REPORTS

OF

CASES DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

AT

APRIL TERM, 1859.

BY E. PECK,
COUNSELOR AT LAW.

VOLUME XXII.

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JUDGES OF THE SUPREME COURT.

CHIEF JUSTICE,

JOHN D. CATON.

ASSOCIATE JUSTICES,

SIDNEY BREESE.

PINKNEY H. WALKER.

TABLE OF CASES.

RULES ADOPTED AT JANUARY TERM, 1860.

RULE 51. That all applications for supersedeas, whether made in open court, or to a Justice in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of bail, sworn to and properly certified.

RULE 52. That the certificate of good moral character of a court of record required to be produced to the Supreme Court, or either of the Justices, by an applicant for license to be admitted as an attorney and counsellor, must, in all cases, be procured from a court of record of the county in which the applicant shall reside, or, if procured from a court of a different county, the application shall be accompanied with good and sufficient reasons therefor, verified by affidavit of one or more credible persons.

RULE 53. That the Justice to whom application is made for a license, may, at his discretion, require the applicant to submit to an examination before him, or in open court.

RULE 54. That hereafter in every application for a supersedeas, an abstract of the record, with a brief

containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the court or Judge to whom the application is made.

Rule 55. That Rule number fifty be so modified that Rule number forty-six shall apply to the Second Grand Division.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

APRIL TERM, 1859, AT OTTAWA.

Mineral Point Railroad Company, Plaintiff in Error, *v.* John M. Keep, Defendant in Error.

ERROR TO JO DAVIESS.

If railroad companies, having their officers and offices, do business and have agents and property in this State, service of process may be made upon such agents in this State, in the same manner that it may be on agents of local corporations.

If the fact of the agency is denied, the return of the officer as to that is not conclusive, this should be put in issue by a plea in abatement.

A party who submits himself to the jurisdiction of a court by pleading, cannot afterwards complain of the irregularity of the service of process. He may give jurisdiction without service of process.

An affidavit before a notary of another State, if he certified that he is authorized to administer oaths, will authorize the issuing of an attachment in aid of a summons.

Corporations are included in the word "person" in the attachment law.

Where an issue of fact is made up on a plea to the jurisdiction, a judgment of *respondeat ouster* is a favor to the party; the judgment *quod recuperet*, being authorized.

A plea to the jurisdiction, should be pleaded in person, not by attorney.

A court has discretion to allow items of set-off, that have been withdrawn, to be again filed.

The written memoranda, taken at the time a deceased witness testified, in a suit between the same parties, may be read in evidence. The correctness of such memoranda may be disputed, and the jury must pass upon them.

If money is advanced to a sub-contractor, the principal contractor will only be held for the amount advanced by his authority.

This was an action of debt upon two contracts, for building the road of the defendant below, plaintiff here; also for war-

rants drawn upon the treasurer of the company, in favor of plaintiff below. The declaration also contained the common counts.

The suit was commenced by summons, returned as follows, 2nd February: "Executed the within by delivering a copy of the same to J. R. Booth, agent, and A. W. Dexter, conductor of said Mineral Point R. R. Co." Amended so as to read, "Executed the within writ by delivering a true and correct copy of the same to J. R. Booth, agent, and J. W. Dexter, conductor of said Mineral Point R. R. Co., this 2d day of Feb. 1857, the President of said company not residing in the State."

On 5th February, affidavit and bond for an attachment was filed, and an attachment was sued out in aid, levied 7th February, on three locomotives, six box cars, and two passenger cars, three rock cars, one lathe and shop, and left copy of attachment with Mr. Booth, agent of said road. No publication of notice was made.

The amended affidavit states that the railroad company is a corporation chartered, located, and doing business in Wisconsin, and under the laws of said State, and keeps its office or place of business in Wisconsin, and has no office or place of business in the State of Illinois, and is a resident of Wisconsin and not of Illinois, and that it has property in Illinois which it is about to remove out of the State, and that in 1855 it became a corporation by act of Illinois, by act of 15th Feb., 1855, and that this attachment is in aid of his action of debt. Affidavit sworn to before notary public, in Wisconsin. There was a motion to quash the amended affidavit, because not sworn to before any person authorized to administer oaths by the laws of Illinois. Motion was overruled.

There was a plea in abatement to the affidavit and writ of attachment which sets out that defendant below had a large amount of personal property in the county of Jo Daviess, which it was not then about to remove from the State of Illinois, to the injury of Jno. M. Keep, as in said affidavit alleged.

A demurrer to this plea was sustained.

Defendant below then moved to set aside sheriff's return on the summons, and read affidavits of Dexter, Booth, and Johnson, who state that Dexter and Booth were not agents, conductors, or in any way employees of the company at the date of the service of summons, nor at any time before or since; whereupon court ruled that the testimony was inadmissible because the sheriff's return could not be contradicted, and that plaintiff was duly summoned and in court.

Plaintiff filed a plea to the jurisdiction, wherein it is set out

that the causes of action accrued to defendant in Wisconsin and not elsewhere.

That plaintiff and defendant are non-residents of Illinois, and that both reside in Wisconsin, and plaintiff is a corporation created and existing under the laws of Wisconsin, and keeps its office and place of business there, and has none in Illinois.

That contract and cause of action sued for were created and to be performed in Wisconsin, where both parties then did and still do reside. Properly sworn to.

On leave, defendant filed two replications to above plea.

1st. That plaintiff is a body corporate in Illinois, and existing, doing business, and having an office in said State, under the act of February 15, 1855.

2nd. That under the act of 15th February, 1855, plaintiff built and is now operating a railroad from the dividing line of the States of Wisconsin and Illinois, to the depot of the Illinois Central Railroad at Warren, in Jo Daviess county, and was, at the date of the suit, transporting persons and property upon it.

Demurrer, general and special, to these replications, overruled.

There was a rejoinder to replications, and trial, and verdict for defendant.

Motion for a new trial was overruled and excepted to, with judgment of *respondeat ouster*.

David B. Martin and Lucius D. Coman file an interpleader, and state,

That the property attached belongs to them, as mortgagees, by mortgage dated 1st January, 1856, recorded 25th April, 1856, of all the road bed, superstructure and equipment, for securing bonds and coupons for $320,000.

Issue was joined on this plea, and trial and verdict for interpleaders and judgment for them, and that sheriff deliver up the property attached to said interpleaders.

The court modified the judgment by vacating that part which required the sheriff to deliver up the property to them.

Defendant below, upon affidavit, moved to set aside this last order, and for an order to the sheriff to return the property attached, to the interpleaders, which the court overruled.

Defendant below then filed the following pleas:

1st. General issue.

2nd. Set-off, and account filed under it.

3rd. *Non est factum*, without oath.

4th. Non-performance of condition of contracts by plaintiff.

5th. *Non damnificatus*.

6th. Payment.

7th. Performance by defendant of all the conditions of the contracts.

8th. Non-performance by defendant of his contract to build road, viz.: did not construct the road in time and in a workmanlike manner.

General replication to each plea.

Defendant withdrew the items of his set-off for $5,000 for subscription to stock of company by plaintiff.

Before the cause came on for trial, the defendant moved for leave to re-file the foregoing item, having since its withdrawal procured evidence to establish it. Which was allowed.

The contract between the plaintiff and defendant for the construction of the road, dated 6th September, 1854, and the accompanying estimates and specifications, were read.

Plaintiff offered to read his own letter of the notice of his intention to abandon the contract in evidence. Defendant objected. Overruled, and the following letter was read:

Warren, December 15, 1856.

Hon. Parley Eaton, President, etc.

Dr. Sir:—On account of the failure of the Mineral Point Railroad Company to pay my estimates for the last three months, and their total failure to pay me anything on my estimate due the 10th inst., I am compelled to declare the contract between me and the company, dated Sept. 6th, 1855, forfeited, for such failure on the part of the company. I have carried along the work and raised the money as long as I can do it. I did intend to go through even if I had to advance all the estimates, but find that I cannot without the company pay estimates, and therefore for such default, am compelled to declare the contract forfeited. The work on section 31 will be suspended entirely. My sub-contractors on other parts of the road will finish their contracts under me, or I shall fulfill my contracts with them. But it must be understood that no future work is done under my contract aforesaid of Sept. 6, 1855. The company can take possession of the whole road if they desire it, and I will settle with my sub-contractors, or they can let them finish their jobs, just as they choose. If they go on and finish, as I am willing they should do, I shall pay them as I contracted. I shall claim of the company what the work is worth. I take this step very reluctantly, gentlemen, I can assure you, but I am compelled to do it. I am desirous of making an amicable settlement with the company, if it can be done, and will endeavor to do what is right. I shall be at Janesville next week, and I hope to hear from you and perhaps see you. Judge Eaton and Mr. Temple could undoubtedly arrange the whole matter with me satisfactorily.

Yours truly, J M. KEEP.

M. H. Carpenter, sworn. Says he is attorney for defendant, and was such on a former trial of this case; that he heard the testimony of Charles Temple, a witness for defendant on that trial, since deceased. That he took down the testimony of said Temple at the time, and then produced the minutes so made by him on that trial, and that he believed the minutes so taken by him were correct. That he could not state his testimony min-

utely from his recollection, but must rely upon his minutes taken at the time.

He then read from the minutes so kept and produced by him.

To the reading of the whole testimony from the minutes, the plaintiff objected.

The defendant then called and examined several witnesses.

The defendant below offered the receipt of T. C. Holcomb, for $1,007.12, and thereupon examined *W. T. Henry* in explanation thereof, who stated,—

That Holcomb was a sub-contractor under defendant. Keep ordered me to take his receipts and give him vouchers for them. This receipt was for money advanced, less fifteen per cent. Defendant said I might advance to within the amount due from defendant to the sub-contractor. We had an account of Holcomb's work. Engineer reported the work of each section distinct. Defendant authorized us to pay Holcomb, so we did not exceed what was due defendant from him to Holcomb.

The Holcomb order, composed of items amounting to $1,007.12, was read in evidence.

The court, at the instance of defendant, gave the following instruction, among others:

"4th. If the jury believe, from the evidence, that the defendant made advances to one Holcomb, and seeks to charge the defendant with such advances, then the jury should reject the testimony, unless the plaintiff has shown further, by the evidence, that the defendant was indebted to said Holcomb, at the time of making such advances, to an amount equal to the money advanced, if such was the limit of the authority to plaintiff to make such advances."

At instance of plaintiff, the court instructed the jury as follows, among others, viz.:

"4th. If the jury believe, from the evidence, that advances were made to defendant by the company, and, at the time the advances were made, it was the agreement between the defendant and the company, that the same were to be taken out of any subsequent estimates due him, and that estimates were made defendant afterwards, and the company elected to take the estimates out of such estimates, the retaining payment out of such estimates by the company, is not such a non-performance and default on the part of the company, as would authorize defendant to declare the contract terminated."

"5th. That under the contract sued on this cause, the plaintiff was authorized to retain fifteen per cent., which was not demandable until the completion of the contract; and if the jury believe, from the evidence, that the defendant abandoned the work voluntarily, and did not complete the contract, with-

out fault on the part of the company, then the defendant cannot recover the retained per cent. in an action based upon the contract, and as to that item the jury should find for the plaintiff."

"7th. The covenant in this contract to pay at the end of each month for the work done during that month, was dependent upon the progress of the work, so far as respects the amount to be paid, but was not dependent on the covenant to finish the work by a certain day; these are independent covenants; and if the defendant covenanted to complete the work, and refused and neglected to complete the same, he cannot recover for work not done by him."

"9th. The defendant cannot recover under the contract for any more work than was done by him up to the time he rescinded it."

The jury found a verdict for the defendant for the sum of $10,749.38 debt, and $982.37 damages.

Plaintiff moved for a new trial, which was overruled, and judgment rendered for the amount, to all which the plaintiff excepted.

The following errors are assigned:

1st. The court erred in overruling plaintiff's motion to quash the writ of attachment for want of a sufficient affidavit.

2nd. In sustaining a writ of attachment against a domestic corporation created by the laws of this State.

3rd. In sustaining the defendant's demurrer to the plaintiff's plea in abatement to the facts set forth in the affidavit for attachment.

4th. The court erred in entertaining jurisdiction of the cause under the summons; because there was no service on any person in the employ of, or connected with the company.

5th. In striking from the files the affidavits of the persons on whom the pretended service was made.

6th. The affidavit does not contradict, but explains the return of the sheriff, and should have been received by the court.

8th. In requiring the plaintiff to plead to the action, and in holding the service sufficient.

9th. In taking jurisdiction of the cause, there being no notice under the attachment or service under the summons.

10th. In submitting the question of the jurisdiction of the court to be tried by, and passed on by, the jury.

11th. In overruling the motion for a new trial on the issue raised by the plea to the jurisdiction submitted to the jury.

12th. In overruling the motion of the plaintiff to re-file the account filed with the pleas, and withdrawn on former trial.

15th. In permitting Carpenter, defendant's attorney, to read

from his minutes what the witness, Temple, had testified on a former trial.

16th. In giving the instructions asked for by the defendant.

18th. In overruling the plaintiff's motion for a new trial, and in entering a judgment in the cause in the form entered.

19th. In changing the order first made, and in overruling the motion of the interpleaders for a return of the property from the sheriff.

W. B. Scates, and M. Y. Johnson, for Plaintiff in Error.

Leland & Leland, for Defendant in Error.

Breese, J. Several objections are made by the appellants to the proceedings in this cause, some of which, deemed the most important, we will notice.

The first is, that there was no service of process in the original suit, and that the court erred in requiring the defendants below, to make any further appearance in the cause than to object to the service.

The service was as follows: "Executed the within writ by delivering a true and correct copy of the same to J. R. Booth, agent, and J. W. Dexter, conductor of said Mineral Point Railroad Co., this 2nd February, 1857, the president of said company not residing in this State."

It is provided by an act amendatory of chapter 83, R. S. 1845, passed in 1853, (Scates' Comp. 243): "In all cases where suit has been, or may hereafter be brought against any incorporated company, process shall be served upon the president of such company, if he reside in the county in which suit is brought, and if such president be absent from the county, or does not reside in the county, then the summons shall be served by the proper officer by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor, or any agent of such company found in the county, at least five days before the trial, if suit be brought before a justice of the peace, and at least ten days, when suit is brought in the Circuit Court."

This act does not seem to be confined to domestic corporations, in its terms, nor do we think it should be, when the purpose of the act is considered. It seems to us, it was designed for just such cases as the present, where railroad companies, having their offices and officers in foreign States, do their business, have their agents and their property in this State. It is a convenient way provided, to get service upon them, so as to subject their property to their contracts, and it is a proper consequence of the provisions of this act that they should be deemed

found wherever one of their officers or agents, such as specified in the act, may happen to be. And this we understand is every day's practice, not only with the Illinois Central, but with all other railroads in the State. The practice under a law, is sometimes good evidence of what the law is, and really means.

It is urged in addition, that the return of the officer is not, and ought not to be, conclusive of the fact of agency, and that the affidavits to show the true character and relative position of the supposed agent and conductor, Booth and Dexter, should have been admitted—that the return can only be conclusive of the fact and the time of the delivery of the copy of the summons to these supposed agents, but not to their character or supposed relation to or connection with the company.

There is great force in this objection, and if the appellant had pleaded in abatement of the writ and not to the merits of the action, it might have availed it.

The object of process being to compel the appearance of a party, if he does appear on void process or without service of process, and pleads to the merits, he can never urge the want of proper process, or want of service or improper service, as grounds for the reversal of a regular judgment rendered against him, the court having jurisdiction of the subject matter. He submits his person to the jurisdiction by his plea. The court did not require the appellants to plead to issue—it was their own voluntary act.

We are not inclined to think the return of the officer, as to the fact of agency, when a corporation is sued, should be conclusive. Great injustice and ruin to incorporated companies might be the consequence, had the officer the undisputed power to select any person he might choose, as the agent of a company sued, and serve the process upon him. That he was the agent must be held to be a fact open to the country. An officer's return is not conclusive of all the facts stated in it, as where he returns upon a *fi. fa.*, "money made and paid to the plaintiff," the payment is a fact which may be contested. So in this case, the fact that J. R. Booth was the agent and Dexter the conductor, is not conclusively established by the return; it can be contested. Our statute authorizing service of process on an agent or conductor, is an innovation upon the ancient practice, and no greater force and effect should be given to it than is absolutely necessary. When a party sues an incorporated company whose president and whose place of doing business is out of the county where suit is brought, and causes his process to be served on one whom he chooses to consider the agent of the company, it is no hardship to require him to prove such person was the agent. We think, therefore, that the fact of agency could have

been put in issue by plea in abatement of the writ, the defendants appearing for that purpose only. By such practice, no injustice can be done. If the issue is found against the company, and the fact of agency established, leave will always be given to plead to the merits.

The motion made by appellants, was not in the nature of such a plea, for no issue could be made up. A most important fact was to be investigated and decided, and it could not be well tried upon affidavits, and without an issue formed.

They have pleaded to the merits, and that cures all antecedent irregularities of process—defective service, or an entire want of service.

As ancillary to this action commenced by original summons, the plaintiff below, on an affidavit made before a notary public of Wisconsin, attested by his notarial seal, obtained an attachment which was levied on one locomotive, and several cars, as the property of the plaintiffs in error, and a copy of the writ and levy "left with Mr. Booth, agent of said road." No notice by publication or otherwise was given, other than the service of the original summons in the mode above stated.

A motion was made to quash the affidavit on the ground that it was not made before any officer authorized by the laws of this State to administer oaths. The motion was overruled, and we think correctly, for the notary states in his certificate, that he is authorized by the laws of Wisconsin to administer oaths, and our statute, section 32, chapter 9, R. S. 1845 (Scates' Comp. 235), provides that the affidavit may be sworn to before any officer authorized by the laws of this State to administer oaths, or by any officer of any state, territory or district of the United States, the fact that the person administering such oath is duly authorized, to be proved in the same manner as in the acknowledgment and authentication of deeds. Now a deed executed in a foreign State, and acknowledged before a notary public and attested by his notarial seal, is a sufficient authentication of the acknowledgment, without any other evidence. So would proof before him by the subscribing witness be sufficient. It is sufficient, that the notary has power by the law of his domicil, to take affidavits, and such affidavits can be used in the courts of this State.

A plea in abatement was then filed to the affidavit and writ of attachment, which was demurred to and the demurrer properly sustained, because the plea did not state, that "the large amount of personal property which the company had in Jo Daviess county, was sufficient to pay the plaintiff's debt."

These proceedings were prior to the attack upon the sheriff's return by motion to set it aside. After this motion was over-

ruled, plaintiff in error filed a plea to the jurisdiction of the court, setting out that the causes of action accrued to the plaintiff below in Wisconsin and not elsewhere, and that both parties are non-residents of this State, they residing in Wisconsin, and that plaintiffs in error are a corporation created and existing under the laws of Wisconsin and keeps its office and place of business there, having none in this State, and that the contract and causes of action sued for, were created and to be performed in Wisconsin, where both parties then did and still do reside.

To this plea the plaintiff below, by leave of the court filed two replications. First, averring that defendants below are a body corporate in this State and existing, doing business, and having an office in this State under the act of February 15, 1855, and second, that under said act, the defendants below, built and are now operating a railroad from the dividing line of the States of Wisconsin and Illinois to the depot of the Illinois Central Railroad at Warren in Jo Daviess county, and was, at the time of the commencement of this suit, transporting persons and property upon it.

To the first of these replications there was a demurrer, which was sustained, and amendment made and a rejoinder put in. The issue thus formed was tried and found for the plaintiff below, and judgment of *respondeat ouster*. Whereupon the defendants filed the plea of the general issue and seven special pleas.

From the views we have already presented, it may be inferred that the question of jurisdiction was properly determined against the plaintiffs in error. There can be no question that they and their property were amenable to the attachment process in aid, as this was, of the suit at law commenced by summons served upon their agent. Though incorporated companies are not expressly named in the attachment act, by force of section 9, chapter 90, (Scates' Comp. 722), the word "person" shall be deemed to extend to and include bodies politic and corporate, as well as individuals. The word "person" therefore in the first section of the attachment law (Scates' Comp. 228) includes bodies politic and corporate as well foreign as domestic.

If it be a foreign corporation, having property within the jurisdiction of this State, it must be regarded as a non-resident debtor and amenable to this process. If it be a domestic corporation, and it is alleged that it has property within this State and is about to remove it without this jurisdiction to the injury of the creditor, a case is made for the issuing of the writ of attachment.

We can perceive no hardship or injury likely to result from so holding. Corporations have vast powers and privileges, suf-

ficient it is supposed, to enable them to carry out the objects for which they are created. It would be neither just nor wise, to bestow upon them the additional immunity of exemption from the observance of their contracts, or to deny to the people, the usual facilities for collecting their debts against them. Nothing in the issues made up on the plea to the jurisdiction is shown, to deprive the court below of jurisdiction.

The judgment on this plea of respondeat ouster may be considered, as a favor extended by the court to the plaintiffs in error, for ordinarily, the judgment would have been *quod recuperet*, an issue of fact having been joined upon the replication and found for the plaintiff. The same jury that tried this issue might have assessed the damages. 1 Ch. Pl. 464. The facts alleged in the plea to the jurisdiction and the issue upon it, were properly tried by the jury. But it may be observed, this plea to the jurisdiction was not properly pleaded, and on motion would have been stricken from the file. It was pleaded by attorney. The rule is it must be pleaded in person, and not by attorney, because the latter would admit the jurisdiction of the court. 1 Ch. Pl. 444.

What we have said disposes of the eleven errors first assigned.

