established that fact, they should find for the defendant. For this purpose the instructions should have been given.

The judgment of the court below must therefore be reversed, and the cause remanded.

Decree reversed.

Margaret Porter, Plaintiff in Error, *v.* George W. Ewing, Defendant in Error.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

Where lands are purchased by A., under a contract with B., that B. should furnish the money, and A. should make the purchases in B.'s name, and also make sales in his discretion, as B.'s agent, and that A. should have one-half of the profits of the business; in such a case, A. has no title to the lands, but only to the profits, and if he dies, his widow is not entitled to dower in such lands.

After a sale by A., B. holds the lands in trust for the purchaser, but previous to such sale he holds them in his own right.

Porter *v.* Ewing.

This was a petition for dower, by plaintiff in error against defendant in error.

The evidence shows that Wm. H. Brown and Wm. Porter, plaintiff's husband, entered into a verbal agreement that Brown was to furnish $1,000, and Porter was to trade with it, and to have one-half of the profits made by his speculations in loaning it, or in buying and selling, and trading generally. That the land in controversy was bought by Porter with a portion of this money, and the title taken in Brown's name; that afterwards, Porter sold one undivided quarter to one March, who sold to E. W. and G. W. Ewing, and another undivided quarter to Duncan. That Brown never received any portion of the money from these sales, but was informed by Porter, by letter, that the sales had been made. That afterwards, Brown, by agreement with Duncan and the Ewings, divided the land and deeded to each their respective portions.

That the thousand dollars was never refunded to Brown, but that the understanding was, that the sales to March and Duncan covered Porter's interest in the land, as he retained all the proceeds from those sales, and Brown kept the remainder as his portion. There were various other transactions between the parties, and partial settlements made from time to time. After the division between Brown and the Ewings, Porter and Brown had a general settlement, at which time Brown deeded to Porter certain lands in Sangamon county, in settlement of all equitable claims which Porter might have upon him under the agreement, and took a receipt reciting the fact.

Under this state of facts, the court below dismissed the petition, and the widow asks a reversal of that decision.

Scates, McAllister & Jewett, for Plaintiff in Error.

Mather, Taft & King, for Defendant in Error.

Caton, C. J. With the view we take of this case, it must be determined by the construction of the contract between Brown and Porter. That contract rested entirely in parol. By it Brown was to place one thousand dollars in the hands of Porter, who was to operate with it as he saw proper, taking titles to property purchased or choses in action obtained for or with it, in the name of Brown, and for his skill, care and trouble in the business, was to have, as his compensation, one-half of the profits derived from the operations with the thousand dollars. This is the substance of the contract, as stated by Mr. Brown. It seems to us, there can be no doubt that under

this contract, Porter had and was to have no interest in the land or other property purchased with this money. He had an interest in one-half of the profits, and in that only. This was a mode of compensation for his services. There were no profits until the final settlement of the concern, properly speaking, unless the parties chose to treat a part of the property or its proceeds as profits, and divide it as such. While the business was still in progress, the value of the property might be more than the thousand dollars one day, and another day less. To-day there might be an apparent profit, and to-morrow a loss. Counsel does not and cannot pretend that Porter had an equitable title to anything but that which was profits, and how was it possible to say that this piece of land was profits more than another? Surely the widow was not dowable of an undivided half of all the lands purchased with or belonging to this fund, else she might claim dower in ten times the amount of the entire value of the property belonging to the fund at any one time. When Porter sold the undivided half of the Chicago property to Duncan and to Ewing, that property had not been set apart as profits, and the money which he received for it was a part of the fund, and belonged to Brown, until he subsequently agreed to treat that property as profits, and allowed Porter to retain that money as his share of those profits, and to retain himself the balance of the land as his share of those profits. Porter was authorized, by the original agreement, to sell the land as Brown's agent, and after he had sold it, Brown held the legal title to the interest thus sold, in trust for the purchasers, the same as if he had sold it himself. Then, for the first time, did he hold it in trust for others and not in his own right, and this trust he performed by dividing the property with the purchasers, and deeding to them their proportions, respectively. If at this time there was an understanding between Brown and Porter, that the money received by Porter for the sale of the half, and the remaining half not sold should be treated as profits, and that Porter should retain the money which he had received as his share, and Brown should retain the portion not sold as a portion of the profits, there certainly was no such arrangement between them at the time Porter sold to Duncan and Ewing. Was there ever a time, when Porter could go to Brown and demand a deed of an undivided half of this or any other property, belonging to this concern? Was there ever a time when Brown had not the right to retain the title to the whole, to insure to himself the reimbursement of the thousand dollars? Until Porter was in a position to demand a deed of Brown without doing anything more on his part, he

had not such an equitable estate in the premises, as to entitle his widow to dower in them. *Owen* v. *Robbins*, 19 Ill. R. 545. There was never such a time, and the right of dower never attached.

The decree is affirmed.

Decree affirmed.

Richard Gregg *et al.*, Appellants, *v.* John Renfrews *et al.*, Appellees.

APPEAL FROM PEORIA.

The defendant's answer, when made under oath, and responsive to the allegations in the bill, must be taken to be true.

But in order to claim this benefit, the defendant must answer fully the charge as made.

This was a petition by appellees against appellants for a mechanics' lien.

The petition shows, that about the 2nd of March, A. D. 1857, petitioners made a contract with Gregg to manufacture boilers, flues, fire-fronts, etc., for a distillery. That the greater part of the articles were to be delivered as soon as they could be manufactured, and the residue between the 1st of April and the 25th of July, 1857, and petitioners agreed to send up hands to assist in putting up the machinery. The articles were shipped according to the contract, and were received and accepted by Gregg. That in August, A. D. 1857, under the contract, petitioners furnished materials and did work, repairing old boilers, as per statement marked "AA."

That under the contract in August, 1857, petitioners furnished materials and repaired old boilers for Gregg, which were used and put up in the distillery. On this account, and on account of other repairs, petitioners filed the following, as part of their account, under contract of 2nd March, A. D. 1857:

August 13.

Repairing old boilers, 30½ days, $3.50	$106.75
Drayage	.50
Repairing new boilers, 95¼ days, less time putting patch on imperfect sheet, $3.50	322.87
Your proportion of time going to and from Peoria, 6¼ days, $3.50	21 88
Your proportion of boiler makers going to and from and at Peoria	111.39
	$557.39

Petition further sets out a list of articles furnished, as is

alleged, at an agreed price, amounting to $3,975.89. These appear to be the only items to which the original contract, as stated, could apply.

The petition then sets out the entire account and claim, including the agreed items, and adding others, making the whole claim amount to $4,959.51.

Gregg filed his answer, setting up and showing that he had paid, and had a just set-off of $3,199.46.

The case was tried before POWELL, Judge, and a jury, who found a verdict for the petitioners for $3,302.79. Defendant entered a motion for a new trial, which was overruled, and a decree was rendered for petitioners for the sale of the premises.

Gregg filed a bill of exceptions, in which it is stated, that petitioners offered evidence tending to prove their account, that the materials were good and the work well done, and that the injury to the boilers was occasioned by improper management on the part of Gregg. That Gregg gave evidence tending to prove the amount of his account attached to his answer.

At the request of the petitioners, the court instructed the jury:

If the jury believe, from the evidence, that the plaintiffs furnished the materials and the labor done, as set out in the petition filed herein, and that the boilers furnished were of good material and workmanship when delivered, and that said articles of machinery were put up in the distillery of the defendant, and that the prices charged for said articles and said labor done are reasonable and the usual prices, they will find for the plaintiff.

If the jury believe, from the evidence, that said boilers were injured in the possession of defendant (Gregg), by himself, or any person in his employ, they will find for the plaintiffs.

The warranty of the plaintiff is only an implied warranty, and only required the plaintiffs to deliver to Richard Gregg, at Peoria, the said three four-flued boilers of good sound materials, and of good workmanship, and in good order.

If the jury believe, from the evidence, that said boilers were not of good material and workmanship, the measure of damages will be the amount it cost to put said boilers in a good, sound condition.

If the jury believe, from the evidence, that said boilers had been burnt, or otherwise injured by fire, by any of the hands in the employ of defendant, they will find for the plaintiff the value of said boilers when they were delivered to Richard Gregg.

That if the jury believe, from the evidence, that said boilers were made of good materials and good workmanship, when delivered to Richard Gregg, and that said boilers were injured

by the carelessness and negligence of the agents or hands of defendant, they will find for the plaintiff all the costs and charges by plaintiff expended in the repairs made on the boilers at the defendant's request.

The defendants excepted to these instructions, and appealed to this court.

N. H. Purple, for Appellants.

Lindsay & Fowler, for Appellees.

Breese, J. The petition in this case contains all the essential averments required by the statute, and is good in form and substance.

The instructions given on behalf of the plaintiffs, taken as a whole, or as a series of instructions, are not objectionable. They state sufficiently the law upon the several points made by them.

The doctrine, that the defendant's answer, when made under oath, if responsive to the allegations in the bill, must be taken to be true, cannot be questioned. But we do not regard the defendant's answer in this light. The petition alleges that the whole amount for materials, machinery and labor, specified in the exhibits filed, is due to the petitioners, and unpaid. That part of the answer which the defendants claim to be responsive is as follows: "Defendants, further answering, state, that the said defendant, Gregg, has a just claim, as they are advised and believe, as a set-off against any claim the said petitioners may prove upon the trial of this cause, for materials returned to the petitioners, for money paid to them, and for and on account of money expended by said Gregg in repairing and fitting up said boilers, so as to make them fit for use, amounting to the sum of $3,052.72, as per account marked A. B., hereto attached and made part of this answer, will appear."