As to the twelfth error, it was clearly a matter of discretion in the court below to permit the defendants to file anew items of set-off, which they had once filed and withdrawn. A plea of set-off is in the nature of a cross action, and items of set-off may be regarded as counts in a declaration, and it would be unreasonable to permit a party to withdraw, at one term some of his causes of action, and reinstate them at another, when the opposite party might not be prepared to meet them. It was, however, in the discretion of the court to allow it, or refuse, and its exercise cannot be called in question.

As to the objection that a witness was permitted to read from written minutes what a former witness, then deceased, had testified, the rule is, and we believe has never been departed from, that a witness may refresh his recollection by referring to his minutes or memoranda made by him, but cannot speak from them, or give them in evidence to the jury—he must speak from his own recollection of the substance of the testimony. *Iglehart* v. *Jernegan*, 16 Ill. R. 521. The rule in England is, that the very words of the deceased witness must be given.

In this case, the record states that the plaintiff "offered what was testified by Charles Temple on a former trial between the same parties in the same case, the said Temple having been then produced and sworn as a witness on the part of the plaintiff, since which time he had died. The plaintiff offered to prove

his testimony by M. H. Carpenter, one of the plaintiff's counsel on the former trial, to which the defendant objected. The court overruled the objection and Carpenter was sworn. Now it will be seen here, that the objection was general, to his being sworn at all, and there was no exception alleged or taken to the decision of the court permitting him to testify. The witness being sworn, testified that he was present at the former trial and heard Temple give in his testimony—that he took it down at the time, acting as counsel for the plaintiff, (minutes here produced,) and that he believed the minutes so taken by him were correct—that he could not state his testimony minutely, from his recollection, but must rely upon his minutes taken at the time and which he believed were correct, and then read from the minutes of the testimony of the deceased witness the following evidence, to wit: "

No objection was made to this mode of giving the testimony of the deceased witness to the jury, nor does it appear from the record, that the witness had not a recollection of the testimony when it was refreshed by reading the minutes.

This court has laid down no rule as to the degree of connection required between notes and memory, and we are at liberty to adopt such an one as may be reasonable and just. Courts generally have said, that the judge's notes of the testimony, are not *per se*, evidence. To make them of any use, he must resort to them merely as a memorandum to refresh his memory, the same as any other witness. Here the minutes of the evidence taken by the counsel were not offered as evidence *per se*—he was sworn to their correctness and read from them without objection. What better evidence of the testimony of a deceased witness could there be, than correct notes of it taken at the time? It fulfills one of the most important requirements of the law, that the best evidence shall be produced in the power of the party to produce. If not truly taken and reported, it is open to attack and exposure from the other side, whose counsel may also have taken full notes, or the judge who tried the cause, may be sworn, and his notes used for such purpose, or any one or more of the jurors or bystanders who heard the case, may be examined as to their fidelity and correctness. It seems to us, that such minutes sworn to be correct are far better and more satisfactory as evidence, than the imperfect and fleeting recollection of any man could possibly be, and we do not feel the force of a reason which shall require us to reject a higher for an inferior grade of testimony. It must be recollected, that the witness detailing the testimony of the deceased, is not called to testify to any fact in the case, but only to the fact as to what the deceased witness swore, and if he swears

that he made full notes of his testimony at the time, and that they are correct, we see no reason why he should not read them to the jury, as the best evidence of the fact to which he is called to depose.

In the case of the *Mayor of Doncaster* v. *Day*, 3 Taunton, 261, Mansfield, C. J., said, what the former witness swore may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy—or the former evidence may be proved by any person who will swear, from his memory, to its having been given.

In *Miles* v. *O'Hara*, 4 Binney, 108, it was held that a copy of the judge's notes of the testimony of a deceased witness were not evidence, though certified by him to be correct, but they would be, if with his oath.

In *Cornell et al.* v. *Green*, *Adm'r*, 10 Serg. and Rawle, 14, after the plaintiff had opened his rebutting evidence, he offered Mr. Fisher who was of counsel in the cause, to prove what had been sworn on a former trial by a witness since deceased. On being examined as to the state of his recollection, he testified that from having been consulted before the suit was instituted, and having directed to be done what the witness in the former trial swore was done, as well from frequently having recurred to his notes of the witness' testimony, as from conversations with him before the trial came on, he had a perfect recollection of what the witness swore—that he would not, however, pretend to say without a previous knowledge of all these facts, what the witness did or did not swear—that he is in the habit of taking down the very words of a witness, and not the substance of his testimony; and that to the best of his knowledge, his notes contain every word said by the witness on the occasion; and added, that conversant as he was with the cause, without frequently recurring to his notes, he would not undertake to state every word said by the witness, but that the material part of what he had said, he could state without recurring to his notes. The court held he was properly admitted to testify, taking strong grounds against the unreasonableness of the old English rule, requiring the very words to be given. In the course of the opinion, Gibson, J., says: "It seems, however, singular that instead of trusting to Mr. Fisher's recollection, the plaintiff did not offer his *notes* in evidence, against which, when properly authenticated, there could be no sort of objection."

To the same effect is *Chess* v. *Chess*, 17 Serg. and Rawle, 409. In this case, the court say, if the notes on one side are not fully trusted, what more obvious correction than to have the notes on the other side produced and sworn to, if they can be

sworn to, or the notes of the judge, or recourse had to the memory of jurors or other persons present, if it shall be insisted that memory is safer than writing. In *Ballinger* v. *Barnes*, 3 Devereux (N. C.) 460, the course here recommended was pursued, the result of examinations on both sides going to the jury. This practice was approved by the court.

We think, written notes made by the counsel for one of the parties in the cause, and sworn to be correct, are more reliable than testimony resting in memory merely, tinged, as those notes may be, by the prejudices of the counsel taking them, being open to correction by the judge's notes, or those of others.

As to the objection that the letter of the plaintiff below to the president of the company, was permitted to go in evidence, it will be seen by the second instruction asked by the defendants below, and given by the court, the jury were specially instructed to disregard all that part of it, which alleged the non-payment of the monthly estimates, as the reason for abandoning the contract. For all other purposes, the letter was admissible as notice.

The fourth instruction given on behalf of plaintiff below, states the law accurately on the point involved in it. The advances by the company to Holcomb, one of the sub-contractors under the plaintiff, could only be justified on the ground that the plaintiff was indebted to Holcomb at the time of making the advances, equal in amount to the money advanced. This limit of the authority to the company to make the advances, might well be imposed by the plaintiff, and it was for the jury to say if it was imposed.

As to the rights of the parties who interpleaded, it is sufficient to say, they have not brought them before this court—they are not parties, in any sense, to this writ of error.

The finding of the jury was after a full hearing of the evidence, the whole question of abandonment and the causes therefor being left to them, and we cannot say that they have so mistaken or disregarded the evidence, as to do injustice to the plaintiffs in error. The main ground of their verdict, may be found in the fact that the reserved fifteen per cent. was allowed the plaintiff, which of itself would amount to near ten thousand dollars.

Perceiving no error in the record the judgment must be affirmed.

Judgment affirmed.

Joseph Peacock, Appellant, *v.* Samuel R. Haven, Administrator, etc., *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

A party bringing suit against an administrator or executor, is entitled to a judgment, although his claim was not presented within two years, if it is not otherwise barred.

The judgment is to be satisfied in due course of administration of the estate inventoried, if the claim is presented within two years; if presented afterwards, then the judgment is to be satisfied out of subsequently discovered and inventoried estate.

If instead of suing, a party having a claim against the estate, is sued by the representative of it, he can plead his claim by way of set-off, and if any balance is adjudged to him, it will be paid out of any estate thereafter discovered and inventoried.

This was an action of assumpsit brought by the plaintiffs below, administrator and administratrix of Ephraim C. Stowell, deceased, for the recovery of the amount of two promissory notes alleged to have been given by the defendant below to the said Ephraim C. Stowell, in his lifetime, one of $166.66, bearing date January 21st, 1854, and the other of no date, of $83.33. The declaration consists of two special counts. The first count is upon the note first above mentioned, and the second is upon the second note.

To this declaration the defendant pleaded two pleas. 1st. The general issue. 2nd. A plea of set-off in the usual form, alleging an indebtedness of the said Ephraim C. Stowell, in his lifetime and at the time of his death, to said defendant, in the sum of one thousand dollars, for work and labor, care, diligence and attendance of the said defendant by him and his servants, done and performed in and about the business of the said Ephraim C. Stowell, at his special instance and request, and for materials furnished said Stowell, and for goods, wares and merchandise sold and delivered to said Stowell by said defendant, and for money lent and advanced to, and money paid, laid out and expended for said Stowell; said defendant also filed with said plea of set-off, a bill of particulars of the same.

To this plea of set-off, the plaintiffs filed two replications on special leave:

1st. The general replication of *nil debet*, traversing said plea of set-off.

2nd. A replication alleging "that administration of the goods and chattels, and right and credits, which were of the said Ephraim C. Stowell, deceased, was granted to them on the 10th day of April, A. D. 1855, at the said county of Cook, by the Cook County Court of said county, and that said supposed

indebtedness from the said Ephraim C. Stowell, deceased, to said defendant, by the said defendant above pleaded in his second plea (plea of set-off,) was not exhibited to said County Court for adjudication, within two years from the granting of the letters of administration aforesaid, according to the form of the statute in such case made and provided."

To this second replication to said plea of set-off, the said defendant filed a general demurrer, and the plaintiff joined in demurrer. The court overruled said demurrer and held said second replication sufficient; the defendant stood by his demurrer; the said suit was thereupon, to wit: on the 22nd day of December, 1858, brought on for trial before said court, J. M. WILSON, Judge, presiding, and a jury. The plaintiffs introduced and read in evidence a note, of which the following is a copy:

"$166.66.

Two years after the fifteenth day of April next, for value received, I promise to pay E. C. Stowell or order, the sum of one hundred and sixty-six 66-100 dollars, at the Exchange Bank of H. A. Tucker & Co., Ill.

JOSEPH PEACOCK."

The plaintiffs gave no further or other testimony, except said note, and after entering a *nolle prosequi* as to the second count of their said declaration, rested their case; and the said defendant thereupon called as a witness *James E. Roe*, who being sworn, said defendant offered to prove by him his set-off which he had pleaded, to which offer said plaintiffs, by their counsel, objected; the said court then and there sustained said objection and rejected said offer, to which decision the said defendant then and there excepted. The defendant offering no further testimony, the case was submitted to the jury, who returned a verdict for the plaintiffs for one hundred and ninety-three dollars and forty-eight cents damages, and said defendant thereupon moved for a new trial, which motion the court overruled and the defendant excepted. Judgment was thereupon rendered against said defendant upon said verdict, and the defendant took an appeal to this court.

The appellant assigns the following as grounds of error:

1st. The court erred in overruling said demurrer to said second replication to said plea of set-off, and deciding that said second replication is sufficient in law.

2nd. The court erred in rejecting said offer of said defendant to prove on trial his set-off, which he had pleaded.

3rd. The court erred in overruling said motion for a new trial.

4th. The verdict of said jury is against law and evidence.

5th. The judgment in this cause is erroneous, and contrary to law and evidence.

GOODRICH, FARWELL & SMITH, for Appellant.

C. HAVEN, for Appellees.

BREESE, J. The demurrer of the appellant to second replication of the plaintiff below to the defendants' plea of set-off, presented this question for the decision of the court below: Does the 115th section of chapter 110 R. S., title "Wills," (Scates' Comp. 1206) absolutely bar a claimant from all rights of recovery or set off, for the reason that he did not present his claim to the court for allowance, within two years from and after the grant of letters of administration?

By sustaining the demurrer, the court decided it was an absolute bar and in this, erred.

As we understand that section and as it has been construed by this court and as its plain language seems to import, a claim is not barred, if not presented within two years, but simply the right to claim a distributive share in, or any participation out of the property actually inventoried. *Judy* v. *Kelly*, 11 Ill. R. 211; *Bradford* v. *Jones*, 17 ib. 93.

A plea of set-off is nothing more nor less than a cross action, and if in the action the claimant would not be barred of a recovery, so neither can he be barred from pleading his set-off. The principle is the same in such case, whether he be *actor* or *reus*, for it is the balance only which may be due from the one to the other, which constitutes the real claim for or against an estate.

The debt in this case against the intestate was contracted in his lifetime, and to its extent, extinguished the debt due from the claimant to the intestate. The presentation of the claim to the administrator within the two years could only have the effect of notifying him there was such a claim against the estate, and enabling the claimant to share in the effects actually inventoried, but it would contribute in no degree to the validity of the claim.

The ground on which the set-off is admitted is that to the extent of the claim presented as a set-off, if proved, there is a mutual extinguishment of the demands of the respective parties.

The various provisions for the distribution of the estates of decedents, in our statute of "Wills," from section 95 to section 137, are for the purpose not only of liquidating the demands existing between the intestate and his creditors, at the time of his death, but for ascertaining balances. If the balance be against the estate it is to be so entered by the court that the condition of the estate may be known, and if insolvent that the creditor may receive his dividend. If the balance be against the creditor, there is no entry of that fact made by the court, for balances

against the estate only, are to be found and entered. In such case, if the executor or administrator sue, such creditor must have the right, resulting from the design of the statute itself, to plead his own demand by way of set-off, and the executor or administrator can only recover the balance, for that balance is all that is due the estate. If a creditor claims a balance in his favor, and it is so found, we see no reason why a judgment may not pass against the executor or administrator for such balance, to be paid as other debts against the intestate, out of assets to be discovered and inventoried, and this, to avoid an unnecessary suit. The result of this reasoning is, that a party bringing suit against an executor or administrator and proving his claim, is entitled to a judgment, whether his claim was presented within two years or not, provided it be not barred by the general act of limitations. If he does exhibit it, his judgment is to be satisfied in due course of administration of the estate inventoried. If he does not exhibit it, then his judgment is to be satisfied out of such property as may be subsequently discovered and inventoried. If, instead of suing, he is sued by an executor or administrator, he can plead his claim by way of set-off, and the balance be adjudged to him to be paid out of any estate thereafter discovered or inventoried.

The judgment of the Common Pleas is reversed, and the cause remanded, for further proceedings not inconsistent with this opinion.

Judgment reversed.

Sarah Ann Prieto *et al.*, Plaintiffs in Error, *v.* John Duncan, Defendant in Error.

ERROR TO LA SALLE.

Where a subpœna in chancery is served upon husband and wife, by leaving a copy for the wife with the husband, at her place of residence, etc., it will be presumed, in the absence of proof to the contrary, that the residence of the parties is identical.

Where a bill to foreclose a mortgage, sets it out, with a copy of the acknowledgment, etc., and states that the date of the mortgage, the signing, etc., and "that it was executed as aforesaid," the averments will be sufficient to show that the party complained of executed it.

It is erroneous to decree the payment of money, out of a fund belonging to persons not made parties to the suit.

This was a suit in chancery, brought to foreclose a mortgage, executed in favor of Duncan, by William Whaley, in his lifetime, to which his wife, now Sarah Ann Prieto, one of the plain-

tiffs in error, was a party. A default was entered against Mrs. Prieto, and a decree taken. The facts are stated in the opinion of the court.

B. C. Cook, and D. L. Hough, for Plaintiffs in Error.

J. Strain, for Defendant in Error.

Walker, J. The first assignment of errors questions the sufficiency of the sheriff's return of service on plaintiff in error. His return is this: "Served by reading this sums to Joseph A. Prieto and delivering to him a copy thereof; also left with him a copy of this writ for Sarah Ann Prieto, wife of the said Joseph A. Prieto, at her place of residence, informing him of the contents thereof, said Joseph being a white person above the age of ten years." The objection urged against the sufficiency of this service is, that it fails to state that Joseph A. Prieto is a member of the family of plaintiff in error. The provisions of the statute require that the service shall be by delivering to the defendant a copy of the summons, or by leaving such copy at the usual place of abode of the defendant, with some white person of the family of the age of ten years or upwards, and informing such person of the contents thereof. This service states that a copy was delivered to the husband at her residence, and that he was a white person of the proper age, and that its contents were explained to him. In law, the husband and wife being one person, the legal presumption is that they reside together, and that they are members of the same family; and the presumption will not be indulged, in the absence of all evidence, that they reside apart from each other. But, even if such an intendment could be made, this return states that this copy was left with the husband at her place of residence, and if the return is true, it creates a strong presumption that as he was found at her residence, they were residing together. Until rebutted, this presumption must be acted upon as true. If a departure in the officer's return, from the precise language adopted by the legislature, may be tolerated in any case and the service be held good, we think this is sufficient. We perceive no error in the return, and by it the court acquired jurisdiction of the person of plaintiff in error.

It is likewise urged as a ground of reversal, that the complainant's bill fails to allege that plaintiff in error executed the mortgage. The bills sets out a copy of the mortgage at length, also a copy of the certificate of the acknowledgment. She purports to have been a party, and her name purports to have been signed to it, and the officer certifies that she acknowledged it,

and the bill contains this allegation: "Which mortgage bearing date the day and year last aforesaid, was executed as aforesaid." How executed as aforesaid? Why, as set out by copy in the bill. No other inference can be drawn from the language. It appears then, to have been signed, sealed and acknowledged by her. We are at a loss to perceive in what manner an averment could have been more directly and positively made. There is no force in this objection.

It is also insisted that the court erred in decreeing the payment of any balance of this debt, after the sale of the mortgaged premises, out of the estate of William Whaley, deceased. His representatives were not made parties to this proceeding, and it was error to decree the payment of any portion of this debt out of assets in their hands, unless they had been made parties and were properly before the court. It could only be by having them properly before the court, that it could acquire jurisdiction to make a decree affecting that fund. Before such a decree was made, they had a right to be heard and have their rights fully presented.

The decree must therefore be modified, so as only to authorize the sale of the mortgaged premises for the satisfaction of the debt; and reversed in so far as it requires any balance of the sum that may remain unsatisfied after the sale of them, to be paid out of the assets of the estate of William Whaley, deceased. And that each party pay one-half of the costs of this court.

Decree modified.

Charles McDonnell, Appellant, *v.* William Harter, for the use, etc., Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The Common Pleas should not assess damages, as if by default, while a plea of the general issue is on file, though verified by an insufficient affidavit. The plea should first be struck from the files.

This was an action of assumpsit. There was a plea of the general issue filed. The affidavit of merits to the plea, states that defendant had a good defense on the merits, except as to $458 of plaintiff's demand. The court, with this plea on file, entered a default, and gave judgment for plaintiff.

W. H. L. Wallace, and Thomas Dent, for Appellant.

J. W. Chickering, and Shumway, Waite & Towne, for Appellee.

CATON, C. J. The plea of the general issue was regularly filed, and was never stricken from the files. On this state of the record the court assessed the damages as if upon a default. If the affidavit of merits, which was filed with the general issue, was insufficient, the plea should have been stricken from the files. While it remained it was a bar to the action, till tried by a jury, or by the court with the consent of the parties in place of a jury, and found to be untrue. There was no such trial, nor indeed was there any issue formed on this plea. It stands upon the record as a simple naked bar to the action. The judgment must be reversed and the cause remanded.

Judgment reversed.

EDWARD B. HURD *et al.*, Plaintiffs in Error, *v.* MELANCTHON BURR *et al.*, Defendants in Error; and
JOHN W. DAVIS, Plaintiff in Error, *v.* JOHN W. CHICKERING, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

In Cook county, where a note is the cause of action, and the declaration besides special, contains the common counts, the affidavit of merits to a plea, may be general, and go only to a part of the damages claimed. Former decisions reviewed.

If a plaintiff shall abandon the common counts, and the defendant shall then refuse to swear that he has a meritorious defense, the plaintiff will be entitled to a judgment.

If the plaintiff, after a plea filed, shall limit his demand, and the defendant refuses to make a further affidavit, judgment may pass as by default.

Judgment against several cannot go, upon service of notice, etc., on one; nor does filing notice, in the office of the clerk of Cook County Court, meet the exigency of the statute.

THE following shows the state of the record in the case of *Hurd et al.* v. *Burr et al.:*

This was an action of assumpsit in the Cook County Court of Common Pleas, by the defendants in error, against the plaintiffs in error.

Summons issued on the 20th day of June, 1855, returnable on the 1st Monday of July, then next, and was served on the 21st day of June, 1855, on Hurd, Periam and Ruckel, and returned "not found," as to Beebe.

On the 20th of June, 1855, declaration counting on a promissory note for $171.23, with the common money counts for

$2,000, was filed with a general breach, and damages laid at $2,000.

Attached to this declaration, was an affidavit showing a service on the 21st day of June, on Joseph Periam, one of the defendants below, of a copy of the declaration, and that the same had been filed "in the office of the clerk of the Cook County Court," and that a rule to plead in ten days had been entered.

On the 22nd day of June, the defendants below filed with the clerk of the Cook County Court of Common Pleas, a plea of non-assumpsit, with an affidavit thereto attached, sworn to by their attorney, stating that he was advised and believed that defendants below had "a good defense to said suit, or a portion of the same, upon the merits."

At the July vacation term, on motion of plaintiffs below, the said plea was stricken from the files, and a judgment by default for want of appearance.

Thereupon, the court upon proof, assessed the plaintiffs' damages at $1,125.69, and rendered final judgment against all of the defendants below, and ordered execution therefor.

In the case of *Davis* v. *Chickering*, the record is as follows:

This was an action of assumpsit, brought by John W. Chickering, defendant in error, against John W. Davis, plaintiff in error, in the Cook County Court of Common Pleas, to the January term, A. D. 1858.

The defendant, for plea, filed the general issue, and defendant's affidavit of merits January 5th, 1858.

Plaintiff moved to strike defendant's plea from the files, for want of a sufficient affidavit of merits.

This motion was allowed by the court. Defendant's default was thereupon ordered to be taken, and judgment entered against defendant.