Here, it will be perceived, the defendant, Gregg, does not claim his bill of particulars, A. B., as payment, but as a set-off to the plaintiff's claim, so far as it goes. He nowhere states, in response to the bill, that he has paid the plaintiff's demand. To claim the benefit of the answer as evidence for the defendant, it must answer fully the charge as made. The charge is, that the account is unpaid. The answer is, that he has a set-off against the plaintiffs, contained in his exhibit A. B., filed with the answer, and which he makes part of the answer. In that exhibit, it appears that the payments of money were made to third persons, but it is not alleged they were made at the plaintiffs' request; and so with regard to the draft on Ewing, it is

not alleged it was on account of this work and materials, or that it was ever received by the plaintiffs, or paid by Ewing.

The answer, then, is not responsive to the allegation in the bill, that the account of the plaintiffs is due and unpaid.

We discover no error in the record, and therefore affirm the judgment, the evidence fully sustaining the verdict.

Judgment affirmed.

Martin Collins, Plaintiff in Error, *v.* Elijah G. Tuttle *et al.*, Defendants in Error.

ERROR TO McLEAN.

The eighth section of the Practice Act applies to actions commenced by attachment.

A plaintiff who has not filed his declaration ten days before the term, is not entitled to a default at that term. The defendant may appear and apply for a continuance at plaintiff's cost, but if he does not make the application, the case should be continued under the general rule, and the costs will abide the final result of the suit.

This was an attachment suit, commenced in McLean Circuit Court, by defendants in error against plaintiff in error, as a non-resident.

On the 2nd June, a writ of attachment issued and was levied on real estate, and a return of "not found" as to plaintiff in error. And at the June term of said Circuit Court, the cause was continued.

At the September term following, defendants in error made proof of publication of notice to plaintiff in error, and on motion, were allowed to file a declaration.

The next day they filed their declaration in proper form, with copy of the instrument sued on, and the Circuit Court, Davis, Judge, rendered judgment against plaintiff in error by default.

Swett & Orme, for Plaintiff in Error.

N. H. Purple, for Defendants in Error.

Caton, C. J. We said, in *White* v. *Hague*, 18 Ill. R. 150, that the 8th section of the Practice Act applies to actions commenced by attachment, and we still entertain that opinion; and the only question left which we propose to consider is, whether the plaintiff who did not file his declaration ten days before the

term, may take a default against a defendant who has been served or had constructive notice, which is equivalent to the service of a summons, ten days before the term, and who does not appear. That section provides: "If the plaintiff shall not file his declaration, together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court, on motion of the defendant, shall continue the cause at the costs of the plaintiff, unless it shall appear that the suit was commenced within ten days of the sitting of the court, in which case the cause shall be continued without costs, unless the parties shall agree to have a trial, and if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of non-suit."

Here the defendant did not appear and ask to have the cause continued at the plaintiff's costs, but the plaintiff took judgment by default. The statute does not, in terms, declare what shall be done in such a case, when the defendant does not appear, but we have to determine that by construction of what is written, and it is a little remarkable that this question has never before been brought before this court. We do not think it was the intention of the legislature, to allow the plaintiff to take a default in case of non-appearance of the defendant. He ought not, upon principle, to be allowed to take a default till he has attained such a standing in court as would entitle him to proceed coercively, against the defendant. There was certainly some object in requiring the declaration to be filed ten days before the term, and that object could only have been to give that time to the defendant, to determine whether he has a defense to the declaration, and to prepare to make it. If the declaration is not thus filed, the defendant is not bound to pay any further attention to the case at that term. He is not bound to dance attendance upon the clerk's office during all these ten days, and then during the term itself, to see if a declaration is filed during that term, and if it is, to employ counsel to get the cause continued. True, he may do so, and if he does, he may throw the costs of the term upon the plaintiff, but he may, on the other hand, allow it to take its course, and stand continued under the general order, when the costs of the term would abide the final result of the cause. This we believe to be the true construction of the statute, and therefore reverse the judgment, and remand the cause.

Judgment reversed.

WILLIAM A. TURNEY *et al.*, Plaintiffs in Error, *v.* NANCY J. TURNEY, Adm'x, etc., Defendant in Error.

ERROR TO JO DAVIESS.

The application by an administrator to sell real estate must be made at the term specified in the notice published by him.

If not made at that term, the proceeding is abated, and the parties in interest must be brought into court by another notice, before any further steps can be taken.

The petition must give the names of the heirs who are the owners of the land sought to be sold, and it is error for the court to grant leave to amend the petition without notice to the heirs or their guardians.

THIS was an application by defendant in error, as administratrix of the estate of John Turney, deceased, for the sale of the real estate of the decedent, to pay debts. The material facts are stated in the opinion. The court entered an order of sale, as sought by the administratrix. Afterwards, leave was granted to amend the petition, as stated in the opinion, and a further order of sale. The heirs now bring the cause to this court, asking that the decree may be reversed, so far as it is still unexecuted.

M. HAY, for Plaintiffs in Error.

W. D. GOUDY, for Defendant in Error.

WALKER, J. The plaintiffs in error in this case only seek by this proceeding to reverse the decree of the court below, in so far as it remains unexecuted. And they have filed a stipulation that the errors assigned upon the record are not to be considered, so far as they relate to sales already made under the decree. We shall, therefore, proceed to examine and determine whether the decree was warranted under the notice and petition filed in the court below.

The notice given by the administratrix, that she would apply for license to sell real estate, whether sufficient, or not, was that the application would be made at July term, 1847. It and the petition were, however, not filed until the following September term of the court.

When the parties had been notified and required to appear at the July term of the court, the presumption is, that they then attended to show cause, and no steps being then taken to procure the order for a sale, the notice or petition not being filed, they were, by no rule of practice, required to take notice that steps would be taken at a subsequent term. By failing to file

the notice and petition, and to have the cause docketed at the July term, the proceeding was abated, and before any other steps could be taken, the heirs and parties in interest should have been again brought into court by another notice, as if none had been previously given. This decree was therefore erroneous.

Again, the petition, as then filed, failed to give the names of the heirs who were owners of the real estate sought to be sold. This is opposed to all the rules of practice, and has not been dispensed with by the statute. This was, however, attempted to be remedied at a subsequent term of the court, but no notice appears to have been given to the heirs or their guardians, that application would be made to the court for the purpose of amending the petition, and the court erred in granting leave to amend. If they had been regularly in court, and the case still pending, it would have been otherwise, but we have seen that the proceeding had abated, and the heirs were not before the court, and the decree was not aided by this attempt to amend.

The decree of the court below is therefore reversed, in so far as the same remains unexecuted, but in so far as it has been executed, it is left in full force.

Decree reversed.

Merritt D. Wood *et al.*, Plaintiffs in Error, *v.* George Goss *et al.*, Defendants in Error.

ERROR TO PEORIA.

A suit instituted by two plaintiffs, one of whom is a resident, should not be dismissed for want of a bond for costs.

If the resident plaintiff is not solvent, the course indicated in the second section of the statute in relation to costs should be followed, and a rule taken to dismiss, unless the plaintiff show cause to the contrary, within a time to be fixed by the court. If such rule is not entered, the dismissal is unauthorized.

This was an action of assumpsit by plaintiffs in error, one of whom was a non-resident, against defendants in error. A motion was made by defendants to dismiss the suit for lack of a bond for costs. This motion was sustained, and exception taken. The case is now brought to this court by writ of error.

H. M. Wead, and C. C. Bonney, for Plaintiffs in Error.

H. B. Hopkins, for Defendants in Error.

WALKER, J. The only question presented by this record, is, whether a suit instituted by two plaintiffs, one of whom is a non-resident, should be dismissed for the want of a bond for costs. The first section of the cost act, provides that when the plaintiff or person for whose use an action is to be commenced, shall not be a resident of the State, the plaintiff or person for whose use the suit is brought, shall, before he institutes his action, file a bond for costs, and on failing to do so, the suit shall be dismissed. The obvious intention of the legislature in this enactment was to secure the defendant in his costs, and when suit is instituted by more than one person as plaintiffs, and one or more of them are resident and solvent, the design of the statute is fully answered. The defendant has the right under this statute to have a resident plaintiff, or security for costs, who is solvent and able to respond to any judgment for costs which he may recover against plaintiffs. The officers have the same right, but when they have one such plaintiff, resident and amenable to the process of the court, no reason can exist for requiring additional or further security.

If a suit be instituted in the name of several plaintiffs, and any portion of them are non-resident, the court should not dismiss the suit until a rule is entered requiring security for costs, in the mode and for the reasons provided for in the second section of the cost act. If the plaintiff who is resident is not solvent, and could not be compelled to pay the costs on an execution, on the filing of affidavits of these facts, the court should enter a rule to dismiss the suit, unless the plaintiff show cause within a reasonable time, to be fixed by the court, and upon failing to answer and have the rule discharged within the time, the court would dismiss the suit, as it would any other case embraced in the second section. No such rule was taken in this case, and no reason is perceived why the suit should have been dismissed. There was therefore error in sustaining the motion to dismiss, and the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

Roman L. Brown, Appellant, *v.* Robert H. Graham, Appellee.

APPEAL FROM ROCK ISLAND.

The possession of one of several tenants in common of personal property which is incapable of division, is the constructive possession of all.

And when a tenant in common, not in possession, sells his interest, the possession of another tenant in common becomes the constructive possession of the purchaser.

If instructions are given to the jury which are calculated to mislead them, the judgment will be reversed.

This was an action of detinue for a horse, commenced by the appellee against the appellant in the Circuit Court of Rock Island county.

Issues in this case were, *non detinet;* property in defendant; property in plaintiff and defendant as tenants in common; property in Henry S. White and others.

The case was tried before Drury, Judge, and a jury.

The evidence showed, that the appellee bought the horse at a sale under an execution against Lucius C. Brewer and Levi Parsons, as the property of Brewer. That at the time of the sale, Brewer owned only one-half the horse, and George D. Gould owned the other half; that afterwards, but before the commencement of this suit, Gould sold his half to Brown, the defendant below, who was in possession at the time the suit was commenced, and that he refused to deliver the horse to the plaintiff. There was conflicting proof as to the value of the animal.

The plaintiff asked the court to instruct the jury as follows, to which defendant objected. Objection overruled, and instructions given, and defendant excepted.

1. A sale by Brewer to Gould, of the horse, or any interest therein, would not, unless accompanied by possession, pass any right or title thereto as against an execution creditor of Brewer. And if the horse remained in possession of Brewer and was not in Gould, it would be liable to levy and sale on execution against Brewer.

2. If at the time of the sale or pretended sale by Gould to the defendant, of the interest claimed by him in the horse, he was not in the lawful possession thereof, but such possession was in the plaintiff or his agent under claim of ownership on the part of the plaintiff, such sale would convey to the plaintiff no title or interest in the horse.

3. If the plaintiff, Graham, bought the horse and received possession thereof, of the sheriff, and caused it to be placed in

defendant's livery stable, the possession of defendant would in such case be the possession of the plaintiff, and the defendant could not deliver to Gould such a possession as would enable him to convey to defendant a good title to the horse or any interest therein.

The defendant asked the following instruction, which the court refused, and defendant excepted:

If the jury believe, from the evidence, that the plaintiff had notice of the adverse claim to this horse by Gould previous to his, plaintiff's, purchase of the property, then plaintiff cannot impeach the previous transaction by Gould and Brewer respecting the property, because it was not delivered, and if the jury believe that Gould had an interest in the horse, that such interest was sold to the defendant, then the jury will find for defendant, though they may believe the same was never in Gould's possession prior to the levying of the execution under which the sheriff's sale was made.

Defendant also asked the following instructions, twenty-five minutes before the close of the argument of the case, and the same were refused as not being asked in time, there being a verbal rule of the court that all instructions should be asked before the commencement of the closing argument; to which defendant excepted.

If the jury believe that the defendant is the owner of an undivided half of the horse in question, they will find for the defendant.

In law the possession of one of two tenants in common is the possession of all, and if the jury believe, from the evidence, that the horse in question was in the possession of a tenant in common, of the horse, at the time of the sale by Gould to Brown, and that Gould was at that time a tenant in common of the horse, then the horse was in his possession for the purpose of a sale, and if they believe further that Gould's interest was legally transferred to the defendant, then they will find for the defendant.

The sale of the white horse to Gould by Brewer is not in question, and the sale was good until impeached, and if the jury believe that the horse in question was in his possession with a claim of ownership previous to the levy of the execution on which this horse was sold, such possession was sufficient to pass title of the half of the horse to Gould from Brewer.

The case being given to the jury, they returned the following verdict:

"We, the jury, find for the plaintiff, and assess the damages at forty-five dollars."

Defendant made a motion for a new trial, on the ground that the court refused proper evidence for defendant, gave improper

instructions and refused proper ones, and because the verdict was contrary to the evidence. Motion overruled, and defendant excepted.

The court then rendered a judgment that defendant recover the property, and forty-five dollars damages and costs, and that he have execution therefor. Whereupon defendant prayed an appeal, and caused the same to be duly perfected.

A. Webster, for Appellant.

Wilkinson & Pleasants, for Appellee.

Walker, J. Property indivisible in its character, owned by tenants in common, is incapable of a several possession by each tenant. It therefore follows, that the possession of one of the tenants is a constructive possession of the others. And when one of the joint owners, not in the actual possession, sells his interest in the property, the purchaser succeeds to all of the rights of his vendor, as held by him, without an actual delivery of possession. He, by such a purchase, becomes a tenant in common, and the possession of his co-tenant is constructively his possession. It is, however, otherwise, when the tenant in common, having the actual possession, makes a sale of his interest, as the possession must in that case, to be valid as against creditors and purchasers, accompany and remain with the title.

If Gould was the owner of an undivided half of the property in controversy, and Brewer of the other half, then the possession of the latter was the constructive possession of the former, and the appellee only acquired a title to an undivided half of the horse, by the levy under the execution and his purchase at the sheriff's sale. He only succeeded to Brewer's title, and became thereby a tenant in common with Gould. And whether Gould was a part owner of the property was a question of fact, for the consideration of the jury. By their verdict, they have found that he had no interest in the property, and we are not prepared to say that the verdict is unwarranted by the evidence.

It is urged that the instructions are such as must have misled the jury in their finding. The first of appellee's instructions refers to a sale of one-half of a horse by Brewer to Gould, which, after the execution came to the hands of the officer, was traded for the horse in controversy, and was therefore inapplicable to the evidence in this case. By the second, the jury are told, that if Gould was not in the lawful possession of the horse when he sold to appellant, but if appellee or his agent was in possession, claiming ownership, a sale by Gould would convey no title or interest in the property. This instruction denies all

right in the tenant in common to sell his interest in the property, unless he is in the actual possession, notwithstanding it is in the possession of his co-tenant. This instruction, as we have seen, does not state the law correctly, and should have been refused. By the third, the jury are informed, that if appellee purchased the horse at the sheriff's sale, and caused it to be placed in appellant's stable, that his possession would be that of appellee, and that appellant could not deliver such a possession to Gould, as would warrant a sale by him, so as to pass any title. The power to sell by a tenant in common, we have seen, does not depend upon his being in actual possession, but depends upon the possession of his co-tenant, and this instruction asserted a different rule, and should have been refused.

The instructions given for appellant did not sufficiently modify or explain those given for the appellee, so as to prevent them from misleading the jury. It is true, that they are told to find for the defendant, if they believe that the plaintiff was not the owner, and that if they found that plaintiff and defendant were tenants in common of the property, or defendant owned an undivided half of it, they should find for him, and also, that if plaintiff only held title by his purchase at the sheriff's sale, that he only succeeded to Brewer's interest in the horse. The instructions given for plaintiff had precluded the idea that defendant could acquire title of Gould unless he was in possession, and the evidence showed that he had acquired his possession of plaintiff's custodian, and they were told that such possession would not support a sale. We are of the opinion that the plaintiff's instructions were calculated to mislead, and must have misled the jury in their finding, and that the judgment must be reversed.

Judgment reversed.

The Galena and Chicago Union Railroad Company, Appellant, *v.* William Sumner, Appellee.

APPEAL FROM WINNEBAGO.

The owner of animals, killed or injured by a railroad, in order to recover against the company, must, by proper averments in his declaration, show not only that the company were required to fence their track and had failed to do so, but must negative the various exceptions in the enacting clause of the statute, and aver that the animals were not injured at a point on the road within these exceptions, and also that the road had been opened for use six months before the occurrence of the accident.

THIS was an action on the case, tried in the Circuit Court of Winnebago county, before SHELDON, Judge, and a jury, and verdict and judgment against appellant for $255. The defects in the declaration for which the case is reversed, are stated in the opinion.

J. L. LOOP, for Appellant.

A. S. MILLER, for Appellee.

BREESE, J. This action is brought under the act of the General Assembly, entitled "An act to regulate the duties and liabilities of railroad companies." (Scates' Comp. 953.)

The declaration contains two counts. The first sufficiently avers all the facts necessary to create the liability of the defendants, except the want of the necessary averment that the road had been opened for use six months before the accident occurred, but the second count is still more defective. In the case of the *Ohio and Mississippi Railroad Company* v. *Brown*, 23 Ill. R. 94, it is held that the owner of animals injured or killed, in order to recover against the company, must by proper averments in his declaration, show not only that the company were required to fence their track and had failed to do so, but must negative the various exceptions in the enacting clause of the act, and aver that the animals were not killed or injured at a point on the road within these exceptions. *Chicago, Burlington and Quincy R. R. Co.* v. *Carter*, 20 Ill. R. 390. Nor is there any averment that the road had been opened for use for six months before the occurrence of the accident. These objections can be taken advantage of on error, for the party complaining is bound to show a good record. The judgment is reversed and the cause remanded, with leave to amend the declaration.

Judgment reversed.

HENRY FUNK *et al.*, Appellants, *v.* JOHN STAATS, Appellee.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

When several partners or joint owners have acknowleged a chattel mortgage, in the justice's district in which one of them resides, and in which the property is situated, such an acknowledgment is sufficient.

The objection to a chattel mortgage, that no memorandum was made on the justice's docket, must be urged in the court below, or it will not be considered in this court.

A debtor has the right to prefer creditors in payment or security, and where a creditor takes a mortgage, in good faith, to secure his debt, the motives of the mortgagor in giving it, do not affect the transaction.

To permit the mortgaged chattel to remain in the possession of the mortgagor, contrary to the terms of the deed, is fraudulent *per se*, and admits of no explanation.

A delivery and possession, which would be sufficient to operate against creditors and purchasers, on a sale of chattels, is sufficient on the foreclosure of a chattel mortgage.

When mortgaged chattels have been reduced to possession, after default, and the title has become absolute in the mortgagee, he may then loan it to the mortgagor, to use it for the owner's benefit, precisely as he might any of his other property, and these facts may be proved by any satisfactory evidence.