The affidavit of merits was as follows:

John W. Davis, being duly sworn, according to law, on oath says, that he is defendant in the above entitled cause, and that he believes he has a good defense, upon the merits, to a part of the amount of damages claimed by said plaintiff in said action.

Defendant, by his counsel, prayed an appeal in said cause to the Supreme Court, which was allowed.

Dickey, Mather & Taft, for Hurd *et al.*

B. E. Gallup, for Burr *et al.*

M. R. M. Wallace, and T. Lyle Dickey, for Davis.

Shumway, Waite & Towne, for Chickering.

Breese, J. The statute under which the questions presented in this record arise, is partial, local and in derogation of the general law of the State on the same subject, and being so, it should be construed liberally for all those who are liable to be oppressed by it.

We have considered this statute, to some extent in *Mc Vicker* v. *Wright*, *post*, and then expresssed our convictions that for the locality for which it was enacted it should be construed strictly—no greater effect to be conceded to it, than its language demands.

It has come before the court in other cases, for construction. In *McDonnel* v. *Olwell et al.*, 17 Ill. R. 375, we expressed the opinion, taking a liberal view of the statute as operating upon defendants, that an affidavit of a defense on the merits, was sufficient without affirming that affiant had, in the language of the statute, a "good" defense. In that opinion, it is clearly foreshadowed, that an affidavit of a partial defense on the merits would, also, be a compliance with the act, and accordingly, when the next case arose, *McDonnell* v. *Murphy*, 20 Ill. R. 346, we then said that an affidavit by a defendant, stating that he has a good defense to a part of the damages claimed would be insufficient, but if the affidavit was directed to a part of the cause of action, it would be sufficient. Upon more mature deliberation, we are satisfied that the rule laid down in these cases requires some modification, so that, while carrying out the true purposes of the legislature, oppression and injury to parties litigant, shall not be the consequence.

Maintaining that an affidavit of merits must go, not to the damages claimed, but to the action in whole or in part, the consequence must be, that the defendant must be very particular in stating what part of the damages. We do not now see why this burden should be imposed upon a defendant, and that too, by construction of a statute not designed for his benefit. Should either party be required thus to particularize, it would seem rather the duty of the plaintiff, who is not required to make affidavit of the justice of his claims, nor to his cause of action. In this view, it would seem more appropriate that the plaintiff should be required to limit, in his declaration, the extent of his claim, so that a note being the sole cause of action, he shall not be permitted to add to the special count upon it, any one or more of the common counts.

If it be not in the power of this court thus to limit a plaintiff, we must then hold, in every case, where a note is the cause of action, and the declaration, besides the special counts contains one or more common counts, that the affidavit of merits may be general and go only to a part of the damages claimed. If in such case, the plaintiff shall *nol. pros.* his common counts, and the defendant shall then refuse to swear that he has a meritorious defense, he being entitled to another affidavit, as to an amended declaration, the plaintiff shall be entitled to judgment.

We are inclined to the opinion, that the affidavit of merits required by the statute, should not be intended to mean an affidavit more special than is required to set aside a default. An affidavit for such purpose is sufficient if it states, he has a good defense to the action on the merits as he is advised by his counsel, without specifying the nature or extent of the defense. A defendant may safely swear when sued for one hundred dollars, he being indebted only fifty dollars, or any sum less than the amount claimed, that he has a good defense to such an action on the merits. If then the plaintiff shall not, on such an affidavit, specify and limit his claim, the plea must stand, and a trial be had. If he does limit his claim to the real demand, and the defendant then refuses to make an affidavit of merits, there is no hardship in suffering judgment to pass against him, as for want of a plea.

We have considered this case in connection with the case of *Davis* v. *Chickering*, also submitted, and the view we have now presented will reverse the judgment in both cases. In the case of Davis, the affidavit was to the merits for a part of the amount of damages claimed.

It may be remarked, in the case immediately before us, that the parties defendants, were not in a condition to be defaulted, as the service of the declaration and notice was upon one only of the defendants and that notice was defective. The notice was that the declaration was filed in the office of the clerk of the Cook County Court, whereas it should have been in the Cook County Court of Common Pleas.

As the plea of the defendants was stricken from the file, there was no appearance by them to cure any defects of this character or want of service. They were not in court to be defaulted, their plea being stricken out, is, as if it had never been.

The judgment in this case is reversed, and also in the case of *Davis* v. *Chickering*.

Judgment reversed.

William P. C. Whiting *et al.*, Appellants, *v.* James E. Fuller *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

An affidavit of merits to a plea is part of the plea, and is preserved in the record without a bill of exceptions. This is the case also, where a plea is stricken from the files.

Persons sued jointly, who plead the general issue, may sustain it by an affidavit of merits, made by one of the defendants. If separate pleas are filed, each plea must be sustained by an affidavit of merits.

On the 28th of May, 1858, suit was commenced and summons issued, returnable to the next June term, which was duly served and returned.

On the same day, plaintiffs below filed their declaration in the cause containing special counts on two notes, one dated November 23, 1857, due in sixty days, made by Whiting & Co., and payable to the order of Fuller & Myers, for $461.20, and the other for $64.05, made by Whiting & Co., dated April 1st, 1858, due at date, and payable to Fuller & Myers, or order, and containing also the common counts.

On the 7th day of June, 1858, which was the first day of the June term of said court, the defendants filed in said cause their plea of the general issue, with notice of set-off.

And on the same day, together with the plea, Whiting filed his affidavit as follows:

"William P. C. Whiting, being duly sworn, deposes and says that he is one of the defendants in the above entitled cause, that he knows for what said suit is brought, that he believes he has a good defense to said suit upon the merits thereof, and further this deponent saith not. W. P. C. Whiting."

On the 10th day of the same June term, on motion of the plaintiffs, an order was entered by the court that the plea of the defendants filed in the cause be stricken from the files for the want of a sufficient affidavit of merits, and that default be entered for want of plea, which was accordingly done.

And thereupon judgment was entered in favor of the plaintiffs and against the defendants for their damages, $516.87, and costs; from which judgment they prosecute this writ of error, and now here assign for error this ruling of the court.

O. Hawkins, and Walker, Van Arman & Dexter, for Appellant.

Shumway, Waite & Towne, for Appellee.

BREESE, J. The affidavit in this case was a part of the plea, and the plea is a part of the record and requires no bill of exceptions to bring it before this court. If a plea be stricken from the file, it still remains a part of the record for the purpose of presenting the question of the propriety of the action of the court in striking it from the file.

The plea was the general issue, filed by both defendants, who were sued as partners. The affidavit of merits is by one only of the defendants, and the court below, holding it was not sufficient, struck the plea from the file and rendered judgment for the plaintiffs.

The question presented is, was the affidavit sufficient?

In conformity with the decision in the case of *Hurd* v. *Burr et al.* and *Davis* v. *Chickering*, *ante*, p. 29, we must hold the affidavit was sufficient. Persons sued jointly or as partners, may plead jointly or separately as their defenses may warrant. A defense which one may have, may not attach to his co-defendant, and each defendant must make the affidavit of merits for himself. One of them may have no defense.

Here the general issue was filed. A defense personal to one of the defendants could not be allowed under that plea, and any other defense under that issue, which was good for one of the defendants, would be equally availing for both defendants, hence there was no necessity that both defendants should have joined in the affidavit.

Under the general issue, one defendant might show that the notes on which suit was brought, were given by his partner to pay his own individual debt and so known to the plaintiffs, and therefore not binding on him. This he could not plead specially. Under the general issue, the affidavit was sufficient.

The judgment of the court below is reversed and the cause remanded, with instructions to restore the plea to the file.

Judgment reversed.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellant, *v.* RODERICK B. FRARY *et al.*, Appellees.

APPEAL FROM BUREAU.

The courts will not interfere by injunction, to prevent the collection of taxes, because there have been irregularities in the assessment.

This was a proceeding in chancery, by bill, asking an injunction against the treasurer to restrain him from levying, selling or distraining the property of the railroad company, for the taxes levied in Bureau county.

The record in this case shows that the said railroad company duly filed a list and valuation of all their taxable property in Bureau county as required by law.

That at the annual meeting of the board of supervisors of said county, in September, the valuation of the items of "Fixed and stationary personal property," of "The other personal property," and of "The pro rata moveable property," in said list and in the list of each railroad in the county, were increased forty per cent. each.

That at a session of said board, held in December of said year, the action of said board at the September term was reconsidered, and such action had that the items aforesaid of said list were each increased forty per cent., and the said items in the lists filed by other railroad companies in said county, were increased in different proportions.

That no notice of any of these changes was ever given to said company.

That subsequently, at a session of said board held in June, 1858, said company petitioned the board to abate said increased valuation.

That said board did at said June session, abate an inconsiderable portion of the same.

By the law of 1855, railroad companies are required to file a list of their taxable property in each county with the county clerk, who shall lay the same before the board of supervisors when they meet to equalize the assessment of property, which, by the acts of 1851 and 1853, must be at an annual meeting.

If the supervisors do not think it a full and fair statement of the company's taxable property and the value thereof, they may assess it in accordance with the rules prescribed for the assessment of such property.

The rules for the assessment of such property are laid down in section two of the Act of 1855, and prescribe a specific description of each lot or parcel of land and its value, the number of acres taken for right of way, stations, etc., the length of the main track and all the side tracks in the county and their value, a list of the rolling stock of said company, and its value, and the value of all other personal property of said company in said county.

The injunction which was granted on this application was dissolved, and the bill dismissed with costs; from this decision an appeal was taken.

B. C. Cook, for Appellant.

W. H. L. Wallace, for Appellees.

Caton, C. J. The main question involved in this case has been examined and considered by this court with all the care and diligence of which we are capable, and with a due sense of its importance, and the influence which our decision must have upon the rights and interests of the individual citizen and the public. We have in this case been called on to inquire in what cases the powers of a court of chancery may be exercised to restrain the collection of the revenue of the State. The decisions of this court show, that in a large majority of the cases, involving the regularity of the proceedings for the collection of the revenue, we have met with irregularities in the proceedings to such an extent as to destroy the titles to real estate acquired at tax sales. In this way, has a court of common law, afforded a remedy for irregularities in the execution of the revenue laws. The same and even additional redress is afforded to parties whose personal property is seized for a tax illegally assessed. If in all these cases the court of chancery had taken the matter in hand, and examined the regularity of the proceedings, whenever an attempt was made to collect the revenue, and restrained its collection, if it were shown that the law had not been complied with in the assessment of the taxes, the result would have been that in many if not most cases the collection of the revenue would have been enjoined, and taxes would not have been collected. Under such a system of the administration of the laws, with so complicated a revenue system as ours, rendered so by a tender regard for the rights and interests of the citizen, no government could exist for a single year. Let us now, by sustaining this bill stretch out the strong arm of this court and stay the hand of the collector in every case where any irregularity can be shown in the assessment of the revenue, and a flood of injunctions would be spread over the land at once, State and county revenue would cease to be collected, at least till the termination of protracted litigation, and the wheels of government would stop. It is no answer to say, let those whose duty it is to administer the revenue law do it with greater care, and do everything which the law requires, just as it requires, and at the time specified, and be careful that they do no more than is required. We must take things as they are and look at practical results.

Neither precedents nor reason, will warrant the use of the writ of injunction for such purposes, and to produce such results. Where the law affords an adequate remedy this writ cannot be

used, and especially where greater mischief will flow than good will result from it, the court will always withhold this species of relief. Equity cannot attempt to prevent, any more than it will redress, all wrongs. It is not in ordinary but in extraordinary cases that this writ is properly invoked. If the law can redress the wrong—if it can repair the injury, equity must suffer it, and let the courts of law redress it. This is the general rule to which there are no doubt exceptions, and exceptions too in cases of the collection of taxes. Those exceptions are confined almost, if not entirely, to cases where the tax itself is not authorized by law, or if the tax itself is authorized, it is assessed upon property which is not subject to the tax. Such was the case of *The Illinois Central Railroad Company* v. *The County of McLean*, 17 Ill. R. 291. There we enjoined a tax levied upon property not subject to that tax. But it is unnecessary to refer to all the cases to be met with in our own and other reports on this subject. Where an injunction has been finally sustained it will generally, if not always, be found to be of this class. That it is possible, that cases may sometimes be found, where this distinction has been disregarded from inadvertence, or from the peculiar circumstances connected with them. We can find no other basis for a reasonable and practical distinction. If we permit the injunction to be issued where the tax is authorized by law and the thing taxed is liable to that tax, there is no stopping point short of enjoining all taxes, whenever any irregularity has intervened. This power the court of chancery has never assumed, nor could it, without the most disastrous consequences to the State. There may be cases, the particular circumstances, or peculiar hardship of which, will justify an exception to this general rule. This is not one.

We have examined the alleged irregularities in the levy of this tax, and are by no means prepared to say that they can be sustained any where. Indeed we think a satisfactory answer to all these objections possible, but we choose to place our decision upon the broad ground of jurisdiction, that all may distinctly know when the court of chancery will and when it will not interfere to enjoin the collection of the public revenue, or at least that they may know what the general rule on this subject is.

We affirm the decree.

Decree affirmed.

Byron Oder, who sues for the use of Jesse Fisher, Plaintiff in Error, *v.* Jonathan Putman, Defendant in Error.

ERROR TO TAZEWELL.

The Supreme Court has not jurisdiction of a case, on error, while it is pending in the court below.

This case is stated in the opinion of the court.

S. D. Puterbaugh, and J. Roberts, for Plaintiff in Error.

N. W. Green, for Defendant in Error.

Caton, C. J. As there was no final judgment in this case, the writ of error will have to be dismissed. There was a demurrer filed to the first count, which was sustained, and judgment for the defendant for costs. On the common counts an issue was formed, which was not disposed of so far as is shown by this record. While that issue is pending in the court below, this court has no jurisdiction.

The writ of error must be dismissed.

Writ of error dismissed.

Russell L. Winston, Appellant, *v.* Ira McFarland, Executor of James McFarland, deceased, Appellee.

APPEAL FROM LA SALLE.

Where an executory contract is in question, alleged to have been founded in fraud, the court will not aid either party.

This was an action of debt brought in the La Salle County Circuit Court, by Ira McFarland, executor, etc., of James McFarland, deceased, against Russell L. Winston (Appellant,) and tried at the Nov. term of said court, 1858, before Hollister, Judge, and a jury, and a verdict had for the plaintiff for $1,184.06 debt, and $536.12 damages, and judgment entered thereon. A motion for a new trial was made and overruled, and a bill of exceptions signed and sealed, and an appeal taken by the defendant in the court below to this court.

The declaration contains four counts upon a promissory note.

On the trial of the cause, the only evidence offered on the part of the plaintiff, was a sealed note.

The defendant filed the plea of *nil debet*, and several special pleas, among them the following, marked as an additional plea, to which a demurrer was sustained:

"And now comes the said defendant, and for an additional plea in this behalf, and says *actio non*, because, he says, that on the day of the date of the said note or instrument in writing in said 1st, 2nd, 3rd and 4th counts mentioned, (said note in said several counts being one and the same note) to wit: on the first day of August, A. D. 1854, to wit: at Peru, in the county aforesaid, the said defendant was then and there indebted to the said James McFarland, then in full life, in the sum of fifteen hundred dollars, and in that sum only, and the said note was given for the sum of three thousand dollars, as in said counts respectively is alleged, and the said defendant then executed and delivered to the said James McFarland a mortgage upon certain real estate in the county of Bureau, in the State of Illinois, to secure the said sum of three thousand dollars in said note mentioned; that said defendant was then apprehensive that he would be liable to suit upon certain supposed fraudulent and forged drafts which said defendant had before then endorsed, and that his property would be subject to levy and sale upon execution issued upon judgments which might be obtained against him, upon such supposed forged and fraudulent drafts, so endorsed by him as aforesaid, and to create an apparent incumbrance upon his said property, and to protect the same from levy and sale upon such executions, the said note and mortgage was executed as aforesaid, and for that purpose was the said note and mortgage so executed as aforesaid accepted by the said James McFarland, when in fact and in truth, the only indebtedness from said defendant to said James McFarland was the said sum of, to wit: fifteen hundred dollars, and this the said defendant is ready to verify, wherefore, etc."

To which plea the plaintiff demurred:

1st. Generally.

2nd. That the facts set up in said plea, if true, do not render said note null and void.

3rd. That the facts relative to the consideration of said note, are not set up with sufficient certainty, and is in other respects informal and insufficient.

There was an order allowing the additional plea to be filed—and sustaining plaintiff's demurrer to said additional plea; trial and verdict for plaintiffs below.

Motion for new trial overruled.

In the assignment of errors was the following:

2nd. The court erred, in sustaining the demurrer to the additional plea of the defendant, filed by leave of the court.

CHUMASERO & ELDREDGE, for Appellant.

C. BLANCHARD, for Appellee.

BREESE, J. The point presented by the additional plea of the defendant below, the appellant here, has been so fully considered by this court, in the case of *Miller* v. *Marckle*, 21 Ill. R. 152, that we deem it unnecessary to go over the ground again.

We there decide, when a contract is executory, as this is, the court will interfere for neither party—that it will leave the parties where it finds them, aiding neither. The maxim, "*in pari delicto, melior est conditio defendentis*," is fully recognized.

The judgment is reversed, and the cause remanded, with leave to the plaintiff to traverse the plea.

Judgment reversed.

WALKER, J. I dissent from the judgment of the majority of the court in this case.

JAMES MOIR *et al.*, Appellants, *v.* BENJAMIN HARRINGTON, *et al.*, Appellees.

APPEAL FROM HENDERSON.

A plea which professes to answer the whole cause of action, but only answers a part, is obnoxious to a demurrer.

THIS was an action of assumpsit brought on a promissory note made by defendants.

The declaration contained special and common counts.

The defendant filed two pleas. The first was the general issue. The second plea set up, "that the said note was given for the sole and only consideration of the sum of $1,000, loaned to two of defendants, Hopkins and Harrington, on November 17, 1856, and that the other defendant, Phelps, signed the same as security without other consideration; that at the time of making the note and loan, the plaintiff corruptly contracted with Hopkins and Harrington to receive interest for the loan and forbearance of said money, for six months from date of said note, to

the amount of one hundred dollars, which was deducted from the $1,000 so loaned, which exceeds ten per cent. per annum interest on the sum loaned; that at the expiration of said six months the plaintiffs and said defendants corruptly contracted that the plaintiffs should receive $100 interest for the loan and forbearance of said sum so loaned, for a further period of six months, which exceeds the legal rate of interest at ten per cent. for said time; that the plaintiffs received the said sums of usurious interest, and the same were paid them by defendants; that the $1,000 described in said note which said note was conditioned to pay, is the same principal sum so loaned, wherefore the defendants aver that the plaintiffs have forfeited the whole of said interest so contracted to be received and received."

Plaintiffs demurred to the second plea, and for special cause of demurrer set out that the plea is double.

Demurrer was sustained, trial had, and judgment was rendered for the plaintiffs for the amount of the note and interest.

Defendants prayed an appeal.

The appellants assign the following causes:

That the court erred in sustaining the demurrer to defendants' second plea.

That the court erred in rendering judgment for the plaintiffs.

PURPLE & HARDING, for Appellants.

O. C. SKINNER, for Appellees.

CATON, C. J. The only question in this case arises from the demurrer to the second plea, which was sustained by the court. That plea commences thus: "and for a further plea in this behalf, the said defendants say *actio non*, because they say," etc., and then goes on to show that the note was given for an usurious loan of money—that the money loaned and usurious interest thereon were both included in the note. The plea was no doubt an excellent one where usury destroys the whole cause of action, but was a bad plea under our statute. It professes to answer the whole cause of action, but answers only a part.

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

Judgment affirmed.

John Waggeman, Appellant, *v.* William Peters, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

Books of account are not admissible as proof, where the party keeps a clerk, or a person who sometimes acts in that capacity, who can prove the items.

Peters sued Waggeman in assumpsit on open account of $1,320.16, for a steam engine and fixtures, to the September term, 1858, of said County Court. The declaration contains the common counts only, for goods sold and delivered.

Plea—general issue with notice of payment, set-off, and also a claim for damages for breach of contract by plaintiff, with copy of specifications amounting to $1,498.50. Issue was joined.

At November term, 1858, there was a verdict for plaintiff. A motion for a new trial was overruled. Judgment for $350 and costs for plaintiff.

S. A. Kinsey was called by plaintiff. Said: I know that defendant came to order engine and machinery sued for, in February or March, 1857. Know nothing of contract, as to price, time of delivery or otherwise; none made in my presence. Fire front charged, is worth 5½ cents per pound. Plaintiff's bill of items read to witness with prices, who said prices were fair, and that defendant had received them all with certain exceptions. Know the plaintiff's ledger and blotter, (these are they); that he keeps no clerk, and that same are correct. I am plaintiff's foreman. Copy from slate to ledger and blotter, in evening, items put on the slate during the day. One-third of charges on books, mine; and two-thirds plaintiff's handwriting.

Order-book of plaintiff, with drafts and entries, here shown to witness, who said they were the same made by him.

William Weis called by plaintiff. Said, that as clerk for Tobey & Anderson, he had frequently settled by plaintiff's books and found them right. An account book of plaintiff was then offered, which witness said was the book he had settled by; but did not know whether it was the book of original entries or not. The book shown was plaintiff's ledger. Plaintiff having proved the delivery of several articles charged, offered said ledger and blotter in evidence; objected to by defendant. Objection overruled, and accounts of plaintiff read in evidence from said books.