The mortgaged property need not in all cases be removed from the premises of the mortgagor, particularly when it is so heavy that its removal would be difficult and expensive. If the mortgagor takes and keeps it under his own control, or that of his agent, it is sufficient.

THIS was an action of trover, by appellee against appellants, for one steam engine and boiler, and the fixtures and appurtenances thereto belonging.

The declaration alleged the conversion on the 20th of April, 1859.

The defendants severally pleaded the general issue, which was joined.

The cause was submitted to the court, J. M. WILSON, Judge, without the intervention of a jury, and, after a hearing, the court found the defendants guilty, and assessed the damages at the sum of sixteen hundred and fifty dollars. Thereupon the defendants submitted a motion for a new trial, which was overruled by the court, and judgment rendered for said sum, etc., and the defendants appealed.

On the trial, the plaintiff introduced the following mortgage:

"This Indenture, made and entered into this twenty-first day of March, in the year of our Lord one thousand eight hundred and fifty-seven, between John F. Temple and Robert M. Wright, of the county of Cook and State of Illinois, party of the first part, and John Staats, of Oswego, New York, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of two thousand and seventy-seven and $\frac{44}{100}$ dollars, in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, sell, convey and confirm unto the said party of the second part, his heirs and assigns, forever, all and singular the following described goods and chattels, to wit: The steam engine, boiler and fixtures, and appurtenances thereunto belonging, now owned and possessed by the said parties of the first part, and situated in the planing mill now occupied and used by said parties of the first part, on the corner of Polk and Canal streets, in the city of Chicago, said engine, boiler and fixtures, and appurtenances, now being

used to propel the planing and matching machines used in said mill, together with all and singular the appurtenances thereunto belonging or in anywise appertaining, to have and to hold the above described goods and chattels unto the said party of the second part, his heirs and assigns, forever.

"Provided always, and these presents are upon this express condition, that if the said John F. Temple and Robert M. Wright, their heirs, executors, administrators or assigns, shall, on or before the twenty-first day of March, A. D. eighteen hundred and fifty nine, pay or cause to be paid to the said John Staats, or his lawful attorney or attorneys, heirs, executors, administrators or assigns, the sum of two thousand and seventy-seven and $\frac{44}{100}$ dollars, together with the interest that may accrue thereon, at the rate of seven per centum per annum, from the twenty-first day of March, A. D. eighteen hundred and fifty-seven, until paid, according to the tenor of a certain promissory note bearing even date herewith, made by said parties of the first part to said party of the second part, given in consideration of lumber sold by said party of the second part to said parties of the first part, that then, and from thenceforth, these presents, and everything herein contained, shall cease, and be null and void, anything herein contained to the contrary notwithstanding.

"Provided, also, that the said John F. Temple and Robert M. Wright are to retain possession of and have the use of said goods and chattels until the day of payment aforesaid, and also at their own expense to keep said goods and chattels, and also at the expiration of the said time of payment, if said sum of money, together with the interest as aforesaid, shall not be paid, to deliver up said goods and chattels, in good condition, to said John Staats, or his heirs, executors, administrators, assigns; and provided also, that if default in payment, as aforesaid, shall be made, that then the said John Staats, or his attorney, agent, or assigns, or heirs, executors or administrators, shall have the right to take possession of said goods and chattels, wherever the same may or can be found, and sell the same at public or private sale to the highest bidder for cash in hand, after giving ten days' notice of the time, place and terms of said sale, together with a description of the goods and chattels to be sold, by at least three advertisements, posted up in public places in the vicinity where said sale is to take place, to make the sum of money and interest promised as aforesaid, together with his reasonable costs, charges and expenses in so doing; and if there shall be any overplus, shall pay the same to the said John F. Temple and Robert M. Wright, or their legal representatives.

"In testimony whereof, the said parties of the first part have hereunto set their hands and affixed their seals the day and year first herein written.

JOHN F. TEMPLE. [L. S.]
ROBERT M. WRIGHT. [L. S.]

"Signed, sealed and delivered in presence of
GEO. W. HALL.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, H. B. Ruger, a justice of the peace in and for said county, do hereby certify that this mortgage was duly acknowledged before me by the above named John F. Temple and Robert M. Wright, this 23rd day of March, A. D. 1857.

H. B. RUGER, J. P. [L. S.]

STATE OF ILLINOIS, }
COOK COUNTY. }

Filed for record 24th March, 1857, and recorded in Book 7 of Chattel Mortgages, page 21.

WM. L. CHURCH, Clerk.

The signatures were admitted by the defendants, but the defendant objected to the admission, as evidence, of the said chattel mortgage without proof that it was properly and duly acknowledged in the justice's district in which each of the mortgagors respectively resided, and that the same was duly recorded in the office of the recorder of the county in which said mortgagors resided.

The plaintiff then called *Robert M. Wright* as a witness, who testified: I am one of the mortgagors in the mortgage produced. At the time the mortgage was executed, and on the twenty-third day of March, 1857, I resided in the town of West Chicago. The firm was in the planing and sawing business. The other party was John F. Temple. The origin of the indebtedness secured by mortgage, was lumber bought of plaintiff. We leased the land and owned the fixtures, the building and machinery situated in West Chicago. John F. Temple resided in South Chicago. Our business was carried on in the place mentioned in the mortgage. Plaintiff was not present when mortgage was executed. George W. Hall, who witnessed the mortgage, represented him. Before the mortgage expired—I think in April, soon after the mortgage was given—I saw plaintiff. All the objection that plaintiff made, was that it was subject to Funk's mortgage. I took plaintiff's mortgage, and two others, to the recorder's office. I do not know what became of the note. On the twenty-second of March, 1859, Barent Staats, of Milwaukee, came, as the agent of the plaintiff, and demanded possession of the engine and boilers. I gave him possession of them. They disconnected the keys and gibs of the main valve, and Barent Staats put Philander H. Baldwin in possession, who, in the day time, was in the mill and kept these keys when the engine was not running; when we were

running it, he put them in place, and took them out when we were through. These keys were indispensable to run the engine. Baldwin remained on the premises some three or four weeks, may be more. The note or debt for which it was given has not been paid. They were run pretty much all the time, perhaps three-quarters of the time ten hours per day since that time: heated with shavings. At the time Baldwin was put in possession, it was in good running order; we were using it all the time, as we wanted to; we run the engine with Baldwin's permission; when we wanted to run, he furnished us the keys and gibs to run with.

I am acquainted with defendant Funk. He was in Chicago when plaintiff's agent took possession, and he told me he knew that fact the day after plaintiff had taken possession, when about seven or eight o'clock in the morning I came to Temple and Wright's office. Defendant Funk was there. I went into the mill. Funk followed me. He told me he had come to take possession of the property mortgaged to him; that as plaintiff had taken possession, he thought he had the same right; and it was not his intention to prevent the mill from running, and that things should remain just as they were, the property in our use; that when we wished to run, why run, and do all we could with it; that Mr. Barent Staats would write to his brother, the plaintiff, in Oswego, New York, and an arrangement would be made, he presumed, to settle matters between the parties; that neither of them wished to close up the concern, but to secure themselves.

I am acquainted with the value of machinery of this kind, and have been engaged about it eleven years. I should consider the engine and boiler and fixtures worth two thousand dollars, and cheap at that, at the time Funk took possession. We then thought it would need new following bolts and bolts for setting out springs. Funk, by his agent, Mr. Herbert, had two custodians. Herbert claimed possession under the mortgage for Funk.

The witness, on cross-examination, said, in his estimate of value, he included engine, boilers, pipes, smoke stack, heater and jackets, but not brick work; under the term appurtenances, should include every thing necessary to run the engine. Value the boilers at ten cents a pound, or $700 each. In estimating the value in the mill, I called it to us $2,500, but estimating it to remove, I call it $2,000; the boilers I think worth $700 a piece, the engine $500 or $600. If the boilers were separated and I left one in shop, I should sell one boiler for $800. I should charge that for it. I should think the one boiler and the appurtenances would be worth about $1,800; the appurten-

ances about $500, I guess. The original cost of the whole, engine, boilers, etc., was $3,215, besides brick work. I do not know what such property is worth. They have grown four years older. Price of engine, boilers and pipes was $3,000. I have put on two prices—when we pull an engine to pieces and sell it so, we should sell it for more.

We run the engine up to the time Mr. Herbert took possession, most of the time. Baldwin was there every day except about one and a half days, when he was sick; was there the rest of the time. The gibs and keys weighed about one pound. Baldwin used to carry them away when we were not using them.

Barent Staats, a witness called on behalf of the plaintiff, testified, that at request of plaintiff he came, March, 1859, from his residence in Milwaukee, to protect the rights of plaintiff in the property described in the mortgage, which, March, 21, 1859, I took from the office of recorder of Cook county, and March 22, 1859, by virtue of mortgage above, I took possession of the mortgaged property, and placed a party there to control it, Mr. Baldwin, whom I placed in possession. About that time I had a conversation with defendant Funk, who came on here about that time. There was some negotiation made by all parties, Temple and Wright, myself, and Mr. Funk. This was a day or two after I took possession. The object was not to break up the concern, and give them a chance to negotiate, and still make good my brother's claim; that was understood between Funk and myself. Funk wanted to take the property to Iowa. I could not consent. Mr. Baldwin was to keep possession. Temple and Wright were to work the mill until a conference could be had between Funk and plaintiff, to see who would sell out to the other. In the course of about twenty days, plaintiff and defendant Funk met at Chicago.

On cross-examination, he testified: Baldwin was employed to keep possession for Staats, not for Funk, till plaintiff and defendant Funk could get together. I wrote my brother; don't remember whether I received an answer from him; thereupon I wrote to Funk.

Philander H. Baldwin, for plaintiff, testified: between eight and nine o'clock A. M., March 22nd, 1859, Barent Staats—having plaintiff's mortgage with him at Temple and Wright's office, about twenty or thirty feet from their mill where the property included in mortgage was—employed me to take care of the engine, boiler and fixtures. He went with me to the mill and showed me the engine, and took some keys out of the piston and gave them to me. Without the keys they could not run the engine. Wright was present. He, Staats, told me to take

care of the engine, boiler and fixtures, and the next day he told me to let Temple and Wright run the mill, if they wished, letting them have the keys, and then take them out. I was to continue until further orders, and I continued in possession about twenty days, from seven to twelve and from one to six o'clock, except one and one-half days I was sick, and during this time, the engine was run three-fourths of the time. When they run the engine I was there, and gave them the keys, and when they were done, I put them in my pocket.

Second day, the next after Staats employed me, I saw Funk, and was introduced to him. Funk had a custodian to look after his property during the twenty days I was there, one Adams. Neither Adams nor Funk interfered with me. On or about April 13th, Herbert told me I was not wanted any longer there, and that he had a lease of the premises for Funk, whom I understood he acted for. He insisted that I should go, and said he should put me out, and I went out. After this, Mr. Staats was there. I don't know the name of the man that went up there. Staats, the plaintiff, undertook to get in, but defendant, Funk's people, directed by Herbert, would not let him in. They (defendants' people) had about twenty police officers there.

On cross-examination, Baldwin testified, that the keys he took out of the engine were pieces of steel, one piece about two and one half inches long, and one piece five inches long.

David S. McLane testified, for plaintiff: Received a chattel mortgage from plaintiff, and with five men undertook to get possession of the property mortgaged in Temple and Wright's mill. Funk's keepers told me I could not have it; I demanded it of them. Herbert came up; asked if I had any paper. He said if I had a writ of replevin, I could have it. I said I had not. Herbert said I could not have it. I waited, at request of men in mill, for Herbert to come. Herbert came with police.

Cross-examined. I pretended to be an officer. I said I was a constable. I was there as a constable to arrest any one who made a disturbance. I had a chattel mortgage to execute. I said I had no precept. My orders were to break into the building if I could not get in peaceably, from the plaintiff, not from the attorneys, but this young man, in the office of Goodrich, Farwell and Smith, said Mr. Goodrich wanted to see me.

William W. Farwell testified, for plaintiff: About 19th or 20th of April last, some question having arisen between Herbert and myself, I desired to know of Mr. Funk, whom I went to see at Herbert's suggestion, whether what Mr. Herbert had done about the property mortgaged to Staats, by Temple and Wright, had been done with his consent and under his authority. Funk replied, that what Herbert had done was by his authority and

by his approval. Herbert was present, and remarked, after my statement of the case, we do not want you to understand that we admit that Staats was in possession.

Cross-examined. Once, when you called, something was said in our office about taking forcible possession of the property. I presume that Herbert sent for Funk to come here.

George W. Hall testified, for plaintiff: Reside in Sterling, Illinois. Am acquainted with all the parties — Temple, Wright, John Staats, and Barent Staats. In the spring of 1857, Temple and Wright asked me to take some part in execution of note and mortgage for Staats. The day of the transaction, Temple, I think, called on me at my place, one or both of them having spoken to me before, and requested me to go to their office, and I went. Temple then handed me a power of attorney from plaintiff, which is in my possession among my papers at Sterling, I suppose. Temple said, Staats had sent it. Temple and Wright proposed to secure the debt they owed Staats by chattel mortgage. The mortgage (above copied) now shown me, was then produced, ready drawn up, and was read, and Temple and Wright signed it, and I witnessed it. A note, also made before, accompanied the mortgage. This was the end of the transaction, except sending the note to Staats and recording the mortgage. They said, I think, that the mortgage should be acknowledged and recorded. I left the mortgage with them to be acknowledged and recorded. Mr. Temple said he should be writing plaintiff, and would enclose the note to him.

Mr. Temple was sitting at his desk when the business was done. I was sitting near by his side. Mr. Wright was present during the whole transaction, but I am not certain whether he was sitting or standing by the desk. We arranged about the acknowledgment of the mortgage, and that was the end of it. I examined the note and mortgage, either before or after the signing. My impression is, that Temple signed the company name to the note. I saw Temple and Wright sign the mortgage. The note and mortgage were on the desk before me. The note was signed at that time, after I got there.

Cross-examined. I never corresponded with Staats, or have done any other business for him in the West. Saw him last, two years ago this summer or fall at Chicago. Wright spoke to me a few days, I should judge a week, previous to signing the mortgage and note, about securing Staats, I think at his house, and at that time spoke of a claim of Foss and others, for the infringement of a patent, and said he should not pay it until he had paid his honest debts, or something to that effect. He said, I think, Staats had furnished them with lumber and favored them with credit, and he ought to be secured or paid before

Foss. I had several conversations with Wright about securing his creditors about that time. Wright named other debts, one particularly. I cannot say that Mr. Temple or Mr. Wright gave me any other reason for preferring any of their creditors, than that stated above, between the date of this conversation and the time the mortgage was signed; I think they did not. I do not remember that I objected to the length of time on which the mortgage was given, at the time it was signed. I think one or both of them said the time given would be acceptable to plaintiff, but I do not know that anything was said on the subject. I had not received any other letter or paper from the plaintiff but this power of attorney, and none other was exhibited. I took that. I supposed it belonged to me. The reason why I did not take the note and mortgage was, I had implicit confidence in Temple and Wright. No other papers were exhibited there but the note and mortgage. I was on intimate and friendly terms with Temple and Wright. They said at that time that they had written to plaintiff, and had received the power of attorney.

Re-examination by plaintiff's counsel. Witness stated, that Wright spoke of a debt due Funk, when he spoke of preferring his creditors. When I met plaintiff in Chicago, I had no conversation with him in reference to the transaction about taking security for the debt. I was busy in the mill, and my attention could not be diverted.

The plaintiff here introduced the note as follows:

$2,077.44. *Chicago, March 21st,* 1857.

On the twenty-first day of March, eighteen hundred and fifty-nine, we promise to pay to the order of John Staats two thousand and seventy-seven dollars and forty-four cents, with interest at the rate of seven per cent. per annum.

Exhibit B.
J. Howland Thompson.

The defendants then introduced their evidence as follows:

Chattel mortgage of the property in question, with other property, from John F. Temple and Robert M. Wright to Henry Funk, dated October 14th, 1858, acknowledged before J. A. Hoisington, justice of the peace, January 25, 1859, by John F. Temple, and the same date before C. H. Barmm, justice of the peace, by said Wright, recorded January 29, 1859. This mortgage contained the usual provision that the property should remain in possession of the mortgagor, and provided further, "that if default in payment as aforesaid on said October 14, 1859, shall be made, or the said Henry Funk shall at any time feel unsafe and insecure, that then the said Henry Funk, or his attorney, agent or assigns, or heirs, executors or administrators, shall have the right to take possession of said goods and chattels, wherever the same may or can be found, and sell the same,"

etc.; and was given to secure payment of a note from Temple and Wright for $1,135.36, payable to the order of Henry Funk, in one year after date. Dated, Chicago, 14th October, 1858.

The defendants also offered in evidence a lease of Seth Wadams, to John F. Temple and Michael H. Wright, dated February 2, 1855, of the lots on which the Temple and Wright mill and office stand, and the assignment of M. H. Wright to John F. Temple; and a lease from John F. Temple to Henry Funk, defendant, dated March 22nd, 1859, of same premises.

John F. Temple, a witness introduced for the defendants, testified as follows:

I reside in South Chicago; resided there when the plaintiff's mortgage was executed and acknowledged. It was made with two others to secure *bona fide* debts to cut off a heavy judgment against one of the members of our firm for an infringement of a patent right which we considered unjust, on which an execution was about to issue in the United States Circuit Court for the Northern District of Illinois. The debt to plaintiff was due when the mortgage was given. Either Wright or myself wrote to the plaintiff. Do n't remember whether we received a letter from plaintiff in reply. Plaintiff afterwards, some months, in 1857, was here, and complained that his mortgage did not have priority. We gave these mortgages to secure these *bona fide* debts, in preference to a claim against one of the firm. These mortgages had a direct reference to this judgment. Our intention was to evade the payment of this judgment by these mortgages. By them our intention was to hinder and delay our creditors, which was its natural result. We put off the mortgage two years, to get all the time we could get to pay under that instrument. We had our own choice. At this time only about $600 of Funk's (defendant's) debt was due.

The judgment aforesaid was against Alpheus Stewart, Michael H. Wright, and Robert M. Wright. The two Wrights and I were partners when the judgment was rendered, and the name of the firm was A. Stewart & Co., and at the time of the infringement also, we three were the partners in the firm of A. Stewart & Co., and were using the patent.

In respect to this judgment, we thought that our property was not enough to cover the judgment and all our other debts; that it would take all our property, or nearly so, to pay the judgment. We had the motive to execute the mortgage to prevent the judgment being levied; to avoid the one by accomplishing the other; we had a two-fold motive. The note secured by the mortgage was never delivered to plaintiff, (the note produced and identified by witness.) It has been in my office up to a day or two ago. No receipts or papers were given up

when the plaintiff's mortgage was made. The debt to plaintiff secured by the mortgage has never been paid.