J. K. Cooper, for Appellant.

C. C. Bonney, for Appellee.

CATON, C. J. These books of account were not properly admissible for any purpose. The witness, it is true, says that the plaintiff kept no clerk; but, at the same time, he shows that he did within the legal signification of the term, as used in this class of cases, keep a clerk. The witness himself swears, that he generally made the original entries of the items which appear in these books. The general practice was to set down the items on a slate during the day, and then at night to copy them into the blotter or ledger. The witness says: "I usually set down the work on the slate, and did a part of the copying into the blotter." For every legal purpose, the witness was the plaintiff's clerk, and was competent to prove the delivery of the items, or the doing of the work. Here the plaintiff had servants in his employ, by whom he should be able to prove his account. If these books were admissible, then are the books of every shopkeeper or merchant admissible, for none can have better means of proving an account than the plaintiff had. If these books were properly admitted, then all books in all cases must hereafter be admitted. Books of account were first admitted as merely circumstantial evidence, to help a plaintiff who did his business himself and without any assistant by whom it was possible for him to prove his account. This was no doubt an innovation upon the common law, but the absolute necessity of the case, and to prevent a wrong to small dealers, who kept no assistants, so commended it, that it seems to have a good footing in the common law courts. But there has been a growing disposition to open the door wider and wider, for books of account as evidence, till now it seems to be thrown down altogether, and the original consideration of necessity, which first introduced them, is altogether lost sight of. But even admitting these books, we are not satisfied with the verdict.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

JOHN M. HARTNETT, Plaintiff in Error, *v.* MARIA BALL, Defendant in Error.

ERROR TO LAKE.

Although an absolute conveyance may be shown by parol testimony to have been given as a security only, yet such evidence must be so strong as to overcome all doubts, before the court will so decree.

At February term, 1858, of the Lake Circuit Court, Manierre, Judge, presiding, a final decree was entered in this case, dismissing plaintiff's bill with costs.

The pleadings and facts are sufficiently stated in the opinion of the court.

C. C. Parks, for Plaintiff in Error.

Frazer & Clarke, for Defendant in Error.

Breese, J. The bill states the loan of $212, at 12 per cent. interest, and the execution and delivery of an absolute deed by one Shartswell to defendant, and of the tender afterwards in 1850, about one year or a little more, of $250, and a demand by Shartswell of a re-conveyance which was refused. Complainant in possession since his purchase from Shartswell, who left his wife in possession on his departure for California in 1849.

Answer of defendant denies in the most positive manner the loan, and insists it was an absolute sale of the premises for $212, which was the full value thereof at the time. That she paid $100 down, and gave her note for the balance, which she paid a few months thereafter; denies that Shartswell was to remain in possession, and denies she was to reconvey on payment of $212 and twelve per cent. interest, or for any other sum; alleges after Shartswell left for California, his family remained in the house but a few weeks; that defendant held the property, receiving the rents for it, made repairs and valuable improvements on it, and paid all the taxes from 1849 until September, 1855, when Shartswell being in possession, sold to complainant, and put him in possession he having full knowledge that Shartswell was only the tenant of defendant, and had full notice of defendant's title; denies any tender of any money at any time by Shartswell, or any one else for him; denies the demand of a deed from her, and denies the refusal of any money, or refusal to make a conveyance; denies that Shartswell ever offered to pay her $212, and twelve per cent. interest, or any other principal sum, or any other interest. Also denies that complainant has ever offered to pay $212, and twelve per cent., or any other sum; and denies ever refusing to receive it, or that she ever had a chance to accept or refuse; and denies the demand of a deed by complainant, etc.; denies Shartswell's possession, and avers that soon after her purchase she took peaceable possession of the property, and from that time until Shartswell's release to complainant, her possession continued peaceable, but admits since Shartswell's release com-

plainant has been in possession without interruption; denies that Shartswell has paid any taxes on the property, except on account of rent. Admits the value to be now $1,500, and denies every material allegation of the bill charging her.

General replication to answer, and notice to dissolve injunction. Case heard on proofs, and injunction dissolved, and bill dismissed.

The testimony is somewhat conflicting, but taking the whole together in connection with Shartswell's letters to the defendant, the testimony of Dowst, one of complainant's principal witnesses, that he himself offered defendant's agent $350 for the property, and the testimony of B. W. Barnes, who appears wholly disinterested, that Shartswell told him he had sold the property out and out to defendant, and from what he had heard since he came back from California, he could buy it back, but that he did not want to, as he thought he could do better with his money, and that defendant is proved not to be a person who loaned money, we think the weight of the evidence preponderates greatly in favor of the opinion that it was an absolute sale as the deed purports, by Richard Shartswell to Maria Ball, and that there is no equity in the complainant's bill. He bought the chance for two hundred dollars, knowing all the facts.

We are in favor of affirming the decree. It is quite likely defendant would have permitted Shartswell to re-purchase in a reasonable time, as she was ignorant of the changes such property, near a flourishing city, undergoes, but when it was rising rapidly in value, she had a right to retract and hold on. The whole case shows an absolute sale, and not a loan and mortgage.

The decree is affirmed.

Decree affirmed.

John Brown, Appellant, *v.* Lawrence Riley, Appellee.

APPEAL FROM KNOX.

A party who purchases personal property of a mortgagor, for a good consideration, it remaining in his possession, at the time of the purchase, will be protected, if the transaction on the part of the purchaser, was one of good faith.

If such property is afterwards loaned to the vendor for a temporary purpose, or if the vendor is in the employment of the purchaser, the rights of the purchaser will not thereby be disturbed.

To impeach the sale of personal property, it is necessary to show that both vendor and purchaser designed to delay creditors.

Brown *v.* Riley.

A chattel mortgage designed to delay and hinder creditors, will not affect an honest purchaser of the property. Notice must be brought home to the purchaser.

This was an action of replevin commenced in the Knox Circuit Court to recover two horses, one double wagon, and one double harness, claimed by the plaintiff, and was tried in that court before a jury at the April term, A. D. 1858. Verdict and judgment for plaintiff. Motion for a new trial by the defendant overruled.

Declaration that defendant unlawfully took two horses, one wagon, and one harness, and unjustly detained the same.

Five pleas were filed as follows:

1st. Did not take and retain the property.

2nd. Did not unlawfully take or detain.

3rd. The property was not the property of the plaintiff, but was the property of one Patrick Gibney.

4th. That as one of the constables of Knox county, Illinois, he took the said property justly, because heretofore, to wit: on the 26th day of February, A. D. 1858, one L. C. Conger, then police magistrate in Galesburg, Knox county, Illinois, issued under his hand in due form, an execution in favor of James C. McMurtry, plaintiff, against Patrick Gibney and Thomas Stokes; that on the 27th February, 1858, the execution came to his hands to execute; that he was then acting constable in said county, and that by the execution he was commanded to make $\$212\frac{20}{100}$ which James C. McMurtry had recovered on the 26th day of February, 1858, before said magistrate, against Patrick Gibney and Thomas Stokes, and that as constable, on the 8th of March, 1858, he levied said execution upon and took the property, and detained the same as the property of Patrick Gibney, whose property it then was, which was the same and only taking and detention, and prays damages and return of the property.

5th. Did not unlawfully detain.

Issues were joined on all the pleas.

Patrick Gibney testified, that he made a mortgage on the property in controversy to Thomas Moony, and that on the 24th of February, A. D. 1858, he sold the said property to the plaintiff; plaintiff was to pay me twenty-five dollars and pay the debt to Moony; the plaintiff saw Moony and gave him a note for $275, and Moony gave up his claim to the property, and the same day I went and gave the plaintiff the property, and plaintiff took the property home, and plaintiff kept it after that; three or four days afterwards the plaintiff asked me to get him a load of wood with the team, and I went for the wood with the team, and then the defendant took the team and property.

I told him the property was Brown's, and he said he would take the property, and he was good for it; defendent threw off the wood.

The defendant took the property upon an execution, and I suppose he was a constable, he claimed to act as such; he claimed to levy on the property; the levy was three or four days after the sale to Brown; the note was given to Moony the same day of the sale to Brown; the sale was at Moony's place; the horses were then in Drake's stable, where I kept them for three months previous; I have never had the mortgage since I made it; the note that accompanied the mortgage was given to me.

Thomas Moony testified, at the date of the mortgage Gibney owed me the note shown of three hundred and sixty dollars; I sold the note and mortgage to plaintiff in February, it might have been on the 24th day; he gave me his note for $275, dated 24th February, for the note and mortgage; Gibney and Brown came to my place, and plaintiff said he was about buying the horses and other property, if he could arrange with me, and asked if I would take his note, and I said yes; the plaintiff had the property, and gave me his note, then I gave him Gibney's note endorsed by me without recourse, and delivered to him the mortgage, and he took the property away; I never had the property in my possession.

At the time I gave the mortgage to the plaintiff, I did not make any assignment of the mortgage; I delivered the note and mortgage to plaintiff the same day; the plaintiff bought the property and took plaintiff's note same day; I sold plaintiff the note and mortgage, and took his note for $275, and what I owed him; I owed him eight or ten dollars.

One *Fitzgerald* testified, that plaintiff and Gibney lived one-half mile apart; plaintiff gave Gibney $25; I heard when the constable took the team, and it was four or five days after the sale; the day of the sale the plaintiff took the horses home, and came back and hired the stable of Drake, where Gibney had formerly kept them, and put the horses in there; the stable was half a mile from plaintiff's; after the sale I saw Gibney feed the team.

L. E. Conger testified, that he replevied the property, when and at the place where it was advertised for sale by the defendant.

The defendant offered evidence as follows:

Henry Frans testified, that defendant acted as constable in Knox county, in February and March last.

Defendant offered and read in evidence an execution and endorsement thereon, issued by L. C. Conger, police magistrate,

dated 26th February, A. D. 1858, purporting to be issued for the collection of a judgment, $212.90 and costs, recovered before him 26th day of February, 1858, in favor of James C. McMurtry, plaintiff, and against Patrick Gibney and Thomas Stokes, which execution had the following endorsement thereon:

"This execution hereto attached came to my hands on the 27th day of February, A. D. 1858, at 2 o'clock, P. M., and on the 8th day of March, 1858, I levied the same execution upon one span of horses, harness and wagon, and on the undivided half of a lot of wood of about two hundred cords, and on a lot of logs; all of said horses, wagon and harness was levied upon as the property of Patrick Gibney, and the said logs and wood as the property of Thomas Stokes; and I further certify that I advertised said wood and logs on the 9th of March, according to law, and on the 20th of March, 1858, sold the wood for $80, and the logs for $1.60; and I certify that the horses, harness and wagon were replevied from me by L. E. Conger, deputy sheriff, at the suit of John Brown against me as defendant, on the 20th day of March, 1858. W. L. RILEY,

Constable in and for Knox Co., Ill."

At the request of the plaintiff the court gave to the jury the following instructions, numbers 1, 2, 3, 4, 5, 6 and 7, and defendant excepted to the giving the same:

1. If the jury find from the evidence, that Brown bought the property in good faith on the 24th day of February, and took possession, the fact that Gibney was drawing wood for the plaintiff when the property was taken, does not effect a legal change of possession, or effect the validity of plaintiff's title, and if it was levied on and taken by defendant while thus in Gibney's use, the levy and taking was wrongful, and no demand is necessary to be proved.

2. If the jury believe, from the evidence, that the plaintiff bought the property on 24th February in good faith, and took possession of it on that day, he had a right to loan or hire the same to the defendant in the execution on the day spoken of to draw wood with, and such loan does not render or make the plaintiff's title void, or subject the property to the execution against Gibney.

3. Unless it is proved that Brown knew that there was fraud in the mortgage, or that the purchase by him was made with a view to defraud, delay or hinder creditors of Gibney, his title is not rendered invalid, even though the jury should believe that the mortgage was fraudulent, and void as such, for want of sufficient consideration.

4. If the jury believe, from the evidence, that the plaintiff was a *bona fide* purchaser of the property in controversy, and received the possession of it on the 24th day of February, and the execution upon which the defendant took said property did

not come to his hands until the 27th day of February, they are instructed to find for the plaintiff.

5. If the jury believe, from the evidence, that the mortgage from Gibney to Moony was not made in good faith, still, if they believe from the evidence, that Brown, the plaintiff, was not a party to said mortgage, and was not a party to any fraudulent sale, and had no knowledge of it, but made his purchase in good faith, and before the execution became a lien, they will find for the plaintiff.

6. The jury are instructed that they are not to infer fraud on the part of Brown, the plaintiff, because he paid a part of the purchase money to Moony, the mortgagee, by the request of Gibney, of whom Brown purchased the property, and that fraud is never to be presumed but must always be proved.

7. If the sale was actually made and possession of the property taken on the 24th of February, it is wholly immaterial that a written assignment of the mortgage was not made till afterwards.

The defendant asked the court to give the following instructions, numbers 1, 2, and 3, and the court refused to give them, and defendant excepted:

1. The jury are instructed, that if they believe, from the evidence, that the defendant came lawfully in possession of the property in controversy, then they will find for defendant, unless they further believe, from the evidence, that the plaintiff, prior to the commencement of this suit, made a demand of the property.

2. The jury are instructed, that if they believe, from the evidence, that the defendant was an acting constable in and for the county of Knox, and that as such constable the execution shown in evidence came to the hands of the defendant to execute, and that while the property in dispute was in the hands, possession or control of one or both of the defendants in said execution, this defendant levied said execution upon the property in controversy and took it away, that such taking and levy would not be wrongful, and that this action cannot be maintained by the plaintiff without proving a demand of the property before bringing the suit, or a taking that was wrongful.

3. The jury are instructed that if the defendant in good faith as constable levied on the property while the same was in Gibney's hands, by virtue of said execution shown in evidence, and took the same away, such levy and taking would not be wrongful, and that a demand must be proven before the plaintiff can recover.

At request of defendant the court gave the following instructions, numbers 4, 5, 11, 6, and 8:

4. The jury are instructed that the endorsement of the constable and the return of the defendant attached to the execution shown in evidence, is *prima facie* evidence of the time when the execution came into his hands, upon what property the same was levied and the time of the levy, and what became of the property.

5. The jury are instructed that the mortgage shown in evidence is void as against the execution shown in evidence, unless possession was taken by plaintiff before the execution came to the officer's hands.

11. The jury are instructed that the execution shown in evidence was a lien upon all the personal property of Patrick Gibney from and after the time when said execution came to the hands of the defendant, and that no sale or transfer of such property by said Gibney, after the execution came to the hands of the defendant, could destroy or affect such lien.

6. The jury are instructed that in this case a wrongful taking is not presumed but must be proven.

8. The jury are instructed that the burthen of proof as to the ownership of the property is upon the plaintiff, and that if the proof is equally balanced as to the ownership, they will find for the defendant.

Defendant asked the court to give the following instruction, number 10, and the court refused to give the same as asked, and defendant excepted:

10. The jury are instructed that a sale of personal property is not valid in any case against an execution, unless the sale is followed up by an absolute and continued change of possession, and that the possession must be delivered by the execution debtor before the execution comes into the hands of the officer to execute.

And the court modified the said instruction 10, by striking out the words "*and continued*," and gave the same so modified, and defendant excepted.

The defendant asked the court to give instructions numbers 9, and 7; the court refused to give them, and defendant excepted. The court modified them and gave them modified as follows, and defendant excepted:

9. If the jury believe, from the evidence, that the property in controversy was sold by Patrick Gibney to the plaintiff, still, if the jury believe that such sale was made to delay or hinder the collection of said execution debt, then such sale was void as against said execution.

Modification to instruction 9: "Provided the jury further believe from the evidence that the plaintiff knew of the purpose of such sale and was party to it."

7. The jury are instructed, that if the defendant was an acting constable of Knox county and that as such constable he received said execution, that from the time he received the execution it was a lien upon all the personal property of Patrick Gibney in said county, and that the defendant had the right, and it was his duty as such constable, to levy the same on any personal property then owned by said Gibney in said county, and take the same away, and such levy and taking would not make a wrongful taking.

Modification to instruction 7: "If the sale from Gibney to plaintiff was a fair and honest transaction, and possession was delivered to plaintiff before the execution came into defendant's hands, then the property belonged to plaintiff and was not subject to execution to pay Gibney's debts."

Verdict for plaintiff. Damages one cent.

The defendant then moved the court for a new trial, for the following reasons:

1. The verdict is against the law and evidence.
2. The verdict is against the instructions of the court.
3. The instructions are calculated to mislead the jury.
4. The court erred in giving the instructions asked by the plaintiff.
5. The court erred in refusing to give the instructions asked by the defendant.
6. The court erred in modifying the instructions asked by the defendant and giving the same so modified.
7. The court erred in refusing to give the instructions asked by defendant as asked.
8. The evidence was not sufficient to authorize a recovery.

Douglass & Craig, for Appellant.

T. G. Frost, for Appellee.

Walker, J. The first question presented by this record is whether the sale of the property in controversy was fair and *bona fide*. The evidence tends to show that Gibney had previously executed a mortgage on the property to Moony, for the sum of three hundred and sixty dollars. And appellee purchased the property of Gibney, and he gave his note to Moony for two hundred and seventy-five dollars, and was to pay Gibney twenty-five. The property was delivered to appellee on the day of its sale, and remained in his possession from that time until the day upon which it was seized on execution. On that day, appellee employed Gibney to haul for him a load of wood with the wagon and team, and while in his possession the levy was

made. The execution bears date the 26th of February, 1858, and was placed in the hands of the officer on the day following, and the levy was made on the 8th day of March, 1858. There was some uncertainty, from the evidence, when the sale was made to appellee. Gibney testified that it was on the 24th day of February, 1858, while another witness testified that he heard when the levy was made, which was four or five days after the sale. Moony also testified that the sale was made some time in February, and might have been on the 24th day. Fitzgerald testifies that he was present at the sale of the property in February. If the sale and delivery was made before the execution came to the hands of the officer, there can be no doubt of its validity unless it was impeached for fraud. There is evidence in the case, justifying the jury in finding, that it was made before the execution became a lien. In case of such a conflict of evidence, it is for the jury to determine to which they should give the preponderance, and the court will not disturb the finding unless it is manifestly against the weight of evidence.

Whilst a sale of personal property, without a delivery and change of possession, is fraudulent as to subsequent purchasers and creditors, if the sale is made in good faith, for a sufficient consideration, and possession is taken by the purchaser, it is valid to pass the title against all creditors not having a lien upon it. And a loan of the property by the purchaser to the seller, for a temporary purpose, or the employment of the seller to use the property in the pursuit of the business of the purchaser, will not avoid the sale, and render it liable to sale on execution issued after the purchase. It may be a circumstance to be taken into consideration by the jury, that the seller is subsequently found with its possession, and it is for them to determine whether such possession is *bona fide*, or is only colorable. In this case, there was evidence to justify the jury in finding that Gibney was in the employment of appellee and using the property in his business, and that the possession of the property was in appellee.

To impeach a sale of property as fraudulent, as to purchasers and creditors, it is necessary to show that both the vendor and purchaser intended to hinder and delay creditors in the collection of their debts. It is not enough that such was the design of the seller, unless the purchaser participated in or had notice of such design at the time of the sale. *Ewing* v. *Runkle*, 20 Ill. R. 448. Whether such was the design of the parties to this transaction, was a question of fact for the determination of the jury, from all the circumstances in evidence on the trial, and they were justified by the evidence in finding as they have done.

Even if the mortgage made by Gibney to Moony was fraudulent, and made to hinder and delay Gibney's creditors, a *bona*

fide purchase of the property by appellee would not be affected by that fraud. To charge him with it, he should have had notice that it was executed for that purpose; and the jury could not infer from the mere fact that the mortgage had been so made, that the appellee was a party to or had notice of it. Such a notice should be established by other evidence. And if it were conceded that the mortgage was fraudulent, there was no evidence that appellee was either a party to the fraud or had any notice of it.

There is no error perceived either in the giving or refusing the various instructions asked in the cause. Nor do we see any error in the modifications which were made to others before they were given. The instructions fairly presented the law applicable to the evidence in the case, and the evidence justified the verdict.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Henry McAuley, Appellant, *v.* William H. Carter *et al.*, Appellees.

APPEAL FROM COOK.

Where the parties to a building contract agree that the superintendent shall pass upon the work, and certify as to the payments to be made, his decision is binding, unless fraud or mistake on his part shall be shown.

Notice need not be given of the certificate obtained from the superintendent, where the contract does not require it.

This is a suit for a mechanics' lien. The petition was filed in the Cook County Circuit Court, November 6, 1857, and sets forth that the petitioners entered into a written agreement with the defendant, bearing date the 25th day of April, A. D. 1856, whereby they agreed to build, finish and complete in a careful, skillful and workmanlike manner, to the full and complete satisfaction of W. W. Boyington, or his assistant superintendent, the mason work of a marble front dwelling to be erected on Michigan Avenue, so as fully to carry out the design of said work as set forth in the specifications (the specifications being attached to the contract) and the plans and drawings therein especially referred to, said plans, drawings and specifications being made part and parcel of the contract; and that the said McAuley, for and in consideration of the said Carter and Miller's furnishing

all materials, and fully and faithfully executing the aforesaid, so as fully to carry out the design for the same as set forth by the specifications, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of W. W. Boyington, or his assistant superintendent as aforesaid, agreed to pay Carter and Miller therefor, $3,300; as the work advances the superintendent is to make out estimates of the work and materials furnished and inwrought into said building, and upon the presentation of a certificate of 85 per cent. on said estimate, the said McAuley is to pay the amount, and the balance in full on completion of the contract; provided the said superintendent shall certify in writing that they are entitled thereto. And by their third petition, they allege that they performed the work and furnished the materials according to the provisions of said contract, and fulfilled all the terms, conditions and requirements of said contract and specifications to be by them kept or fulfilled, and that said work was duly accepted; that there is due the petitioners, on account of work done under said contract, the sum of $700, and that that sum was duly certified to by W. W. Boyington, superintendent, previous to the commencement of this suit; and that they are entitled to the further sum of $189.50 for extra work, and that this sum was duly settled, and certified to by said superintendent.