I was present at Herbert's office; a conversation was had between Barent Staats and Funk about the respective claims on the property generally. Both professed a disposition to be easy with us. A proposition was made to have the mortgages renewed, and both parties come in *pro rata*, but not accepted. Barent Staats was in a hurry to get home, and when rising to leave, said he would write to his brother, and agreed that neither should take any legal steps to secure their claims without notice to the other, and that some time, I think ten days, was given Staats to get an answer from his brother; then he left. This was about the twenty-second of March, 22nd or 23rd. I did not hear anything said about taking the property to Iowa. This conversation was after Staats had taken possession of the engine, etc.

I was present when Herbert took possession for defendant Funk, April 11, 1859. The property mortgaged to Staats was then in our possession. I judge, no one interfered with me. I was in the office. Mr. Wright and Adams were in mill between five or six o'clock, P. M. The mill had been running about three-fourths of the time since Mr. Staats took possession. There were no indications that any one but us were in possession, or that Staats was in possession. The business went on the same as before. Baldwin was in and out, and one time was absent from Friday noon, and did not return till Monday evening. About this key that Baldwin had, we could make one in five minutes with a jack knife, out of hard wood. Outsiders could not tell anything about the key.

After Herbert for Funk took possession, I never saw Baldwin there again. This absence was after Baldwin had been there three weeks or more.

On cross-examination, the witness testified: I am brother of defendant Funk. The two mortgages spoken of, given at the same time with plaintiff's mortgages, one of them was to defendant Funk for a debt included in his new mortgage of October 14th, 1858, to amount of $586, and some cents. The balance of the second mortgage to Funk was money borrowed for the firm, some time in 1857, May or June, I think. The note to Staats is in Sidney Smith's handwriting. I tore off the signature sometime last winter; had lost the note and thought it was rather exposed and tore them off. No one was by; don't know whether it was before or after the last mortgage to Funk was recorded. I had no instructions to do it; advised with my attorney, Mr. Herbert. Don't think Herbert told me to tear the signatures off, but that the note was worthless. Before this note fell due, plaintiff did not ask for it. The instructions to

Funk's man, Adams, were to see that nothing was carried away. Neither party knew that the other had placed a custodian there. Adams was put in by Funk the next morning after Staats told him he had put Baldwin in. Funk was here four or five days in all, and went to the mill occasionally. He came there by request. Funk and Staats wished to show that they were friendly to us; did not wish to break us up, if they could help it.

John F. Temple re-examined by defendant's counsel: Was present at the time testified to by witness Hall, when note and mortgage were signed. Neither were delivered or given to Hall. The mortgage was read to Hall. Wright went to get Hall to come to the office. I had conversation with Hall within a week before this, and stated to him the object to be to evade payment of the judgment. About this time our firm had written to plaintiff to employ Hall to act for him. I stated to him that the judgment was unjust, and I wished to execute the three mortgages to plaintiff and defendant, and to another person, to evade its payment. The making these mortgages was voluntary on our part, and were given to secure money we owed. About everything was covered by the three mortgages to plaintiff, Funk, defendant, and Adam Funk.

There is a large mass of other testimony in the record, relating principally to the value of the property, but it is believed that the foregoing comprises all which is necessary to a full understanding of the case.

The defendants, by their counsel, then moved the court to exclude that part of the testimony of Barent Staats, John F. Temple and Robert M. Wright, which goes to show any agreement or understanding between the plaintiff and defendant, offered for the purpose of explaining the possession of Temple and Wright, and the want of exclusive possession on the part of the plaintiff of the property, covered by plaintiff's mortgage, from the 22nd of March to the 12th of April, as being inadmissible for that or any other purpose; but the court overruled the motion, and defendants excepted.

G. Herbert, for Appellants.

Farwell & Smith, for Appellee.

Walker, J. There are various questions presented for determination by this record, the first of which is, whether it was necessary to show that the mortgage had been acknowledged by each of the mortgagors, before a justice of the peace, in the precinct in which he resided. It appears to be conceded that Wright resided in West Chicago, and that the instrument was

acknowledged before a justice of the peace of that division, and the property to be affected by it was situated, and the business of the firm was carried on in that precinct, but Temple, the other partner, resided in a different district. Was this a sufficient compliance with the law regulating such instruments? The act provides that the mortgagor "may acknowledge such mortgage before any justice of the peace in the justice's district in which he may reside." The act also requires the justice to make a memorandum of the mortgage, and enter a list of the property mortgaged, upon his docket.

From these provisions it is manifest that the object, in requiring the acknowledgment, and the entry of the memorandum, in the justice's district in which the mortgagor resided, was to give notice to creditors and purchasers. It being usual for the owner of chattels to have them at his place of residence or business, a compliance with these provisions would usually afford those wishing to purchase the property, a ready and easy means of acquiring information as to its situation, without resorting to the records at the county seat. It would therefore seem, that when the several partners or joint owners have acknowledged such a mortgage in the justice's district in which one of them resides, and in which the property is situated and used, the object of the statute is fully answered. Otherwise, no matter how numerous the joint owners, or how different their residences, whether in the same precinct, county, State or country, they would have to acknowledge the instrument before the officer, and have the memorandum made on his docket, in the precinct of their several residences, in many cases hundreds of miles distant from the property. What possible object could the legislature have had, in requiring a resident of Massachusetts, who was a joint owner of property in Illinois, to make the acknowledgment in the justice's district of his residence. Such could not have been their object. But when the property is situated in a district different from that of either of the joint owners, it may be different.

It is also urged, that the evidence failed to show that the justice of the peace before whom the acknowledgment was had, made any entry of the fact, or made any memorandum of the property embraced in the instrument on his docket. The record fails to show that any objection was made to reading it in evidence on that ground. Other objections were urged at the time, and the party cannot now be heard for the first time to raise that question. To entitle it to consideration in this court, the question should have been raised on the trial below, and thus have afforded the opposite party an opportunity to obviate the objection.

It is urged that the evidence shows, that appellee's mortgage

was executed to hinder and delay creditors. Hall testifies, that the mortgagors informed him that Foss was on the eve of obtaining a large judgment against one of the members of the firm, and that their means would not be sufficient to pay their creditors and satisfy that judgment, and that they wished to prefer the payment of appellee's debt, to this judgment when obtained. Temple, in his letter to appellee, assigns the same reason for proposing to give the mortgage. It is true, that he afterwards, in his testimony, says that it, with the other mortgages then given, were designed to hinder and delay their creditors, and that he so informed Hall, appellee's agent. We think the court below was justified in giving credence to the evidence of Hall, rather than to that of Temple. If the design of appellee was to secure his debt, and not to aid the mortgagors in hindering or delaying their creditors, there is no legal objection to the transaction. A debtor has a right to prefer creditors in payment or security, if the parties act in good faith. And the evidence in this case warrants the conclusion, that appellee's only object was to secure his debt, and if that was the case, the motives governing the mortgagors could not affect the transaction, so long as he had no participation in it.

The next question arising on this record, is, whether the appellee reduced this property to possession, on the default in the payment of the debt, so as to retain his lien. Appellants' mortgage was subsequent in date to that of appellee's, which appears to have been properly recorded, and the appellants, therefore, had constructive notice of its existence, when theirs was executed. There can then be no question that they took their lien subject to that of the appellee's. And unless appellee postponed his lien to that of appellants', by delay in reducing the property to possession, after the default in payment, it remains a prior lien. It has been uniformly held, that to permit the mortgaged property to remain in the possession of the mortgagor, contrary to the terms of the deed, is fraudulent *per se*, and is incapable of explanation. But whether the possession does so remain with the mortgagor, is a question of fact, which must be determined from the evidence. And it has been held, that after the property has been reduced to possession on default, and the title has become absolute in the mortgagee, he may then loan it to the mortgagor, or employ him to use it for the owner's benefit, precisely as he might any other property he may own, and that these facts may be proved by any satisfactory evidence. It is believed that no adjudged case can be found, which holds that a mortgagee, after foreclosure, forfeits the right to such property by loaning it temporarily to the former owner, or by employing him to use it in the ordinary affairs of the owner, any more than he would to thus employ his other property. He

receives it with no taint or infirmity growing out of the former existence of the mortgage. It all depends upon the good faith of the transaction after the foreclosure, of which the jury must judge from all the circumstances appearing in evidence, as well from the former relations of the parties, as their present condition.

In determining whether the property in this case was, in good faith, reduced to possession by the mortgagee, the court had the right to consider all the circumstances attending the transaction. And a sufficient delivery and possession on a sale of chattels, to operate against creditors and purchasers, will be sufficient on a foreclosure of a chattel mortgage. The reason of the rule in the one case, is the same as in the other, and hence a delivery and possession which will sustain the one, will be sufficient in the other. The situation and nature of the property must of course be considered. Articles ponderous and unwieldy are not capable of the same visible signs of ownership, as are those which are light and more portable. What would be a sufficient possession of a steam boiler and engine, owing to their ponderous and unportable nature, would not be of household furniture, farming utensils, merchandise, and other lighter articles, which are susceptible of ready and easy change from the visible custody of one person to that of another. Suppose, in this case, that the appellee had removed the engine and boilers from their fastenings and bed, and placed them in the yard or highway, would any one doubt that it was a sufficient assertion of ownership and possession to have answered the requirements of the law? And yet, after much labor and some expense, the property would still have been apparently in the possession of the mortgagors.

Again, Baldwin, Wright and Ryerson, all state in their testimony, that appellants were informed that appellee had taken possession of the property, before they made any effort for that purpose. But it is urged, that notwithstanding the notice, the acts done by appellee, through his agent, did not constitute a possession of the property. The brother of appellee came, on the 22nd of March, the day after the maturity of the mortgage, went into the mill, and there received possession of the engine and boilers, by a formal delivery, but they were not removed. He, however, at the time, took into his possession the keys and gibs of the engine, without the use of which it could not be started and used, and placed them in the hands of Baldwin, who was then appointed custodian of the property. It was at that time agreed that the mortgagors might run the engine, with permission of Baldwin. The evidence also shows, that until appellants obtained the exclusive possession of the property, it was only used by Baldwin's permission. The keys and gibs

were obtained from him each morning, and returned to him each evening, he remaining on the premises and about the mill during working hours, the whole time, except one day and a half, when he was sick.

This, we think, was a sufficient possession, if *bona fide*, under the mortgage, to fulfill the requirements of the law. It was of the same character as that under which it was held by appellants, except that they had procured an assignment of the lease of the property on which the mill was situated. That circumstance had no tendency to render the possession more visible or notorious, unless the record of deeds had been examined. But either was all the possession which could be taken, without much inconvenience and considerable expense. The property was under the exclusive control of the custodian of appellee, and there is no evidence in the record from which it appears that the mortgagors, or either of them, while Baldwin was there, exercised any control, in person, over this mill or its machinery. The mere fact that the same hands who had operated the machinery under the mortgagors, were still so engaged, was not of itself calculated to mislead the public. They were only operatives, and being in the apparent actual possession, if this *indicia* of ownership was calculated to mislead the public, it would be to induce the belief that they were the owners.

Whilst the evidence is not of that clear and satisfactory character that relieves the mind of all doubt as to the value of the property, we think the preponderance is in favor of the value fixed by the witnesses of appellee. They seem to have had the best opportunities of knowing its condition, and equal means of ascertaining its value, with those of the appellants'. That the court below fixed a value less than that of appellee's witness, is not an error of which appellants have a right to complain. If it was erroneous, it was in their favor, and they have no right to object. On the whole record we perceive no sufficient error to require a reversal, and the judgment of the court below must be affirmed.

Judgment affirmed.

John Hughes, Plaintiff in Error, *v.* Samuel S. Streeter, Defendant in Error.

ERROR TO COOK.

After a satisfaction of a judgment by the sale of property, no further execution can issue upon the judgment, until the satisfaction is vacated, the levy and sale set aside and an execution awarded by an order of the court in which the judgment was rendered.

The duties of a clerk are ministerial and not judicial, and he has no authority to set aside a levy or sale, or to vacate an entry of satisfaction of a judgment.

When the description of the land levied on and sold under execution is so defective that the particular piece of land sold cannot be located, the levy and sale and entry of satisfaction should be set aside.

HUGHES filed his motion, supported by affidavit, in the Cook Circuit Court, to quash an execution issued on a judgment obtained by Streeter against him, on the 16th day of August, 1859, for six hundred and sixteen ninety-two one-hundredths dollars and costs, and to maintain his motion offered the following pieces of evidence:

A written notice of this motion—a copy of which was served on defendant's attorney, 3rd Sept., 1859.

An execution in favor of defendant and against the plaintiff, for the sum of $618.92 and costs, issued out of this court, upon said judgment, and bearing date the 5th day of October, 1857, directed to the sheriff of Jo Daviess county, and by him returned with the following indorsements and returns: "Received this execution for collection this 6th day of October, 1857, at the hour of 10 o'clock, A. M."

"By virtue of this writ, I have, this 7th day of October, 1857, levied upon the following described tract or parcel of land, to wit: a part of the east half of the south-east quarter of section number twenty-six, in township number twenty-nine north, range number two east of the fourth principal meridian, in Jo Daviess county, Illinois, containing seventy-four acres, more or less."

"Made six hundred and sixty ten-hundredths dollars, by sale of the property described in the above levy, the amount of the judgment, interest and costs in this execution, and the purchaser being the plaintiff, the same is returned satisfied this 27th February, 1857."

Another execution in favor of defendant, and against plaintiff, on said judgment, for the sum of six hundred and eighteen dollars and ninety-two cents and costs, out of this court, and bearing date the 16th day of August, 1859, directed to the sheriff of Jo Daviess county.

At the same time, Streeter, the defendant, entered his cross-motion, founded upon affidavit, for an order setting aside and vacating the sale of the real estate, made under the above execution, issued 5th October, 1857, numbered 8150; and the return thereon of satisfaction.

And afterwards, the court rendered a judgment on said motions, overruling the said plaintiff's motion to quash said execution, issued 16th August, 1859, and also setting aside and vacating the sale of the real estate, in Jo Daviess county, made by the sheriff of said county, on the 27th day of February, 1857, under and by virtue of the execution issued 5th day of

October, 1857, upon the same judgment, for $618.92 and costs. And also setting aside and vacating the return of the sheriff indorsed thereon, together with the subsequent entry of satisfaction of the judgment aforesaid.

Hughes now brings error to reverse these decisions.

SCATES, MCALLISTER & JEWETT, for Plaintiff in Error.

SMITH & DEWEY, for Defendant in Error.

WALKER, J. The rule has been uniform both in this country and Great Britain, that after a satisfaction of a judgment by the sale of property, no further execution can issue upon the judgment, until the satisfaction is vacated, the levy and sale set aside, and an execution awarded by an order of the court in which the judgment was rendered. No case has been referred to, and none is believed to exist, in which a clerk has ever before issued an execution on a judgment thus satisfied. And it is for the plain and manifest reason, that his duties are only ministerial, while the setting aside a levy, or a sale, or the vacating the entry of satisfaction of a judgment, is a judicial act. When the plaintiff has sold property in satisfaction, his judgment ceases to exist, and when the record entry of its satisfaction is vacated, it is thereby revived, and receives new vitality. The exercise alone of a judicial power, equal to that which first made the decision, can impart this new life to a judgment which has once been satisfied by an officer or person clothed with power to make the entry. The hearing the evidence and finding the facts on the motion, is as purely judicial, as is the ascertaining the amount of the indebtedness, and rendering the judgment in the first place. The clerk might as well assume the one jurisdiction as the other, and the exercise of either is wholly unwarranted.

We have, however, been referred to the case of the *Frankfort Bank* v. *Mackley*, 1 Dana, 373, as an authority to sustain the practice. That was a case where an agent of plaintiff, through mistake, entered a credit on the execution, and the clerk issued an alias for the full amount of the judgment. That case stands, so far as we can find, solitary and alone, and no rule of law is referred to in support of the authority of the clerk, and the court, in the opinion, very properly discourages the practice. The facts of that case are not the same as in this, and even if they were, we should not be inclined to follow it as a precedent, or as authority, since we believe that it is opposed to the uniform practice, and is not sanctioned by the common law, is unauthorized by statute and in violation of our constitution, which has vested all judicial power in courts, and

not in ministerial officers. We are therefore clearly of the opinion that the court erred in not quashing the alias execution, as its issue was not warranted until the satisfaction, the levy and sale, had been set aside by the judgment of a court of competent jurisdiction.

The question will necessarily arise on another trial, whether the levy and sale made under the first execution should be set aside, and we shall therefore proceed to the determination of that point. This question depends upon whether the defendant in error acquired anything by the levy and sale. If the description of the premises is sufficient to fix the location of the land, he then obtained the right of redemption from the mortgage, otherwise he procured nothing. It sufficiently appears by the affidavits, that the officer designed to levy upon the interest of plaintiff in error in the eighty acre tract, and that the defendant in error designed to purchase, and supposed that he had purchased that interest. The whole transaction seems to have been had under a misapprehension of the parties, and their intention appears to have been, to make the levy and purchase of the land by a sufficient description. A part of eighty acres, containing seventy-four acres, more or less, is wholly insufficient to designate any tract of land, that can be located. By this description it might be located in a large number of different modes, either of which would equally answer the call of the deed. It is true, that it is seventy-four acres in a designated eighty acre tract. But whether on the one or another of the sides, in the centre or in one of the angles of the tract, it is impossible to know. There is nothing in the levy and certificate of purchase from which that fact can be ascertained, and we have no other means, which we can recognize, of ascertaining the intention of the parties. Whether the half of the quarter section is fractional, does not appear. But even if it did appear that he owned seventy-four acres by an appropriate description, there is nothing in the levy to limit and designate the portion of the half of the quarter that he owned. Had it stated that it was all of the land which he owned in the tract, or that it was all of the land he had acquired by purchase from a particular individual, or some such reference to something else, by which it could have been located, it might have been sufficient. But we have no such reference, and we have no doubt that the description is so defective that no title whatever passed by the sale. This being the case, the defendant in error did not obtain anything by his purchase, and has an equitable right to have the levy and sale set aside, and an execution awarded, by which he may acquire the benefit of his judgment.

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

Edward B. Chumasero, Appellant, *v.* Horatio G. Gilbert, Appellee.

The Same, Appellant, *v.* The Same, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

The *lex fori* must govern the rate of interest recoverable on a contract, which does not state the interest to be paid; and if a greater rate of interest is sought, there must be averment and proof to justify it.

Exchange cannot be recovered, where there is not an agreement to pay it.

These were actions of assumpsit, commenced in La Salle County Court, by the appellee against the appellant, and tried at the September term, A. D. 1859, before Champlin, Judge, a jury having been waived by agreement of the parties. Judgments were rendered against the appellant.

The declarations each contained a special count upon notes, which were payable without defalcation, for value received, at the Broadway Bank of New York City. The declaration also contained the common counts. There was not any averment relative to exchange.

The appellant filed a plea of the general issue.