In the specifications which set forth the particular manner in which the work is to be done, are the following provisions:

W. W. Boyington, or his assistant architects, are declared to be the superintendents of the work for the owner. Their duties will consist in giving, on demand, such interpretations either in writing, language or drawings, as in his judgment 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 hereinafter described, and in giving on demand any certificates that the contractor may be entitled to, and in settling all deductions of or additions to the contract price, which may grow out of all alterations of the design after the same are declared to be contracted; also determining the amount of damages which may accrue from any cause, and particularly, decide upon the fitness of all materials used and work done—the contractor being bound in all cases to remove all improper work or materials, upon being directed to do so by the superintendent.

The answer of McAuley admits the making of the contract, but denies that the petitioners did the work or furnished the materials to be done and furnished by them, according to the conditions and terms of said contract and specifications, specifying several particulars.

O. L. Wheelock testified. Am an architect; assisted in drawing the plans and specifications for the building referred to in the contract handed to me. (Here were handed to the witness the contract and specifications above referred to.) I know of the plaintiffs going in and putting up the walls of the building, under this contract and specifications, upon the premises described in the petition.

Contract and specifications read in evidence.

The plaintiffs handed to the witness the following writing:

"I hereby certify that I have examined the within bill, and checked such items as I was satisfied were correct and done under my supervision, and crossed out such items as I considered not correct. In accepting this work upon the condition of the contract, I must deduct the sum of fifty dollars for damages to the front, caused by not being suitably anchored to the wall of L. C. Clarke: the anchoring has since been done, but the blemish still remains.

I hereby certify to so much of the within bill as amounts to	$189.50
And approve the contract of the house	3,300.00
	$3,489.50
By deducting as aforesaid the sum of	50.00
	$3,439.50
I have drawn certificates to the amount of two thousand and six hundred dollars	2,600.00
	$839.50

Respectfully submitted, W. W. BOYINGTON."

The witness stated that he was acquainted with the hand-writing of W. W. Boyington, and that the signature to the above paper was in his hand-writing. Plaintiffs offered to read in evidence the foregoing paper. Objection made and overruled, and exception taken.

The defendant called a witness and offered to prove that W. W. Boyington, at the request of defendant, McAuley, gave notice to the plaintiffs of defects in the building of the walls of the dwelling-house, and that those defects have not been remedied.

That the excavations under the building were not made of the depth required by the specifications.

That the stone of the footing of the walls was not set into the earth as required by the specifications, and that the sand used for mortar for the walls was not clear beach-washed sand as required by the specifications.

That the stone front of the building was not anchored as required by the specifications, nor were the iron anchors worked into and secured to the timbers as required by the specifications.

That the stone front of the building was projected in consequence of the insufficient anchorage, and that thereby the front

of the building was defaced, and that the walls in the southeast corner of the building, in consequence thereof, had settled and were still settling, to the great injury of the rooms inside of the building.

The extent of the damage sustained by defendant McAuley in consequence of the above defects. Evidence rejected by court, and exception taken.

The defendant then offered to prove that the contract with respect to the house was not performed by the petitioners as required by the specifications, in certain particulars; but the court overruled said evidence and each and every item thereof, holding that said McAuley was estopped by the certificate already given in evidence. Exception taken.

The defendants then gave in evidence their certificates dated May 31, 1856, July 8, 1856, July 21, 1856, August 11, 1856, and September 22, 1856, all drawn by W. W. Boyington, amounting to $2,600, and are all in the following form:

"$300. *Chicago, May* 31, 1856.

Mr. H. McAuley:

This is to certify that there is due to Messrs. Carter & Miller, the sum of three hundred dollars for labor and materials furnished your building on Michigan Avenue, payable at sight at Chicago.

Yours Respectfully, W. W. BOYINGTON,

No. 1. Architect and Superintendent."

On each of which is indorsed the receipt of Carter & Miller, the petitioners.

This being all the evidence, the defendant's counsel then asked the court to give to the jury the following instruction:

To entitle the plaintiffs to recover in this action for any balance which may be due them for doing work and furnishing materials under the written contract given in evidence in this cause respecting the dwelling-house, it is necessary that they should, before the commencement of this suit, have procured from the superintendent of said work mentioned in said contract, a certificate of the amount due them, and have given notice to the defendant that they had procured said certificate, and unless the jury shall believe, from the evidence, that the defendant was in some manner notified before the commencement of this suit, that such certificate had been procured, then the verdict in this case should not include the claim for work done and materials furnished under said written contract. Instruction refused, and exception taken.

Motion for new trial made and overruled.

Errors assigned by appellant:

The court erred in receiving in evidence the certificate and

the indorsements thereon purporting to be signed by W. W. Boyington.

The court erred in refusing to permit the defendant, McAuley, to show that said Boyington, on the 26th of November, 1856, at the request of McAuley, gave notice to the plaintiffs below, of defects in the building of the wall in the dwelling-house, and that those defects had not been remedied.

The court erred in refusing to permit defendant, McAuley, to prove the particular defects in the performing of the work by the plaintiffs on the dwelling-house, and the damages which resulted to the defendant therefrom.

The court erred in refusing to permit the defendant, McAuley, to give evidence to the jury, that the contract read in evidence respecting the dwelling-house, was not performed by the plaintiffs in certain particulars set forth, and that the omissions there mentioned were overlooked by said Boyington by mistake.

The court erred in refusing to give the instruction asked by defendant.

The court erred in overruling defendant's motion for a new trial.

Hoyne, Miller & Lewis, for Appellant.

J. H. Thompson, for Appellees.

Breese, J. By the contract between the parties in this case, it is provided that the work shall be done in a careful, skillful and workmanlike manner, to the full and complete satisfaction of W. W. Boyington or his assistant superintendent, and on completion of the contract the balance due shall be paid appellees, "provided the said superintendent shall certify in writing that they are entitled thereto." The appellees are required by the contract, to submit in all things to the judgment of the superintendent, and he is declared to be, "superintendent of the work for the owner," and the owner is also bound, in all cases, to recognize the binding effect of the acts of his superintendent.

This being the contract of the parties, the case on the part of the appellees, was made out, by producing and proving the final certificate of the superintendent. That was the condition, and the only one, on which their right to recover rested, and when produced, it must be held, in the absence of any fraud, conclusive. No evidence of the amount of work done, or of its character, was admissible—both parties are concluded by the certificate of the superintendent. *The Board of Trustees of Ill.*

and Mich. Canal v. *Lynch*, 5 Gilm. R. 526; *McAvoy* v. *Long*, 13 Ill. R. 147.

The superintendent must be regarded as the sole and exclusive judge of all matters pertaining to this contract, and from his decision there is no appeal, nor can it be attacked except for fraud or mistake, neither of which is alleged. And the mistake to be available must be one which shows clearly, the superintendent or judge, was misled, deluded, and so far misapprehended the facts, that he did not exercise his real judgment in the case. Nothing of this sort is pretended here—there is no such issue.

No notice being required by the contract to be given the appellant, that appellees had obtained the certificate of the superintendent, the instruction asked for was properly refused. He was, besides being sole judge between the parties, the agent of the appellant, and of course appellant had all the notice necessary and was bound to take notice of his acts. The condition precedent to the payment of the money having been performed by the production and proof of the superintendent's certificate, nothing remained for them to do, and it is wholly immaterial whether the work was well or ill done, so that the superintendent was satisfied. The judgment is affirmed.

Judgment affirmed.

Ezekiel Parsons, Plaintiff in Error, *v.* William Overmire, Defendant in Error.

ERROR TO MARSHALL.

Where A. and B. cultivate a farm jointly, A. furnishing a horse, harness, etc., and B. a horse, for their joint use, and B., on being arrested on a criminal charge, tells A. to take his horse home, that he, A., would be back in a few days, and B. does so, afterwards using and claiming the horse as his own; this is a sufficient delivery from B. to A. to enable the former to keep the horse, as against other creditors of B.

This was an action of replevin in the *detinet*. Issues—*non detinet;* property not plaintiff's; property defendant's, not plaintiff's. Verdict for defendant. Motion for new trial overruled.

John Webster, being sworn, testified that he was acquainted with the plaintiff and with James Shinn; that during the month of February, 1854, the plaintiff and said James Shinn both lived on a farm, in Marshall county, belonging to the witness; that

about the first of February in said year, witness sold to said James Shinn the mare in controversy in this suit; that at the time, said Shinn owned and had the harness in controversy; that the witness had a conversation with James Shinn, in which witness asked said Shinn if he had given the plaintiff a mortgage to secure his debt; that Shinn said he had not given a written mortgage, but that he had turned out the mare and harness to the plaintiff for him to hold until his debt was paid; that Shinn also said at the same time that he owed Parsons over a hundred dollars, and that Parsons was to hold the mare and harness until it was paid. Witness further testified, that said Parsons and Shinn had taken and were to work witness' farm for that year jointly; that said Parsons had furnished one horse, and said Shinn had furnished the mare in controversy; that they had kept the two together to make a team, and had used, and had intended to use, the team for the mutual benefit of both; that from the time of the conversation between witness and Shinn, until the trial, when the mare was afterwards taken from Parsons by Gore, witness had always heard Parsons speak of the mare as his; that he always claimed her; that witness had heard Parsons call the mare his in Shinn's presence, and Shinn made no answer; that during that period, witness saw both Parsons and Shinn use the team. Witness further testified, that he had heard both Parsons and Shinn state that Shinn owed Parsons over one hundred dollars; that Parsons used the mare as his own. Said witness further testified, that some time in the month of March, 1854, Parsons and Shinn and witness went together in a wagon to a sale; that the said team was driven before the wagon, and driven by Parsons, to the sale; that at the sale, Shinn killed one Orgon, and was arrested and taken off; that he did not return with Parsons and the witness; that Parsons drove the said team home; that from that time to the time when the mare and harness in controversy were taken from Parsons by Gore, Parsons was in the actual possession of said mare and harness, claiming title to the same and calling them his own; that Shinn never came back; that before and after his suit commencing with Shinn, when Parsons desired he took the team and used it, and that Shinn also used it whenever he desired; that he saw no difference in the use of said team; that witness, during the whole of said February and March, lived in the same house with Shinn and Parsons; the 1st of February, Shinn bought the mare of him and paid for her; that after Shinn was arrested, witness saw notes made by Shinn in favor of Parsons, in Parsons' possession, for more than one hundred dollars; that the notes bore date four to six weeks prior to the time witness saw them.

Another witness testified, that in the month of March, 1854, before the defendant, Overmire, purchased the mare and harness in controversy, the witness, as agent for and at the request of plaintiff, notified defendant that plaintiff claimed said property, and would replevy the same; that after said defendant had purchased said property and before the commencement of this suit, the witness, as agent for and at the request of plaintiff, demanded the property in controversy from the defendant, and that he refused to deliver the same.

Another witness testified, that at the request of S. L. Richmond and Mark Bangs, he went from Lacon towards the place where Parsons lived, after the property in controversy; that he met Parsons on the way, driving the mare in controversy, with another horse, before a two-horse wagon; that he had an execution against said Parsons, and proceeded to levy the same upon the other horse; that witness also took the mare and harness in controversy, but against the will and consent of Parsons; that he took the property in controversy to Lacon, and delivered the same to Bangs.

The defendant introduced a witness, who testified that shortly after Shinn bought the mare in controversy from Webster, witness applied to Shinn to purchase said mare; that Shinn informed him that Parsons had a claim on her, and she could not be sold except by Parsons' permission; that Parsons said, if witness wanted to buy her, to buy her, and he would not object.

The defendant then called *Mark Bangs*, who testified that he had an interest in the event of the suit; that he had no notice of Parsons' claim on the property in controversy, at the time of his purchase of it; that he had sold out his interest in the property to Richmond.

The plaintiff consented that Bangs might testify, waiving all objections to his competency.

The seventh instruction for plaintiff, refused by the court, and to which refusal plaintiff excepted, is as follows:

If it was agreed between Shinn and Parsons, that the mare and harness should be considered in the possession of Parsons, as a matter of security for debt, then during the existence of such agreement, as between Shinn and Parsons, the possession of such property would be deemed to be in Parsons, although he may have permitted Shinn to have used the property from time to time, and although they may have used the property jointly.

The court, at the request of defendant, gave the following instructions, to which, among others, plaintiff excepted:

2. Even if the jury believe, from the evidence, that Shinn agreed that Parsons might have security on the mare to secure him (Parsons) in a debt that Shinn owed to Parsons, yet if the

jury at the same time believe, from the evidence, that the mare was not delivered by Shinn to Parsons under such an arrangement between them, then any such an arrangement is void in law, as to the purchasers of Shinn, without notice of Parsons' right.

3. If the jury believe, from the evidence, that such an arrangement was made between Shinn and Parsons, as is mentioned in the second instruction, and that the mare was not put into possession of plaintiff under such an arrangement; and if the jury further believe, that Shinn sold the mare to Bangs and Richmond, and that Richmond and Bangs afterwards sold the mare to Overmire; then the jury ought to find for the defendant, unless he had notice of Parsons' claim before the sale to him.

6. If the jury find for the defendant, then the plaintiff is entitled to recover damages for the detention of the property from the time this suit was brought, until the present term; and if the jury find for the defendant, they will assess such damages at what the proof shows the use of the mare and harness were worth for such time.

The errors assigned are: Judgment and verdict should have been for plaintiff, and not for defendant; refusing plaintiff's seventh instruction; giving instructions for defendant; and overruling motion for new trial.

Leland & Leland, for Plaintiff in Error.

S. L. Richmond, for Defendant in Error.

Caton, C. J. If the testimony of Webster is to be relied upon, then there is no avoiding the conclusion that both the mare and harness in controversy, were pledged by Shinn to Parsons, to secure a debt which the former owed the latter, and that the possession of the articles was delivered by the pledgor to the pledgee, and retained by him, till they were wrongfully taken from him by Gore. This possession is most seriously questioned in the argument for the defendant in error, and requires to be particularly noticed. Both Shinn and Parsons had rented a farm together, which they worked jointly. Shinn owned the mare and harness in question, and Parsons a horse, which they worked together as forming one team in the joint cultivation of the farm. In this condition of affairs the pledge was made, after which, both the mare and harness were claimed by Parsons as his property in the presence of Shinn, who made no question or denial of such claim. Indeed the witness swears, that Parsons always claimed the property as his own and used it as such. Sometimes one drove the team in the prosecution

of the work on the farm, and sometimes the other. While affairs were in this position, the witness, Parsons and Shinn, went in a wagon with this team to a public sale, Parsons driving. At the sale, Shinn committed a homicide, for which he was arrested, when he told Parsons to take the mare home and take care of her; that he would be back in a few days. This is the last we hear of Shinn in connection with this property. There is no evidence in the record, even that the defendant below claimed the property, under a purchase from Shinn, though it is probable that it was so understood at the trial.

The facts above stated, show a transfer of the possession of the property pledged, as much as it was possible to do under the circumstances of the case. Shinn ceased to claim the ownership of the property, which was openly and notoriously claimed by Parsons, who ever after in conjunction with such claim, treated it as his own. If he had not the possession of the mare and harness, then by the same rule, he had not the possession of his horse either. He had the same possession and control of the one as he had of the other. What other transfer of possession was it possible there could be, situated as the parties were, without absolutely breaking up their farming arrangements? Shall we hold that it was impossible for one of these parties to sell and transfer property used in the joint cultivation of this farm to the other, without taking it off the farm altogether; or the seller abandoning the place and going away. Indeed, even this was done in the case before us, before there was any pretense of a claim of right to the property asserted by the defendant below, as derived from Shinn; if we admit that there was such derivation of right. Shinn was gone; arrested under a criminal charge, and so far as we know, has never been on the place since. Parsons returned with the property, and continued to claim and use it as his own, and was in the actual possession and use of it when it was violently taken from him by Gore, and he was driven to this action to regain the possession of it.

Considerable stress is placed in the argument for the defendant below, upon the fact that Shinn at the time of his arrest, told Parsons to take the property and take care of it, and that he would be home in a few days. This it is claimed was an assertion of ownership by Shinn, inconsistent with the claim and possession of Parsons, and not disputed by him. We do not think so. Shinn had a residuary interest in the property, which under the circumstances, justified him in expressing solicitude about it, and enables us to understand the remark, as it was undoubtedly understood by Parsons, as not in the least inconsistent with the claim and possession of the latter.

What has been already said sufficiently disposes of the questions arising on the instructions.

The judgment is reversed and the cause remanded.

Judgment reversed.

James Swanzey, Appellant, *v.* John Moore, Appellee.

APPEAL FROM BUREAU.

Executory contracts are avoided by the statute of frauds; executed contracts are not.

If a laborer contracts verbally, to work an entire year, he is entitled to the wages agreed upon; and to the same proportionate compensation, for any period of time he labors, less than a year.

A parol contract, which is required by the statute to be in writing, is as binding as any, when performed, or while being performed.

If a party agrees to labor for a year for a certain sum, he must labor for that time to be entitled to any compensation. He is not bound to labor longer than he pleases, but if he abandons the contract voluntarily, he need not be paid for the time he does labor.

If a party agrees to labor for a fixed period, and quits before that period has elapsed, without any sufficient cause, or for any cause he has provoked, he cannot recover for the time he has labored.

This suit was brought by appellee against appellant for work and labor.

Appellee proved that he had worked for the appellant from the 5th March, 1856, until the 25th August, 1856, as a common farm laborer, and that his services were worth from $17 to $18 per month.

The appellant then introduced evidence, tending to prove, that said work was done under a special contract, made between the parties, about one week before said 5th March, to the effect that the appellee should work for the appellant for one year from said 5th March, for $200. The appellee introduced evidence tending to prove, that said service was performed under a special contract between said parties, that the said appellee should work for the appellant one year, if the said parties could agree. Appellant further introduced evidence tending to show, that the appellee professed to be a good stacker of grain, and that while in appellant's employ as aforesaid, that the appellee stacked a quantity of wheat for appellant imperfectly, and that in consequence thereof a portion of said wheat became wet and spoiled. The appellant proposed to ask a witness, how much wheat appellant had lost by such bad stacking, and the value of the wheat so lost, but the court refused to permit the witness to

answer, and the appellant excepted. The appellant further introduced testimony tending to show that the appellee left appellant's service without good cause, and that there had been no disagreement between said parties before then, but that on the day appellee quit work, that appellant's son, who partially took charge of appellant's farming business in his absence, expressed dissatisfaction that the appellee and another hired hand of appellant, had not hauled more than two loads of hay; that the appellee then left appellant's service, and worked no more for the appellant. The court, at the instance of appellee, instructed the jury that the appellee was entitled to recover, notwithstanding that the said services had been rendered under the special contract to work for one year from the 1st March, 1856, if the contract was made before that time; and rejected instructions that if the appellee had voluntarily rendered said services under such contract, that he could not in this suit insist that the contract was void, to which the appellant excepted.

The appellant asked the court to instruct the jury, that if the contract was, that the appellee should work for the appellant one year, if they could agree, that then one single dispute with, or reproof from Swanzey's boy to appellee, without appellant's knowledge or participation, would not authorize the appellee to leave the appellant's service before the expiration of his, appellee's, term of service; but the court declined to give the instruction, and the appellant excepted. The appellant asked as a qualification to appellee's instruction, that the appellee could not manufacture a pretense to disagree with Swanzey or his agents, but that he must have had a good reason to disagree with, and become dissatisfied with appellant or his agents, in order to entitle the appellee to quit the appellant's service before the expiration of his time; but the court declined to give such qualification, and the appellant excepted.

The jury found for the appellee. The appellant moved for a new trial, which the court overruled, and the appellant excepted. The cause was tried before BALLOU, Judge, who rendered judgment upon the verdict against Swanzey for ninety dollars.

The errors assigned are:

1st. That the court erred in refusing to permit the witness to answer as to the loss of the wheat caused by appellee's bad stacking, and the value thereof.

2nd. In giving appellee's first instruction, and rejecting appellant's second and fourth instructions.

3rd. In refusing appellant's qualification to appellee's third and fourth instructions.

4th. In refusing appellant's fifth instruction.

5th. In overruling appellant's motion for a new trial.

6th. The court erred in every decision he made against appellant.

For said reasons the appellant prays the Supreme Court to set aside and reverse the said judgment rendered against the appellant, and restore to him his legal rights which he lost as aforesaid.

PETERS & FARWELL, for Appellant.

O. C. GRAY, for Appellee.

CATON, C. J. This work was done under a contract void by the statute of frauds. And the question is whether Swanzey could insist upon the violation of the terms of such a contract, as a defense to the action. Upon this there can be no reason to doubt, when the character of such a contract is considered. It will be found that executory contracts are only avoided by the statute of frauds; executed contracts never. A parole contract which that statute requires to be in writing is as good as any when performed, or while being performed, or when partly performed, so far as the performance goes. Suppose this man had worked the whole year, no one will deny that he would be entitled to the wages fixed by the contract, and no more. The same measure of compensation must satisfy him for the time he did work. Suppose he had agreed to work five years for Swanzey for nothing, but just for the love of it, while he would not be bound to work a day under such a contract, yet if he worked six months or a year under it he would have to be content with the pleasure of the exercise for his compensation. Here was a contract that he should work one year for so much money. Till that service was performed he was entitled to no pay. Whatever he did under that contract must be controlled by its terms. He worked a portion of the time and quit, without a cause. By the terms of the contract under which he did the work he is entitled to no pay. While he agreed to work for nothing he cannot change his mind and go for a *quantum meruit*. He was not bound to work under the contract a single day longer than he pleased. Swanzey could not sue him for a violation of his contract, which was obnoxious to the statute of frauds. While executory, either party might repudiate it. When executed or so far as executed, it was as valid and binding as if it had been in writing. Thus far we have assumed that Moore quit the service without just cause. This is a question which has hereafter to be settled by a jury under proper instructions. On the former trial the contract proved was that Moore should work for Swanzey for one year if they could agree, and that he quit after working a portion of the year be-

cause Swanzey's son, who acted as his agent, had expressed dissatisfaction because Moore and another man had hauled but two loads of hay in a day. In view of this state of facts the appellant asked the court to instruct the jury that the appellee could not manufacture a pretense to disagree with the appellant or his agent, but that he must have had good reason to disagree or become dissatisfied with appellant or his agents, in order to entitle appellee to quit appellant's service before the expiration of his time. This the court refused to give, probably for the reason that it had been already held that the special contract proved was void by the statute of frauds, and that the appellee could recover for the work already done as if there had been no contract, from which position it necessarily resulted that the appellee had a right to quit without cause and when he pleased. We hold differently, and hence the question involved in the instruction became material, for if he quit the service in violation of his contract, he was not entitled to recover for the services already performed. Of the correctness of the instruction we have no doubt. The contract must receive a reasonable and practical construction. Neither party at the time they made the contract contemplated an arbitrary disagreement. A disagreement for reasonable and just cause was undoubtedly intended by the parties, and Moore had no right to seek a frivolous pretense for a disagreement. Such a course was a fraud on the agreement. The instruction should have been given. The judgment must be reversed and the cause remanded.

Judgment reversed.

Amos H. Schofield *et al.*, Plaintiffs in Error, *v.* Almeron C. Watkins *et al.*, Defendants in Error.

ERROR TO WILL.

Two of the board of trustees of schools, where they concur in opinion, may legally perform any act which the board is authorized to do. And their acts will be held valid, until vacated by *certiorari*, or some other direct proceeding.

Where the cost of a school house to be erected, does not exceed a thousand dollars, the directors may make such levy as is necessary for that purpose.

Where such directors hold their office *de facto* or *de jure*, their acts in levying a tax will not be inquired into for irregularities by a court of equity.

Such a tax will be binding, although persons and property liable to assessment, are not included.

If the tax is attempted for the benefit of the directors acting corruptly, in fraud of law, equity will relieve.

The legislature may form school districts, or legalize irregularities in the assessment of taxes, etc.

The complainants filed their bill in the Will County Circuit Court, alleging that the complainants were the owners of taxable property, in the school district, in the town of Plainfield, in the county of Will aforesaid, known as number seven, and hereafter more particularly described, all of whom, except one, reside in and are taxable inhabitants of the said town of Plainfield.

That divers other persons among the complainants, naming them, are the owners, and for a long time have been, of taxable property situate, lying and being in old district number one, in the said town, and are all inhabitants of the said town of Plainfield.

That long before the year 1855, and before the attempted alteration of districts number one and seven, about the 20th day of March, A. D. 1844, and in the month of April, A. D. 1848, by the orders and actions of the trustees of schools of township thirty-six, range nine, in the county of Will aforesaid, that township being the town of Plainfield, the said township was divided into seven school districts and the boundaries of each particularly defined and designated, and the said districts severally and legally organized for school purposes.

That in the division aforesaid, the said district number one, included sections fifteen, sixteen, twenty-one, twenty-two, and the north-west quarter of section fourteen and the village of Plainfield, (the old town meaning), and district number seven aforesaid, included sections number nine, ten, and south-west quarter of section three, except the north half west of Du Page river, and west half of south-east quarter of section three, and East Plainfield and Arnold's addition to Plainfield, as by the record and proceedings of said trustees, will more fully appear.

That for a long time before and at the time of the said attempted alteration of the districts number one and seven, there was a suitable and proper site and school house upon each of said districts, and schools kept and maintained in a successful and peaceful manner.

That at the time of the attempted change and alterations, as hereinafter mentioned, there was no board of trustees of said township, having the competent power and authority to make any valid or legal change of the said districts. That in the spring of 1848, O. J. Corbin, L. Hamlin, and H. B. Godard were elected trustees of said township; that afterwards, and in the spring of 1850, the said H. B. Godard left the State of Illinois and went to California, and ceased to be a resident of the said township. That from the time of the election of trustees for said township last before mentioned, there was no other election of trustees, or for a trustee, in and for said township,

until after the time of making the said supposed change and alteration.

That by the 31st section of the act of the State of Illinois, entitled "An act to establish and maintain common schools," approved February 12th, 1849, and by the 36th section of the 98th chapter of the Revised Statutes of 1845, it is *Provided*, That no person shall be eligible to the office of trustee unless he shall be a resident of the township.

That the said Godard left the State of Illinois, to be gone and reside out of said State for the period of more than two years, which was known to the said Corbin and Hamlin, the other trustees.

That by reason of the said Godard leaving the State as aforesaid, there became and was a vacancy in the said board of trustees.

That the remaining trustees did not at any time before the said attempted alteration of said districts, order any election to fill said vacancy, nor was said vacancy filled, nor were the said Hamlin or Corbin re-elected at any time between the time of their elections as aforesaid, and the said time of the attempted change of said districts number one and seven.

That the said L. Hamlin and O. J. Corbin, claiming to exercise the power and authority vested in the board of trustees, but having no power or authority to act as a board of trustees, did, on the 27th day of October, A. D. 1855, the same not being a regular session of said board of trustees, make a supposed or pretended order, as follows: "After due consideration in the premises, we the said trustees, do ordain and constitute our districts number one and seven, to be recorded and designated as district number one, with the proviso that the building contemplated to be built for the use of said school, shall be built on the south-west corner of section number ten (10,) in township number thirty-six, range nine, and east 3rd principal meridian."

That the said order was wholly void, because the trustees of schools, by law, had no power or authority to decide upon or fix the site of buildings.

That under the said order, changing the aforesaid school districts number one and seven into a district designated as number one, certain persons assumed to act as directors of said supposed district, made out of the old districts number one and seven, as aforesaid, and designated as number one,—and as such assumed directors of said new district number one, did, on or about the 29th day of June, A. D. 1858, make a pretended certificate for the purpose of levying a tax upon the owners of property in said old districts one and seven aforesaid, as follows, viz:

"We, the undersigned, directors of district number one (1),

township number 36, range number 9, in the county of Will, and State of Illinois, do hereby certify, that said board have estimated and required to be levied for the year 1858, the rate of one thousand dollars for teaching, and eight hundred and fifty-four dollars for incidental and building purposes in said district. June 29, 1858."

That the said supposed directors, even if they had been legal directors of the school district, and the said district had been legally organized, had no power or authority to make the certificate aforesaid, or to cause the said amount to be assessed upon the taxable inhabitants of said districts.

That the said board of directors did not make the estimate of rates per cent. on the one hundred dollars valuation of property in said district, nor did said board make known by certificate the *rates* so required to be levied, with the list of tax payers, to the county clerk of said county, as required.

That before the time of making the said certificate to the clerk, to wit: on the 21st day of June, 1858, a meeting of the legal voters in the district, which had been regularly called, convened within the district, to vote upon the question, whether there should be any tax levied for building purposes; that the votes of the legal voters within said district, were then and there taken upon the question, and a majority of nine was cast against levying any tax for building purposes.

That there are two school sites within the said district, designated as number one; and there has not at any time since the said organization of said last mentioned district, out of numbers one and seven, before described, been any vote taken of the legal voters of said district, to purchase a new site, or change or locate one, nor to build a school house, except the vote of the 21st of June aforesaid. That the said directors have caused the said two sites in said new district, to be used for school purposes, during a considerable of the time since the said change of the districts.

That by the 48th section of the act of 1857, last mentioned, it is provided, that the directors have power to locate and build a school house, which shall cost not to exceed the sum of one thousand dollars, only in case a vote is taken on the subject of locating a site, at an election, and a majority of the votes cast at said election is not obtained for any site.

That there was no vote of the people of said supposed district taken, at any time before the making of said certificate, to the said county clerk as aforesaid, authorizing the levying of the sums or either of them, in said certificate mentioned, or for the purpose or purposes therein stated, as is required by the 44th section of the statute of 1857, before mentioned.

That on or about the 7th day of April, A. D. 1856, the said Godard remaining out of the State, and the said vacancy not having been filled by an election, the said O. J. Corbin and L. Hamlin, as such trustees of said town, for the purpose of defining the territorial boundaries of said union district number one, made an order and pretended to ordain and establish that said union district should include sections nine, ten, sixteen, twenty-one, the west half of twenty-two, the west half and north-east quarter of section fifteen, the north-west quarter of section fourteen, the west half of eleven, all of section two except forty acres, the east half of the east half of the south-west quarter, and eighty acres of section one, being the west half of the north-west quarter of said section, also the east half of section three, the south-west quarter of section three except the north half west of the Du Page river.

That the directors of the said union district number one, in making the said certificate of the rates to be assessed as aforesaid, and the list of the tax payers in the said district, omitted a large number of the names of tax payers in the said district, naming those omitted.

That the said list was not made and completed until after the first day of July, 1858; that the last column thereof was made out after said first day of July.

That in computing and assessing the taxes in the said union district, there were, and are, divers parcels of land subject to taxation, within the aforesaid boundaries of said district, but which were not included or assessed at all, giving the names of the owners of and the description of the property not assessed.

That the said school directors, or some of them, are fraudulently colluding with the township trustees and others, to obtain money, not for the purpose of building a school house, as is pretended, but for the purpose of having said money to use in their own business, or in that of some of them, etc.

The prayer of the bill asked that the collector be enjoined from collecting or attempting to collect the said tax or any portion thereof, and that the tax and every part thereof be held null and void.

The bill was sworn to in the usual form, and an injunction issued pursuant to the prayer of said bill.

The defendants filed a certified copy of a statute of the State of Illinois, as follows:

AN ACT to legalize certain proceedings of the School Trustees of Town 36, Range 9, in Will County, and of a certain School District therein.

Whereas, doubts exist whether the proceedings for the formation of Union School District Number One, in town thirty-six, range nine, in Will county, are strictly regular, and whereas

a considerable sum has been raised for the building of a school house in said district, for the purpose of removing all doubts as to the regularity of said proceedings,

SECTION 1. That all the acts and proceedings of the school trustees of town thirty-six, range nine, in Will county, and of the school directors of Union District Number One, in said town, in uniting districts and levying and collecting taxes for building school house, and the support of schools therein, be and the same are hereby legalized, and that all proceedings may be had in the same manner as if the said before mentioned proceedings had been strictly regular and legal.

SECTION 2. This act to take effect and be in force from and after its passage.

On the 6th day of April, 1859, the cause was submitted on the bill, and the copy of said statute, and by agreement of counsel the court entered a *pro forma* decree that the said statute is a sufficient bar to the relief prayed for in said bill—that the said bill of complaint be dismissed, and the injunction issued be dissolved, and that upon the complainants entering into a bond to the township trustees, conditioned for the payment by the complainants of all taxes assessed against them in said school district, in case the Supreme Court shall affirm the decree of this court, then the said injunction, so far as the collection of the said taxes against the said complainants is concerned, shall be continued as a temporary injunction during the pendency of this cause in the Supreme Court.

The plaintiffs assign for errors, the following:

1st. The court erred in deciding that the said statute, filed in said cause, was a bar to the relief asked by complainants, in their bill.

2nd. The court erred in deciding to dissolve the injunction granted in this cause.

3rd. The court erred in dismissing the complainants' bill.

The court rendered a decree in favor of the defendants to said bill, whereas by the law of the land, the decree should have been rendered in favor of the complainants.

SCATES, MCALLISTER & JEWETT, for Plaintiffs in Error.

LELAND & LELAND, for Defendants in Error.

WALKER, J. It is urged as an objection to the power to levy a tax in this district, that at the time it was formed, one of the trustees was absent in California, and that but two acted in its formation. The law constitutes two members of the body a quorum to transact business. And when they concur in any act,

which the board may legally perform, no reason is perceived why the act is not as legally binding as if all were present. When the legislature designated that number as a quorum for the transaction of business, it conferred upon them full power to perform all the duties devolving upon the board. Even if their act was in this respect illegal, it purported to be regular and must be held binding until vacated by *certiorari* or some other direct proceeding. They can act as officers *de facto*, and within the scope of their authority, and for all that appears in the record this proceeding was perfectly regular in forming this district.

It is also insisted that the directors had no power to levy a tax for the purpose of erecting a school house, unless the inhabitants voted in favor of such tax. In the cases of *Munson* v. *Minor* and *Merritt* v. *Farris*, *post*, it is held that where the building proposed to be erected does not exceed the cost of one thousand dollars, the forty-eighth section of the act establishing a system of free schools, confers the power upon the directors to make such a levy, and a vote of the district is unnecessary. In this case the bill fails to allege that, it is for the erection of a school house to cost over that sum, and the amount levied being less than one thousand dollars they were authorized to make such a levy. Nor could a vote resulting in a majority against such a levy divest them of the power. They derive the power from the law and not from a vote of the citizens. If the power delegated to the directors is liable to abuse in its exercise, the correction is in the hands of the legislature, and not in the courts. The tax was levied by persons exercising and performing the duties of directors of this district, and these incorporations have the power to impose these taxes, and whether they held their office *de jure* or *de facto*, their acts in levying a tax will not be inquired into by a court of equity for mere irregularities.

It was likewise insisted that, the tax was void because persons and property liable to assessment were omitted from the assessment list. This question was also presented in the case of *Merritt* v. *Farris*, and held not to invalidate the assessment or tax. If such omission was intentional, or occurred from gross negligence on the part of the officer whose duty it was to make the assessment, or return the list, it would doubtless render them liable to an action for the damage sustained by tax payers who had thus sustained injury.

It is alleged in the bill that this tax was levied by these directors for their own individual use, and not for the purpose of erecting a school house. And it was urged that the court erred in rendering the decree dissolving the injunction, and dismissing the bill. The certificate returned by them to the clerk

states that a portion of the levy was for teaching, and an other portion was for incidental and building purposes, in the district. If this was not true, but was only using the forms of law, and an exercise of powers conferred by law for unauthorized purposes, and in fraud of the law, there can be no doubt that parties oppressed by such acts, have a right to relief from them. If the allegation in the bill is true, and it is sworn to, and remains undenied, it is a degree of corruption that is believed to be unusual, and the first that has occurred under the exercise of this power. And it would be such a fraud upon the rights of the citizens of the district, and upon the law as would invest a court of equity with jurisdiction to prevent its perpetration. Courts of equity may take jurisdiction to prevent, as well as relieve against a fraud. The fact that the parties injured have a remedy at law to recover damages they may sustain by such a fraudulent abuse of power, or that directors thus acting might be indicted and punished for such corruption in office, does not divest a court of equity of its jurisdiction in case of fraud. Fraud vitiates and avoids all acts, and no reason is perceived why, if the exercise of a legal power to levy a tax is employed for corrupt and fraudulent purposes, that it should not be within the same rule, or why a court of equity should not exercise its jurisdiction. If the tax was levied by the proper officers, and for an authorized purpose, it would be otherwise.

It was however insisted that this tax was legalized by the act of the legislature adopted the 19th Feb. 1859. That act provides that all the acts of the trustees of schools in this township, and of the directors in this district, in uniting the districts out of which this one was composed, and the levying and collecting taxes for building school house and support of schools, are legalized, and that all proceedings may be had in the same manner as if the proceedings had been strictly regular and legal. This act took effect upon its passage, and there can be no doubt that the legislature have the power to form a school district, or may legalize the acts of officers in attempting to form a district, so as to render such district legal, and there can be as little doubt, that such was the operation of this enactment. If any irregularity had occurred in its formation by the trustees, which would have been grounds for reversing their order establishing it, those irregularities were cured by this enactment. And the power to cure irregularities in the manner of levying a tax, is equally undoubted, and so far as this tax was levied for the purposes specified in the act, there is no doubt that the levy is thereby made valid. But the act only professes to legalize a tax to build a school house and to support schools in the district. It does not legalize a tax levied for the private benefit of the

directors, and the bill alleges that such was the object of the levy of the tax. This act cannot bear the construction that it was intended to legalize this tax for such a purpose.

The decree was erroneous, and must be reversed, and the cause remanded, with leave to the defendants to answer the bill.

Decree reversed.

George H. Cranz, Plaintiff in Error, *v.* John Kroger, Defendant in Error.

ERROR TO ROCK ISLAND.

A verbal gift without delivery may be resumed. Not so if the gift is evidenced by a writing.

A parent may resume property given to an infant child, without the consent of the child.

Proof of detention of property, may be made by any circumstances which go to satisfy the jury. If a party refuses to listen to a demand of property, it may be satisfactory.

This was an action of replevin, brought by Kroger against Cranz, in the court below.

The declaration alleges the unlawful detention by defendant of certain articles of personal property, to wit: One piano, one piano stool, six chairs, one card table, and one sofa; and a demand made by plaintiff for the same, and a refusal of defendant to deliver, etc.

Pleas: 1, non detinet; 2, property in defendant; 3, property in Amelia Alexander.

Issues to the country.

The plaintiff produced as a witness, *Samuel P. Goodale*, who testified, that sometime in the early part of the season of 1855, a quantity of goods were brought from the depot of the Rock Island Railroad, at Rock Island, to the warehouse of J. H. Langley & Co.; that said goods consisted of one case of glass, three boxes of household goods, four other boxes of goods, one chest, one piano, one barrel, three boxes of furniture, and three bundles of chairs, and all marked "M. E. Kroger." That said goods were taken from the warehouse of said Langley & Co. at various times, and were receipted for by John Kroger, the plaintiff; that sometime after their arrival at said warehouse, and while a portion of said goods yet remained in store, the plaintiff and defendant came together to the warehouse, and inquired after the remaining goods.

It was then admitted at the trial, that among the goods referred to by the witness Goodale, were the articles mentioned and described in the plaintiff's declaration.

Jasper Fisher, a witness for plaintiff, testified, that he assisted in moving the articles in controversy in this suit, from the warehouse of said Langley & Co., to a house where defendant was then living. The plaintiff, Kroger, paid witness for this service.

Truman B. Gorton testified, that he knew the parties; that while he was sheriff of Rock Island county, defendant was arrested on a capias, and was taken by witness, at defendant's request, before the Probate Court of said county, in order that the defendant might obtain his discharge under the insolvent laws of this State.

The defendant, Cranz, was examined under oath before said Probate Court, in regard to his property. Defendant said he did not own a piano; that the one he had was leased from Mrs. Kroger; that the six mahogany chairs, centre table and sofa, were in the same situation; that he (defendant) had given plaintiff's wife, Mrs. M. E. Kroger, a bill of sale of said articles, and that she owned them; that Kroger and his wife were present at said examination, and that Kroger's wife, at the request of defendant, testified in his behalf on that occasion.

The plaintiff here introduced a schedule, made out and sworn to by defendant before said Probate Court, when seeking his discharge from custody and imprisonment under the insolvent law.

Said schedule and oath thereto bear date October 1, 1855; and among the assets and property of defendant, no mention is made of the property in controversy in this suit. The oath of defendant to said schedule is in the form prescribed by statute in such cases.

Robert Don testified, that he went with plaintiff's wife to demand some furniture of defendant. Met defendant on Orleans street. Plaintiff's wife said to him, she wanted her property, but did not specify what. Defendant replied, he had nothing that belonged to her, and passed on.

Hugh Gilmon testified: Mrs. Kroger spoke to defendant, and demanded the furniture; witness thinks she had a list on a paper she had in her hand; Mrs. Kroger was apparently about to begin to read, when defendant interrupted her, and said he had no property that belonged to her, and passed on.

On the part of defendant, *Dr. Rathbun* testified, that about two years ago he was present with plaintiff and defendant, and assisted in a settlement of all their matters; witness went, at defendant's request, to see plaintiff, and get a bill of sale that defendant had given to plaintiff's wife, of the property in ques-

tion ; witness saw plaintiff, and made known to him his errand, to which plaintiff replied that he wanted to see his (plaintiff's) wife about it, and would let witness know. A day or two afterwards witness again saw plaintiff, when plaintiff informed witness that his (plaintiff's) wife would not let the bill of sale go to any one but her sister, and that she (plaintiff's wife) meant to hold it for her sister, so that no one else could get the furniture ; that plaintiff's and defendant's wives are sisters ; that at the settlement between plaintiff and defendant, nothing was said about the property in controversy in this suit ; witness went to get the bill of sale, a few days after the settlement occurred.

Robert W. Smith testified, that he was present before the Probate Court when defendant sought to be discharged under the insolvent law ; witness examined defendant under oath upon that occasion, and was resisting his discharge ; defendant, before the Probate Court, testified that he did not own the property in question ; that before he left Cleveland, Ohio, where plaintiff and defendant formerly resided, he gave plaintiff's wife a bill of sale of said property, but that she nor plaintiff ever took possession of it ; that he, defendant, still kept the property in his house, and that he now (then) held it under a lease from plaintiff's wife.