The appellee offered in evidence a copy of the notes, and then offered to prove, and the appellant admitted the fact to be, that at the time the notes became due, exchange on New York City was one and a half per cent.; but said appellant, at the same time, objected to the introduction of said testimony, which objection was overruled by the court.

The court found for the appellee, and assessed his damages at $711.89.

Chumasero & Eldredge, for Appellant.

B. C. Cook, for Appellee.

Walker, J. This court held, in the case of *Chumasero* v. *Gilbert*, *ante*, 293, that the *lex fori* must govern the rate of interest recoverable on a contract, which contains no agreement for a different amount. Or if the contract was entered into in a State where the law has fixed a greater rate than is allowed by our statute, that fact must be averred and proved, to authorize a recovery of such rate. In these cases it was therefore error to allow seven per cent., the rate allowed by the New York statute, as there was no such averment or proof.

The notes contained no agreement to pay exchange on New York, in addition to the principal sum. It is true the money, by the terms of the notes, was payable in the city of New York.

But the agreement was to pay the sum of money named, and that was the extent of the maker's liability, with the legal rate of interest after maturity, if not promptly paid, as a compensation in damages for the delay. No adjudged case has been referred to, and it is believed none can be found, in which it has been held that the plaintiff may, without any agreement, recover exchange between the place where the recovery is had, and that agreed upon for the payment. Nor do we know of any rule which would authorize it. It was therefore error to allow damages for exchange of New York.

The judgments of the court below are reversed, and the causes remanded.

Judgments reversed.

SPRINGFIELD, JANUARY TERM, 1861.

Martin Ryan *et al.* *v.* James L. Anderson.

Where parties by agreement consent to an appeal, it will be sustained, although error was the appropriate remedy.

This was a motion to dismiss an appeal, because the judgment below was for costs only, and the action did not relate to a franchise or freehold; and because the judgment was in favor of the parties appealing; and they did not sign the appeal bond.

The record shows the following agreement: "It is agreed that this case may be appealed to the Supreme Court upon the bond of William McMurphy, R. M. Worthington, and George Metz, directors of said township, without further security."

The action was commenced by certain parties, as collector, treasurer and school trustees of township two, etc., in Schuyler county.

O. C. Skinner, for the Motion.

C. L. Higbee, *Contra.*

Per Curiam. The court having jurisdiction of the subject matter, consent will give jurisdiction over the person; by agreement, these parties are properly in court. Although error was the appropriate mode of procedure to bring the parties before the court, yet the remedy does not depend upon the process, and the agreement precludes the parties from taking advantage of the means adopted to bring them before this tribunal.

Motion denied.

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7. Money left with a party to make purchases, without a promise to that effect, will not bear interest, unless there is an unreasonable delay in refunding the money after demand. Ibid. 133.

8. If a party attempts to rescind a contract, he should place the proper party in *statu quo*, by an offer to return what the pleader has received. *Smith* v. *Doty*, 163.

9. The failure of one of the parties to a contract to fulfill his agreement, authorizes the other party to rescind the contract. *Carney* v. *Newberry*, 203.

10. But such failure does not of itself destroy the contract. The other party must give notice, within a reasonable time, of his intention to repudiate it. Ibid. 203.

11. If the lack of virtue is relied on, to absolve the defendant from the fulfillment of his contract of marriage, his knowledge of that fact must have been acquired after entering into the agreement, and the defendant must have terminated the engagement immediately upon being apprised of the truth. *Burnett* v *Simpkins*, 264.

12. Under a contract to build a house by a fixed date, it will be held, that suffering the contractor to proceed after the day fixed for its completion, and the acceptance of the work at a future day, amounts to a waiver of performance at the time specified in the contract. But the mere extension of time does not affect the other stipulations of the agreement. *Nible* v. *Braukn*, 268.

13. One part of a contract will be so construed with another as to make the whole stand if possible, construing ambiguous words most strongly against the party who uses them. *McCarty* v. *Howell*, 341.

14. A party who sues upon a special contract, cannot recover, unless he shows he has performed the contract substantially; or if he has performed but a part, that the remainder was waived or prevented, and the part performed has been accepted. The measure of the damages is the contract price, to be appropriately apportioned. *Holmes* v. *Summel*, 370.

15. If a suit is brought for work and labor in assumpsit, the defendant may show a special contract; if he does, the plaintiff cannot recover unless he shows that, though the work was not done as contracted for, yet that it has been appropriated, when the contract price will rule practically, leaving the defendant to recoup for any injury for non-performance of the contract. Ibid. 370.

16. Where goods are received by a common carrier, to be carried under the usual bill of lading, it is incumbent on him to show that the injury resulted from one of the causes excepted in it. *Western Transportation Co.* v. *Newhall*, 466.

17. The responsibility of common carriers continues until the goods have reached their final destination: after that is reached, there may be circumstances under which their responsibility as carriers would cease, and they become liable as warehousemen only. Ibid. 466.

18. The intention of the parties, as expressed in their articles of agreement, must, as between themselves, be decisive of the question whether a partnership did or did not exist between them, and as to its extent. *Stevens* v. *Faucet*, 484.

19. A manufacturer, who makes a contract to deliver work, without requiring prepayment, is held to have relinquished his lien on the manufactured article. Ibid. 484.

20. The intention of the parties to a written contract, as deduced from a fair construction of the words used by them, must govern, in deciding questions as to their rights under it. *Tracy* v *City of Chicago*, 500.

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1. The holder of several bank bills may present them as an aggregate sum and demand specie, and the bank is bound to pay. *Reapers' Bank* v. *Willard*, 433.
2. A bank has not the right, when its bills are presented for redemption, to delay and harass the bill holder by a dilatory way of counting out change for redemption. *Same* v. *Same*, 439.

SPECIAL TERM.

1. The Superior Court of Chicago has authority to appoint special terms. *Burnham* v. *City of Chicago*, 496.
2. A judgment, entered as of the January special term, instead of the regular February term, by mistake of the clerk, will not be reversed on account of such mistake. *Same* v. *Same*, 496.

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Where an appeal from an order locating a road, and assessing damages, is taken to supervisors, they cannot act unless the parties are notified; should they do so, their action is invalid; but the appeal will stand, and may be heard by the supervisors of the same towns, upon proper notice given. *McPherson et al., Commissioners*, v. *Holdridge*, 38.

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1. An attorney who tried a cause in the court below, is not authorized to appear in the Supreme Court without a new retainer. *Covill* v. *Phy*, 37.
2. The Supreme Court will not disturb a verdict where there is a conflict of evidence, although it would have been better satisfied with a different verdict. *Bloom* v. *Crane*, 48.
3. Where there is *data* before the court, to show an error in the computation of interest, the judgment may be reformed in the Supreme Court; and costs will be awarded accordingly. *Boyle* v. *Carter*, 49.
4. If the best proof of a fact is not adduced, the party should object on the trial; such an objection comes too late in the Supreme Court. *Brush* v. *Seguin*, 254.
5. The Supreme Court of this State has not jurisdiction to enforce a decree against the United States. *Clark* v. *Livingston County*, 371.
6. Where instructions have been given, which, though erroneous, could not have misled the jury, to the injury of the plaintiff in error, this court will not, on that account, disturb the judgment of the court below. *Howard Insurance Co.* v. *Cornick*, 355.
7. Where parties by agreement consent to an appeal, it will be sustained, although error was the appropriate remedy. *Ryan* v. *Anderson*, 652.

TAXES — TAX TITLE.

1. A judgment for taxes, which does not show that the clerk of the Circuit Court has recorded the collector's report, and the certificate of publication, is invalid. *Dukes* v. *Rowley*, 210.
2. The holder of a tax title must show that the collector's report and certificate of advertisement were properly recorded, that a judgment was rendered, and a precept issued. Ibid. 210.
3. A collector's deed is *prima facie* evidence that the land had been properly listed and assessed; this may be rebutted by appropriate evidence. Ibid. 210.
4. The judgment must in some other way than by the use of numerals, state the sum for which it is rendered. Ibid. 210.
5. It will be presumed that proper proof was made to the Circuit Court, before judgment, that the certificate returned was made by the publisher of the paper in which it appeared. Ibid. 210.
6. A tax deed cannot be admitted, as evidence of title, until the foundation is laid by the production of a judgment and precept, regular and sufficient on their face. *Baily* v. *Doolittle*, 577.
7. The absence of any words or characters to show what is the meaning of the figures used in the judgment or precept, or what is the amount of the sum intended to be represented thereby, is a fatal defect. Ibid. 577.
8. A party to a contract for the purchase of land, by which he has agreed to pay all taxes thereon, is not permitted to apply such payments of taxes on a tax title, and thereby defeat the title of his vendor. Ibid. 577.

TENANT IN COMMON.

1. The possession of one of several tenants in common of property which is incapable of division, is the constructive possession of all. *Brown* v. *Graham*, 628.
2. And when a tenant in common, not in possession, sells his interest, the possession of another tenant in common becomes the constructive possession of the purchaser. Ibid. 628.

TIME.

TITLE TO LAND.

See Sale of Land, 4, 5.

TOWNS AND CITIES.

See Injunction.

TOWNSHIP ORGANIZATION.

See Highways and Streets, 7.

TRESPASS — TRESPASSER.

VENDOR AND VENDEE.

VERDICT.

WAREHOUSES — WAREHOUSEMEN.

WARRANTY.

WIDOW.

WILLS AND TESTAMENTS.

WITNESS.

See CHANCERY, 1.

WRITTEN INSTRUMENTS.

See EVIDENCE, 7.