Emilie Alexander testified, that she was the step-daughter of defendant, and that defendant's wife was witness' mother ; that plaintiff's wife is the aunt of witness and sister to witness' mother ; and that she (witness) was now sixteen years of age. Witness further states, that both plaintiff and defendant, with their families, formerly resided in Cleveland, Ohio ; that while residing there, they lived separate and apart from each other ; that the piano in controversy in this suit was presented and given to her as a Christmas present, by her step-father, the defendant, six years ago last Christmas ; that witness used and possessed said piano in the family of her step-father ever since, with the exception of a short time when she was away at boarding-school ; that she was the only member of her step-father's family that used or practiced on the instrument ; and that the plaintiff and his wife, before the bringing of this suit, often spoke of said piano as her property, and as a Christmas present made witness by her step-father, the defendant ; that the plaintiff and his family, and the family of defendant, moved from Cleveland, Ohio, to Rock Island, Illinois, four years ago last spring ; and that the two families, with the exception aforesaid, came west together with the household goods and furniture (including the property in question) of both families ; that at Cleveland, the boxes containing the household goods and furniture of defendant were marked by defendant, " M. E. Kroger, Rock Island,

Illinois ;" and that they were thus marked, for the reason that defendant did not expect to leave Cleveland until some weeks after his family left ; that some six or eight weeks after defendant's family arrived at Rock Island, defendant came on ; that after defendant thus moved, the property in controversy in this suit was brought from the warehouse of Langley & Co. into the house of defendant ; that after the arrival of defendant at Rock Island, the families of plaintiff and defendant have never resided together, or in the same house.

On the part of the plaintiff, the court, DRURY, Judge, presiding, was asked to instruct the jury as follows :

1. If, at the time of the commencement of this suit, the plaintiff was the owner of the property in question (either in his own right or in right of his wife), and defendant wrongfully detained the same, the plaintiff is entitled to recover in this suit.

2. If the plaintiff, either in his own right or in the right of his wife, was the owner of the property in question, on or about the month of October, 1855, and there is no evidence of a subsequent sale or transfer thereof, the presumption is, that he continued to be such owner up to the time of commencing this suit.

3. A husband is by law entitled to reduce to his possession the personal property of his wife, and, upon so reducing the same to possession, he is the absolute owner thereof.

4. A sale or gift of property by defendant to plaintiff, when consummated by the parties, is valid and binding upon them, notwithstanding it may have been made and entered into without consideration, with intent to hinder, delay or defraud the creditors of the defendant.

5. Although the defendant may have transferred to plaintiff the property in question, by gift or sale, without consideration, yet, when consummated, such gift or sale is binding on him, and he cannot impeach the same on the ground of fraud, or for want of consideration therein.

6. A sale or gift is consummated by delivery of the property to the vendee ; and the acceptance of a lease of property by a party, is conclusive evidence against him, of the possession of the property in the lessor.

7. Admissions by a party are evidence against him ; and, although such admission is to be taken together as a whole, the jury are not bound to regard all parts of it with equal confidence. The fact that it is against his interest or for it, its improbability, inconsistency or contradiction, or corroboration by other facts in proof, are circumstances proper to be considered in determining the weight to be given to it.

8. To constitute a legal demand of property in this case, it is not necessary for the demanding party to make use of the word demand, or to specify, by name or particular description, the property demanded; but any language which makes known to the party on whom the demand is made, that the demandant desires the possession of property, and informs him, by reference or otherwise, what property he desires the possession of, is sufficient to constitute a demand.

9. It is incumbent on the plaintiff to show a wrongful detention by the defendant, as against the plaintiff, of the property in question. A demand and refusal are evidence of such wrongful detention, but not the only evidence; other facts and circumstances tending to show such detention, are proper to be shown; and if the jury are satisfied, from such other facts and circumstances, of the wrongful detention, then proof of a demand and refusal is unnecessary.

10. Although a person may give articles of personal property to his infant child or step-child, yet he may afterwards take it away, or sell or dispose of it, at his pleasure, and without his consent or approval.

All which instructions, so asked by plaintiff, were given by the court, and to the giving of which, the defendant at the time excepted.

On the part of the defendant, the court was asked to charge the jury as follows:

1. If, from the evidence in this case, the jury believe that the property mentioned in the plaintiff's declaration, at the time this suit was brought, was the property of the defendant, Cranz, then the jury should return a verdict for the defendant.

2. If, from the evidence, the jury believe that the property mentioned in plaintiff's declaration, or any part thereof, was, at the time this suit was brought, the property of Amelia Alexander, the witness, then the jury should return a verdict agreeable to such finding.

3. If, from the evidence in this case, the jury believe that, at the time this suit was brought, the property in controversy was the property of the plaintiff, still the plaintiff is not entitled to recover in this suit, unless he proves a legal demand of defendant, of the property mentioned in plaintiff's declaration.

4. In order to make a legal demand of articles of personal property by one person from another, such articles of personal property must be indicated by proper words of description, or named so as to apprise the party upon whom the demand is made, what particular property is demanded; otherwise such demand is not sufficient whereon to bring replevin for the detention of personal property.

5. If, from the evidence, the jury believe that the defendant in this suit, without consideration, conveyed, by sale or otherwise, the property in controversy to the plaintiff, such sale or conveyance is void, and the law will not aid the party to whom such sale is made to recover the property, under such circumstances.

6. In order to render a sale without consideration valid between the parties, possession of the personal property sold must follow and accompany the sale; otherwise, such sale is void in law.

7. A person has a right to give articles of personal property to his child, or step-child, and such gift, followed by possession in the donee, will be valid as against all the world, except creditors existing at the time such gift was made.

8. If, from the evidence in this case, the jury believe that the defendant gave the plaintiff's wife a bill of sale of the property in question, and that the plaintiff, afterwards, and while the defendant had possession of the property, negotiated for the surrender of such bill of sale, with a view to the release or abandonment of such sale, then the non-production of such bill of sale at the trial, without explanation, is evidence tending to show that such bill of sale has been canceled, and may be weighed by the jury.

9. If, from the evidence, the jury believe that before the commencement of this suit, and since the plaintiff asserted a claim to the property in question, and while the defendant had possession thereof, the parties came together, and settled and adjusted all matters of controversy between them, then such settlement would bar the plaintiff's right of recovery in this case.

But the court, upon its own motion, modified said defendant's instructions, numbered 3, 5, 7 and 9, as follows:

3. If, from the evidence in this case, the jury believe that, at the time this suit was brought, the property in controversy was the property of plaintiff, still the plaintiff is not entitled to recover in this suit, unless he proves a legal demand of the defendant, of the property mentioned in plaintiff's declaration, *or circumstances showing an unlawful detention.*

5. If, from the evidence, the jury believe that the defendant in this suit, without consideration, conveyed, by sale or otherwise, the property in controversy to the plaintiff, such sale or conveyance is void, and the law will not aid the party to whom such sale is made, to recover possession of the property under such circumstances.

The above is the law, if the jury further believe, from the evidence, that there was no delivery under the sale.

7. A person has a right to give articles of personal property to his child, or step-child; and such gift, followed by possession in the donee, will be valid against all the world, except creditors existing at the time such gift was made. *Given as qualified in plaintiff's instructions as to infant children.*

9. If, from the evidence, the jury believe that, before the commencement of this suit, and since the plaintiff asserted a claim to the property in question, and while defendant had possession thereof, the parties came together, and settled and adjusted all matters of controversy between them, *in relation to this property*, then such settlement would bar the plaintiff's right of recovery in this case: *Provided the jury believe, from the evidence, that at the time of such settlement, the property was to become the property of defendant.*

The court gave said defendant's instructions, numbered 1, 2, 4, 6 and 8, as asked, and gave instructions, 3, 5, 7 and 9, as modified by the court; and for not giving said instructions as asked, and for giving them as modified, the defendant excepted.

Whereupon, after verdict for plaintiff, said defendant moved for a new trial, for the following reasons:

1. Because the court gave instructions to the jury, as asked by plaintiff, numbered from one to ten inclusive.

2. Because the court refused instructions, as asked by defendant, and gave instructions as modified by said court.

3. Because the court admitted improper evidence in behalf of plaintiff, though objected to by defendant at the time thereof.

4. Because the court excluded evidence offered by defendant at the trial of said cause.

5. Because the verdict of the jury is contrary to law and evidence.

Which motion of said defendant for a new trial, was overruled by the court, and to which decision defendant then and there excepted.

Whereupon, the court gave judgment on said verdict for plaintiff.

Beardsley & Smith, for Plaintiff in Error.

B. C. Cook, and Wilkinson & Pleasants, for Defendant in Error.

Breese, J. It is a well-settled principle that a verbal gift without delivery can be resumed by the giver. Not so, however, where the gift is evidenced by writing. 2 Kent's Com. 438; *Irons* v. *Smallpiece*, 4 Eng. C. L. R. 635; *Caines and Wife* v.

Marley, 2 Tenn. (Yerger's) R. Here there was a bill of sale executed to the plaintiff's wife, of the property in question. But assuming the gift of the property to be in parol only, there is proof to show a delivery. The defendant himself marked the boxes containing the articles declared for, at Cleveland, Ohio, to M. E. Kroger, the plaintiff's wife, and forwarded them to her at Rock Island, in this State, where they were placed in a warehouse and taken therefrom by the plaintiff, he giving his receipt for them. It is also proved that defendant had taken a lease of the articles from the plaintiff's wife. The parol gift then, if it was one, was consummated by delivery and could not be recalled; and the acceptance, by the defendant, of a lease of the property from the plaintiff, estopped him from denying her right to it. 5 Bac. Abr., title "Leases."

It cannot be denied, that a parent may give an article of personal property to his infant child, and resume the gift, without the consent of the child, and sell it. This power arises from the position of the parties, and from the principle of control a parent can exercise over his infant child, and all that belongs to it. This disposes of the claim of Amelia Alexander, as arising out of a supposed gift to her of the piano prior to the sale and delivery to the plaintiff, and when she was but ten years of age.

We do not perceive any essential error in any of the instructions, or modifications of those asked by the defendant, as made by the court.

There are certainly more ways than one of proving the detention of property, under that issue in replevin. A demand and refusal is one way, but any circumstances which go to satisfy the jury that a demand would have been unavailing, or a refusal of a party to listen to a demand, would be sufficient. *Johnson* v. *Howe*, 2 Gilm. R. 344.

The weight of evidence is entirely with the plaintiff in this case. On an important occasion, before the Probate Court, the defendant disclaimed all title to this property—insisted it was the plaintiff's, and all the interest that he had in it was a lease, and there is no evidence that since that investigation he has been clothed with the title. The judgment is affirmed.

Judgment affirmed.

Charles Ballance, Plaintiff in Error, *v.* Lyman J. Loomiss *et al.*, Defendants in Error.

ERROR TO PEORIA.

A party who seeks to set aside a judgment by a proceeding in chancery, so as to obtain a new trial, must show himself clear of all *laches*, and also that every effort on his part was made to prevent the judgment against him.

A party is not bound to answer such portions of a bill as are demurred to, until the demurrer has been passed upon.

If different lots of land have been sold *en masse*, (although they may have been previously offered separately,) greatly below their value, the courts may interfere by injunction to prevent the delivery of the deed.

The deputy of an absconded sheriff may continue to act, until the office of the principal has been vacated.

The bill, in this case, seeks to set aside a sale of a quarter section of land and a town lot, made on the 2nd day of November, 1850, by the deputy sheriff of Peoria county, by virtue of an execution in favor of defendants in error against Ballance, plaintiff in error.

The bill was filed on the first day of December, A. D. 1851, and alleges (among other matters) the following facts:

That the defendants in error recovered a judgment against the plaintiff in error, in the Peoria Circuit Court, on the 3rd day of April, 1850, for the sum of $180.70 and costs of suit, on which an execution was issued, July 6th, 1850, and placed in the hands of Clark Cleveland for collection, and the execution was levied on the town lot and land by Cleveland, who was the deputy of Compher, sheriff of said county, on the 12th of September, and sold on the 2nd day of November, 1850, to the defendants in error, for $226.79, and a certificate of purchase was executed to them, showing that they would be entitled to a deed on the 2nd February, 1852, unless redeemed, etc.

That said property was sold together, when it should have been sold separately, and was worth *four* times the amount bid for it.

That Cleveland had no authority to sell, because he claimed to be the deputy of Compher, who had absconded before the execution came to Cleveland's hands.

The answer of the defendants sets forth:

That they admit that they purchased both parcels of land together, but allege that they were first offered separately by the deputy sheriff, who could get no bid, and were then offered and sold *en masse*. They further allege, that the title to the lot was encumbered by "French claims," and it was very doubtful whether Ballance's interest was worth anything.

That the tract of land was encumbered by mortgages, and that Ballance had no deed of *record* to the land, and the claim or title of Ballance to both tracts was so uncertain that no value could be placed on them.

Admit that Compher had left the county, but did not know that he would not return.

On the trial, the defendants offered in evidence the execution and officer's return thereon, which return shows that the property was first offered separately and no bidders had. It was then sold *en masse.*

The defendants also proved, by *Clark Cleveland*, that Ballance had lived in Peoria twenty years and was a man of ample means; that he acted as deputy under Compher, the sheriff, from 1846 to November, 1850, when the new sheriff was elected. Van Ness Smith also was a deputy of Compher, and they both continued to act, after Compher left, as deputy sheriffs, until a new election was had in November.

He also proved that it was generally understood and believed, that Ballance's title to the lot was not good, and that it was covered with French claims.

Jacob Gale also sustains Cleveland.

M. Williamson proves that mortgages were on the record against the land.

The court below decreed that Ballance should pay to plaintiffs below $295.28, with interest from the date of the decree, on or before the first of July next, and that upon such payment the sale should be set aside.

From this decision of the Circuit Court the defendant below brought the case here by writ of error.

C. Ballance, *Pro se.*

H. M. Wead, for Defendants in Error.

Walker, J. The first error assigned is the sustaining a demurrer to that portion of complainant's bill which sets up and relies upon facts to entitle him to a new trial at law. The bill alleges that defendants had no grounds of recovery in their action at law, and alleges that they were employed to perform the labor by the contractors, and not by complainant; that the verdict and judgment were erroneous and unjust, and that he had attempted to bring the case to this court, but was prevented in consequence of being unable to procure a bill of exceptions so as to file the record, within the time required by the rules of this court; that the case was dismissed for want of the filing of the transcript of the record, and that he was absent at Spring-

field attending to important business in the United States Circuit Court, and was acting as a grand juror in that court and was unable to obtain leave of absence to attend the Supreme Court to give his attention to the case; that he telegraphed, and wrote to, and sent an affidavit to Mr. Coffing, with a request that he would attend to procuring further time to file the record, but the matter was not attended to by him.

The bill proceeds upon the grounds that the complainant had a complete remedy at law, but asks a new trial upon the grounds of unavoidable accident. It is a well-recognized rule of equity, that where a party has an adequate remedy at law, and fails to rely upon it in that form, he will not be heard to insist upon it in equity, unless he has been prevented from doing so by accident and circumstances over which he had no control, and which every reasonable effort on his part could not have prevented. Any *laches* on his part will prevent his obtaining relief in equity. If it appears that the judgment complained of is unjust, and that the party in good faith has used, or attempted to use, all the means given him by the law to assert his rights by active efforts on his part, made in good faith, and to the extent that a party has it in his power to use, but has nevertheless been prevented from presenting a defense to the claim, equity should grant a new trial at law. But in this case, we think the facts disclosed by the bill fall far short of the efforts required to entitle a party to such relief. The judge was not seen to procure the bill of exceptions, but a letter was only written to him for that purpose, which remained unanswered, and no further steps are alleged to have been taken. An attorney at Ottawa was telegraphed and written to, and an affidavit sent to him, requesting him to apply for further time to file the record. Whether this attorney was there, or received the communication, or had undertaken to appear for complainant, is not shown. Nor does it appear that an answer to the dispatch was requested, notifying complainant whether he might rely upon the services of the attorney thus addressed. He should have procured an attorney who agreed to give the matter his attention, and having failed to do so, it cannot be regarded as an inevitable accident which ordinary prudence could not have foreseen and avoided, but manifests a want of the most ordinary care and prudence. The demurrer was therefore properly sustained.

The overruling the exceptions to the answer was proper. They questioned the sufficiency of the answer to that portion of the bill which referred to the defense at law, and which was demurred to by defendants. They were not bound to answer that portion of the bill to which they had demurred, while it was pending and undisposed of by the court. If the demurrer

had been overruled, then they would have been properly required to answer that part of the bill, but until that was done it constituted a sufficient answer to that portion of the bill to which it was interposed. The answer is in other respects sufficient and unobjectionable.

It is likewise insisted that the sale was void because two separate disconnected tracts of land were offered for sale in mass and not separately, and that they were so purchased by the defendants on one bid for the amount of the judgment and costs. The certificate of purchase states that the two tracts of land were offered for sale at public vendue and that the plaintiffs in execution bid the sum of $226.79 which was the highest and best bid for said tracts or lots of land, and they were struck off to them at that sum. The return of the sheriff to the execution, shows that the tracts were offered separately, and that there was no bid for either, and that they were then offered for sale together, when they were struck off to plaintiffs in execution, on their bid.

This court in the case of *Day* v. *Graham*, 1 Gilm. R. 435, say that where the purchaser of a number of separate tracts of land in mass, is the plaintiff in execution, and before he conveys to another, the court will set aside the sale upon motion. But after he conveys to another person, or where a third person becomes the purchaser, the court will not determine in this summary way, questions which may affect the rights of others not before the court, without opportunity of explaining away circumstances which might destroy his title. And again in the case of *Stewart* v. *Croes et al.*, 5 Gilm. R. 442, this court say: "Had there been an allegation that the land was worth $1,000 at the time of sale, instead of at the time of filing the bill, such allegation in connection with the other statements in the bill, would have presented a clear case for the intervention of a court of equity, for it would never be allowable for an officer to sell in mass, a tract of land worth $1,000, to satisfy an execution for less than thirty dollars, when the tract was susceptible of division, and the sale of a small part would have satisfied the debt." In this case the evidence shows that the city lot was well improved and was worth three thousand dollars or upwards, and the land from sixteen hundred to twenty-four hundred dollars, making the aggregate about five thousand dollars. Although there seems to be some question about the title to the lot and some incumbrance upon the land, still we cannot but regard the sale as at a great sacrifice when it was sold for only about two hundred dollars, and as bringing this case fully within the case of *Stewart* v. *Croes*, and invests the court with jurisdiction to grant relief against this sale.

The bill in this case prays an injunction to prevent the execution of a deed upon this sale, and for general relief. And upon the whole record we are of the opinion that the complainant is entitled to have a perpetual injunction against the sheriff and all others acting for him, restraining them from executing a deed under the sale, upon his paying to the defendants the full amount of the judgment and costs with interest, until the day the money shall be paid.

Until the office of the sheriff was declared to be vacant by a court of competent jurisdiction, or until an election was held and a successor was elected and qualified, the deputies of Compher might we think discharge the duties of the office. The fact that the sheriff had absconded, had not been judicially determined, nor had a successor been elected and qualified, and persons having process could not certainly know the fact, and to hold that he had absconded, that the deputies ceased to have power to act when he absconded, would render all their acts void, from the time he left the county. They were officers *de facto* and while acting as such, their official acts will not be inquired into in a collateral proceeding, and all their acts must be held to be binding until the office of their principal was vacated by a direct proceeding.

This disposes of the assignment of errors presented by both the complainant and defendants, and no error is perceived requiring a reversal of the decree of the Circuit Court, which is affirmed, and that complainant have sixty days from the date of the affirmance of the decree to comply with its terms, and perform its requirements.

Decree affirmed.

James Van Blaricum *et al.*, Plaintiffs in Error, *v.* The People, Defendants in Error.

ERROR TO RECORDER'S COURT OF THE CITY OF CHICAGO.

The Supreme Court will not inquire into the reasons why the legislature requires certain conditions in a recognizance.

This was a proceeding by *scire facias* to recover judgment against bail, impleaded with the principal, in Recorder's Court of Chicago.

On February 7, A. D. 1855, the grand jury of said court returned a bill of indictment against George Van Blaricum for the crime of larceny.

Van Blaricum was tried, found guilty, and sentenced for the larceny aforesaid.

He then sued out a writ of error to said Recorder's Court, upon the said judgment of conviction, and obtained a *supersedeas* upon condition that he execute a supersedeas bond, which he accordingly did, in the words and figures following, to wit:

"Be it remembered, that on the 8th day of March, 1855, George Van Blaricum, *alias* George Bancroft, resident of Indianapolis, State of Indiana, but now in the penitentiary of the State of Illinois, in Madison county, James Van Blaricum, of Indianapolis aforesaid, and Floyd Higgins, of Cook county, Illinois, severally acknowledged themselves to owe to the People of the State of Illinois, the sum of twenty-five hundred dollars, lawful money, to be made and levied of their several goods, chattels, lands and tenements respectively, if the said George Van Blaricum fail in the condition following, that is to say: The condition of the above obligation is such, that whereas the said George Van Blaricum, *alias* George Bancroft, was, on the 22nd day of February, A. D. 1855, convicted by the Recorder's Court of the city of Chicago, of the crime of larceny, and sentenced to imprisonment in the penitentiary of the State of Illinois for the period of four years from and after his delivery to the warden of said penitentiary; and whereas the said George Van Blaricum, *alias* George Bancroft, hath sued out a writ of error to reverse said judgment of conviction, from the Supreme Court of the third grand division of said State, and whereas the Hon. John D. Caton, one of the Justices of the said Supreme Court, on an inspection of the record of said conviction, hath ordered that the said writ of error operate as a supersedeas of the judgment aforesaid, and that the said George Van Blaricum, *alias* George Bancroft, be discharged from custody under said judgment of conviction, upon condition that he execute a recognizance, with James Van Blaricum and Floyd Higgins as sureties, conditioned according to the one hundred and thirty-ninth section of the 30th chapter of the Revised Statutes of the State of Illinois, entitled 'Criminal Jurisprudence,' approved March 3rd, 1845. Now if the said George Van Blaricum, *alias* George Bancroft, shall be and appear before the Supreme Court of the State of Illinois for the third grand division, to be held at Ottawa on the second Monday of June next, and submit to such order as the court may make in the premises; and further, that he will be and appear at the next term of the Recorder's Court, at the court house in the city of Chicago, Cook county, Illinois, on the first Monday of April next, and at each subsequent term thereof, on the first days thereof, until the determination of said writ of error, and shall not depart either of the said courts at any of

the terms aforesaid, without the leave of the said courts respectively, and shall submit to such judgment as may be rendered in the premises, then this recognizance to be void, otherwise in full force.

Witness our hands and seals this 8th March, 1855.

Entered into and approved before me, this 9th day of March, A. D. 1855.
JOHN R. SWAIN,
Sheriff Madison County, Ill.

Which bond was filed in the clerk's office of said Recorder's Court.

The following forfeiture was entered upon the said supersedeas bond:

THE PEOPLE, ETC.,
vs.
GEORGE E. VAN BLARICUM,
Impleaded with EDWARD POWERS.
} *Indictment for Larceny.*

This day came the said People by Daniel McIlroy, Esq., State's Attorney, and the said defendant being three times solemnly called, comes not, nor any one for him, but herein makes default; and James Van Blaricum and Floyd Higgins, securities of the said George E. Van Blaricum, being three times solemnly called, and demanded to produce the body of the said George E. Van Blaricum, but failing herein,

It is ordered by the court, that the default of the said defendant, and his securities, be entered of record, and that the said recognizance be taken and declared as forfeited, and that a *scire facias* issue, returnable to the next term of this court, requiring the said defendant and his securities then and there to appear and show cause why the said People should not have execution of said recognizance, according to the force and effect thereof. It is also ordered by the court, that a *capias* issue for the bodies of the said defendant and his securities, returnable to the next term of this court.

On May 1st, 1855, the *scire facias* was issued in said cause in these words:

STATE OF ILLINOIS,
COUNTY OF COOK,
City of Chicago.

The People of the State of Illinois to the Sheriff of Cook County, GREETING:

Whereas, on the ninth day of March, A. D. 1855, George E. Van Blaricum, James Van Blaricum and Floyd Higgins, by J. B. Underwood, his attorney in fact, appeared before John R. Swain, sheriff of Madison county, State of Illinois, and entered into a recognizance in the words and figures as follows, to wit: Be it remembered that on the 8th day of March, 1855, George Van Blaricum, *alias* George Bancroft, resident of Indianapolis, State of Indiana, but now in the penitentiary of the State of Illinois, in Madison county, James Van Blaricum, of Indianapolis aforesaid, and Floyd Higgins, of Cook county, Illinois, severally acknowledged them-

selves to owe to the People of the State of Illinois, the sum of twenty-five hundred dollars, lawful money, to be made and levied of their several goods, chattels, lands and tenements respectively, if the said George Van Blaricum fail in the condition following, that is to say: The condition of the above obligation is such, that whereas the said George Van Blaricum, *alias* George Bancroft, was, on the 22nd day of February, A. D. 1855, convicted by the Recorder's Court of the city of Chicago, of the crime of larceny, and sentenced to imprisonment in the penitentiary of the State of Illinois for the period of four years from and after his delivery to the Warden of said penitentiary; and whereas the said George Van Blaricum, *alias* George Bancroft, hath sued out a writ of error to reverse said judgment of conviction, from the Supreme Court of the third grand division of said State, and whereas the Hon. John D. Caton, one of the Justices of the said Supreme Court, on an inspection of the record of said conviction, hath ordered that the said writ of error operate as a supersedeas of the judgment aforesaid, and that the said George Van Blaricum, *alias* George Bancroft, be discharged from custody under said judgment of conviction, upon condition that he execute a recognizance, with James Van Blaricum and Floyd Higgins as sureties, conditioned according to the one hundred and thirty-ninth section of the 30th chapter of the Revised Statutes of the State of Illinois, entitled "Criminal Jurisprudence," approved March 3rd, 1845. Now if the said George Van Blaricum, *alias* George Bancroft, shall be and appear before the Supreme Court of the State of Illinois for the third grand division, to be held at Ottawa on the second Monday of June next, and submit to such order as the court may make in the premises; and further, that he will be and appear at the next term of the Recorder's Court, at the court house in the city of Chicago, Cook county, Illinois, on the 1st Monday of April next, and at each subsequent term thereof, on the first days thereof, until the determination of said writ of error, and shall not depart either of the said courts at any of the terms aforesaid, without the leave of the said courts respectively, and shall submit to such judgment as may be rendered in the premises, then this recognizance to be void, otherwise in full force.

Witness our hands and seals this 8th March, 1855.

GEORGE E. VAN BLARICUM. [SEAL.]
JAMES VAN BLARICUM. [SEAL.]
FLOYD HIGGINS. [SEAL.]

Entered into and approved before me, this 9th day of March, A. D. 1855.

JOHN R. SWAIN,
Sheriff Madison County, Illinois.

Which said recognizance was duly filed in the office of the clerk of the Recorder's Court of the city of Chicago, on the 12th day of March, A. D. 1855.

And whereas, at the April term of said Recorder's Court of the city of Chicago, begun and held at the court house on the first Monday of April, A. D. 1855, in the city of Chicago, in said county of Cook, the said George E. Van Blaricum being three times solemnly called to answer, according to the tenor of said recognizance, came not, nor any one for him, but herein failed and made default; and the said James Van Blaricum and Floyd Higgins being three times solemnly demanded that they bring the body of the said George E. Van Blaricum into court,

or that their said recognizance would be declared forfeited, came not, nor any one for them, nor did they produce the body of the said George E. Van Blaricum, but made default herein, which was taken and entered of record against the said George E. Van Blaricum, and James Van Blaricum, and Floyd Higgins, and their recognizances declared forfeited. Now therefore, we command you that you summon the said George E. Van Blaricum, James Van Blaricum, impleaded with Floyd Higgins, if they shall be found in your county, personally to be and appear before the Recorder's Court of the city of Chicago, in the county of Cook and State of Illinois, aforesaid, on the first day of the next term thereof, to be holden at the court house, in said Chicago, on the first Monday of August next, then and there to show cause, if any they have or can show, why the forfeiture aforesaid should not be made absolute, and the People of the State of Illinois have execution to make the amount of the same, according to the force, form and effect of the said recognizance. And have you then and there this writ, with an endorsement thereon in what manner you have executed the same.

Witness, Philip A. Hoyne, clerk of our said court, and the [SEAL.] seal thereof, at Chicago, this first day of May, A. D. 1855.

P. A. HOYNE, *Clerk.*

Upon which *scire facias* is the following return:

"Served this writ on the within named Floyd Higgins, by reading to him, this 3rd day of May, 1855. The within named George E. Van Blaricum and James Van Blaricum are not to be found in my county.

JAMES ANDREW, *Sheriff.*
By F. E. BUCKLEY, *Deputy.*"

That on July 16th, 1855, an alias *scire facias* issued in said cause, which is in all respects like the original. To this *alias* the following return was made:

"The within named George E. Van Blaricum and James Van Blaricum not found in my county, this the 4th day of August, 1855.

JAMES ANDREW, *Sheriff,*
By T. M. BRADLEY, *Deputy.*"

On December 1st, 1855, a judgment was rendered upon said *scire facias.*

The following are the errors assigned:

1. Supersedeas bond void.
2. No legal forfeiture of said bond.
3. The said writs of *scire facias* are void.
4. The court erred in entering up judgment against the said Van Blaricum alone.

5. The court erred in awarding execution against the said Higgins alone.

6. The said Higgins is no party to the said writs of *scire facias*.

7. General assignment.

R. S. Blackwell, for Plaintiffs in Error.

C. Haven, District Attorney, for the People.

Breese, J. We see nothing substantially defective in the process or proceedings in this cause. The recognizance entered into by the parties defendants, was in pursuance of the statute, and the forfeiture entered up by the court, was in pursuance of the recognizance, and the *scire facias*, service and return thereof, in conformity to law in such cases.

It is not for the court to inquire why the statute required such a condition of the recognizance, as the appearance of the party, it is sufficient to know that it did require it, and the party by not performing it is clearly in default. We see no error in the record, and affirm the judgment.

Judgment affirmed.

George G. Sutherland *et al.*, Appellants, *v.* Anson Phelps, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

A declaration upon an appeal bond is sufficient, which avers that the appeal was not prosecuted, and that the judgment appealed from was not paid, and that the judgment was affirmed. It need not be averred that the order dismissing the appeal was filed in the court from which it was taken.

The dismissal of an appeal is equivalent to an affirmance of the judgment.

An averment that the judgment appealed from was final, or that the judge of the court from whence the appeal was taken approved the bond, is unnecessary.

This was an action on an appeal bond. The declaration recites the condition of the bond, and avers that the appeal was dismissed, that the judgment was affirmed, and that the same was remitted by the Supreme Court to the Cook County Court of Common Pleas; that execution was issued, etc.

The defendants below filed a demurrer to this declaration, assigning as special causes, that the declaration only assigns as a breach, that appellants "did not prosecute the said appeal;"

that the condition set forth in the declaration is not alleged to be the condition of the bond; that a sufficient breach was not averred; that an affirmance of the judgment was not averred, etc., etc.

The court below overruled this demurrer, and rendered judgment for plaintiff below, on the declaration.

The defendants below appealed.

R. F. Winslow, and E. Anthony, for Appellants.

E. A. and J. Van Buren, for Appellee.

Breese, J. We find nothing on the record of any assignment of errors in this case, except the general error, that judgment was rendered in favor of the plaintiff below, when it should have been rendered for the defendants.

To determine this, we have only to look to the declaration and the proceedings upon it, in the court below. The declaration was in debt on an appeal bond, and on demurrer thereto, it was assigned as cause of demurrer, that the only breaches of the condition of the bond are, that the obligors did not prosecute the appeal.

By reference to the declaration, and the breaches assigned, it will be seen that there is an express averment, that the defendants did not prosecute the appeal, but that "they have not paid the judgment so appealed, and referred to in said bond."

A traverse of these allegations, so far from presenting an immaterial issue as urged by appellants, would present the very marrow of the case, and if maintained by appellants, would discharge them.

The second, third, fourth and fifth causes of demurrer, are equally groundless. The declaration does aver that the condition set forth in the declaration, is the condition of the bond, and avers a sufficient breach; that the appeal was not prosecuted but dismissed, and the judgment not paid, and it is distinctly averred that the judgment of the Common Pleas was affirmed, by the allegation that the judgment of the plaintiff was affirmed, which by reference to the preceding allegations in the declaration is sufficiently certain, that the judgment obtained by the plaintiffs in the Common Pleas as set out in the declaration, was the judgment meant. "That is certain which can be rendered certain," by a mere reference. It is not necessary, it should be averred in such a declaration, that the order of the Supreme Court dismissing an appeal, was filed in the court from which the appeal was taken. An averment that such order was remitted to that court, is sufficient.

As to the objection that the declaration contains inconsistent allegations in this, that it is stated that the appeal referred to in the declaration and in the condition of the bond was dismissed, and it is also stated that the judgment of the Court of Common Pleas was affirmed.

There is no inconsistency in this. This court has said, in the case of *Mc Connel* v. *Swailes*, 2 Scam. R. 572, that the dismissal of an appeal is equivalent to a regular, technical affirmance of the judgment appealed from, so as to entitle the party to claim a forfeiture of the bond and have his action therefor.

As to the objection that it is not averred in the declaration, that "the judgment appealed from was a final judgment," we can only say, we regard such an objection as frivolous, since it is only from final judgments or decrees an appeal can be taken.

And so of the last objection, that it is not averred that the bond declared on was approved by the court. This was wholly unnecessary, for whether approved or not the obligors are liable, and we would intend it was approved, if necessary to sustain the judgment. We are inclined to think these objections, so groundless as they are, were made rather with a view to avoid the damages consequent of a dismissal of the appeal, than on any confidence in their soundness.

We affirm the judgment, and may in a like case, hereafter, assess damages, as in case of a delay appeal.

Judgment affirmed.

William M. Dodge, Administrator of William Doherty, Plaintiff in Error, *v.* Jacob Mack, Defendant in Error.

ERROR TO PEORIA.

The death of a defendant in execution, after its delivery to the sheriff, but before a levy under it by him, will not prevent that officer from proceeding to levy and sell.

This was a judgment by confession, upon a cognovit in vacation, December 22nd, 1858, on note for $173.69, dated November 11th, 1858, due at forty days, with exchange on New York, and ten per cent. interest.

Upon this judgment, execution was issued and placed in the hands of the sheriff.

A motion was filed March 29, 1859, to stay proceedings, set aside levy, etc., for the following reasons, to wit:

1. There is no legal judgment to warrant the execution.

2. William Doherty departed this life before any levy had been made.

3. The goods, chattels and property levied, were in the actual possession of the administrator, peacefully acquired before and at the time of the making of the levy.

4. The pleadings, record and proceedings are otherwise irregular and contrary to law, as appears by the same, and the affidavit filed, etc.

Profert was made of the letters of administration.

There was an affidavit of Wm. M. Dodge, plaintiff in error, showing that execution issued December 22nd, 1858, which was delivered to the sheriff on the next day, the 23rd.

That no levy was made during the life of the defendant.

That defendant died March 10th, 1859.

That sheriff went to defendant's store on the 14th March, 1859, and demanded possession, of the clerks, which was refused, and no levy made.

That affiant was appointed administrator March 19, 1859, and took actual and peaceful possession of the property in question.

That on March 21, 1859, the sheriff broke the outer door of the store, and seized and removed a portion of the goods.

The affidavit of John Bryner, the sheriff, was filed, stating that the facts stated in Dodge's affidavit are substantially true.

That the clerks claimed no personal interest in the goods.

That affiant offered to appoint one of the clerks custodian, but they refused.

That he ordered said clerks out of the store, but they refused to go.

That said clerks said that he, the sheriff, could have ingress and egress at his pleasure.

That after that day the store was kept closed and locked.

That he indorsed a levy on the 14th of March, and "*considered himself* as having a right to enter and take away the goods at any time thereafter."

On March 30, 1859, the motion to stay proceedings, set aside levy, etc., was overruled by POWELL, Judge.

The errors assigned are as follows:

1. There is no legal judgment to warrant the issuing of the writ of execution.

2. The levy mentioned in said proceedings is illegal and void.

3. The property seized by the sheriff was the property of the administrator at the time it was taken, and so not subject to any execution against said William Doherty.

4. The court below erred in overruling the motion to stay proceedings and set aside the levy.

5. The record and proceedings aforesaid are otherwise irregular and contrary to the law of the land.

Charles C. Bonney, for Plaintiff in Error.

Bryan & Stone, for Defendant in Error.

Walker, J. At common law, goods and chattels were bound from the teste of the writ of *fieri facias*, but by our statute they are only bound from the delivery of the writ to the sheriff. The question presented by this record is, whether the death of the defendant in execution, after such delivery, and before a levy, will prevent a levy and sale on the execution. In England, and many of the States of the Union, debts due by judgment, bond, or evidenced by a writing under seal, are regarded as of a higher dignity, than debts due by simple contract, and are given a preference in payment out of the estate of the deceased, over claims due by simple contract. While under our statute of Wills, no such distinction is made on account of the form of the evidence of indebtedness. It is true that our statute has divided them into classes, but bases the classification on different grounds. The 115 section of the statute of Wills, divides all demands against the estate of deceased persons into four classes: "*First*, All funeral and other expenses attending the last sickness, shall compose the first class. *Second*, All expense of proving the will, and taking out letters testamentary, or of administration, and settlement of the estate, and the physician's bill in the last illness of the deceased, shall compose the second class. *Third*, When any executor, administrator or guardian, has received money as such, his executor or administrator shall pay out of his estate, the amount thus received and not accounted for, which shall compose the third class. *Fourth*, All other debts and demands of whatever kind, without regard to quality or dignity, which shall be exhibited within two years from the granting of letters as aforesaid, shall compose the fourth and last class." Thus it will be seen that whether a debt be due by judgment, bond, or simple contract, if resort is had to the mode prescribed by this statute for its payment, no preference is given. Yet that there are cases where the debt may be collected without filing the claim, and sharing in the distribution of the assets, is undoubtedly true. As where the creditor holds a mortgage on property of deceased, or where property has been pledged to secure the payment of the debt, or where there has been a recovery and an execution issued and levied in the life-

time of the deceased, in each of these cases, the property thus bound may be sold after the debtor's decease, in satisfaction of the debt. In each of these cases the creditor has acquired a lien, and the specific property has been appropriated either by the debtor, or by the law, for its satisfaction, and the death of the debtor can in nowise affect the rights of the creditor. Then does the lien acquired by a delivery of the *fieri facias* to the officer, bind the property at all events, or only upon the condition that a levy is made in the lifetime of the defendant?

The 8th sect., chap. 57, R. S. 1845, provides that no execution shall bind the goods and chattels of any person, against whom such writ shall issue, until it shall be delivered to the sheriff, or other officer, to be executed, and this section is a transcript of the 16th sec., 29 Car. 2, ch. 3, and under that statute the decisions of the English courts have been uniform, that, when execution has been delivered to the sheriff in the lifetime of the defendant, the officer may proceed to levy and satisfaction although the defendant may have died before any other steps were taken. *Parsons* v. *Gill*, 1 Ld. Ray. 965; *Odes* v. *Woodward*, 2 ib. 850; *Robinson* v. *Yonge*, 3 P. Wm's. 398; *Lord Kinnaird* v. *Lyall*, 7 *East*, 296; *Bragner* v. *Langmead*, 7 T. R. 20; 2 Bac. Abr., title Execution, C. 4. The construction given to the 29 Charles the 2d, is that the provision was intended to protect purchases, but in no way affected the rights of the parties to the judgment. And this was the obvious intention of the legislature in adopting the 8th section of the 57th chapter of the Revised Statutes. The lien created by the first section of that statute, on real estate, by the 37th section of the same chapter is not destroyed, but is only suspended, by the death of the defendant, for one year, when a sale may be had by giving notice to the executor or administrator in the manner prescribed.

The issuing of an execution and placing it in the hands of the proper officer, by which the lien on the property subject to execution is perfected, is the commencement of execution, which being an entire thing, may be completed by levy and sale after the defendant's death. And while it is true, that the executor or administrator takes the property as such, by grant of letters, it is subject to liens and in the same situation in which it was held by his testator or intestate. If it is incumbered by chattel mortgage, a pledge or other lien, he takes the title subject to such burthens. The death of the debtor does not discharge the lien. If a levy or sale were made before the death of the defendant, it will be conceded, that, the death of the defendant would not stop the officer from making a sale on the levy, or paying over the money realized on the sale, and yet the title to the property in the one case, or the money in the other, would

not be vested in the plaintiff. The title in the property or the money would vest in the executor or administrator by grant of letters, but it would be subject to the payment of the debt for which it had been levied. It would be in the custody of the law, until sold, and the money paid over, and the personal representative would be entitled to any balance. And as the lien had as fully attached under the execution, as if a levy had been made, or a mortgage given, or a pledge perfected, no reason is perceived why the 115th section of the statute of Wills should destroy this lien, and require the judgment to be satisfied out of the assets as other debts, any more than it does these other liens. And we cannot see why, if this lien created by a delivery of execution to the officer, is held to have been destroyed by the defendant's death, as being within the statute of Wills, that the same should not be held of all mortgage and other specific liens of every description, which would be manifestly against the legislative intention. That act undoubtedly did intend to prevent preferences of any other kind than those therein specified, if the creditor resorted to the probate court, for a satisfaction of his debt. That court could not regard such lien, but could only direct the payment as that of any other claim, falling within the same class, and the claimant would have to look to his other securities, to acquire a preference. The law favors the vigilant, and will not postpone the prior in right, even to a superior equity. But in this case, it is a question between the judgment creditor, and the administrator acting for the benefit of all the creditors and distributees, who have not a superior equity, and are subsequent in right, and have no right to defeat this creditor or even to postpone his remedy.

We are for these reasons, of the opinion that the levy of the execution on these goods was regular, and that the court below committed no error in refusing to quash the execution and levy, and that the judgment must be affirmed.

Judgment affirmed.

Paul Riley, Appellant, *v.* Andrew Loughrey, Administrator of the Estate of Mary Loughrey, Appellee.

APPEAL FROM BUREAU.

It is no defense to an action on a note, that it was given to the payee in lieu of three other notes, given to the husband of the payee. The widow might be acting as executrix, in her own wrong, or might be the heir; in either case the notes surrendered would be satisfied.

When there are several counts in a declaration, and a special plea with the plea of *nil debet*, it is error on overruling a demurrer to the special plea, to proceed to render judgment upon the cause of action.

This was an action of debt, commenced by appellee against appellant, in the Circuit Court of Bureau county, to the January term, 1858.

Appellee filed his declaration in the case, containing three special counts, and the common counts.

The special counts are on a sealed note, alleged to have been given by the appellant to Mary Loughrey, the intestate, on the 16th of February, 1852, for $184.18, with interest at ten per cent. from date.

The common counts are for money had and received, etc., to the use of Mary Loughrey, the intestate; and declaration concludes with averments of the issuing of letters of administration on Mary Loughrey's estate to the plaintiff.

Defendant filed four pleas with notice of set-off, to wit: First, *nil debet*, and three special pleas.

The plaintiff demurred to all the pleas, and the court sustained the demurrer to the special pleas, and the defendant asked and obtained leave to file amended pleas, and at the September term, 1858, he filed an amended special plea to the first, second and third counts of the declaration, alleging that the notes mentioned in said counts were one and the same, and that the note was given without any valid consideration whatever; that the note was given under the following circumstances: that in 1848 defendant gave his three several notes to one Loughrey, husband of the said Mary Loughrey, which amounted to $300; that said notes were given for a valuable consideration, and remained in the hands of the said Loughrey, as his property, from the time the same were given, until his (L.'s) death, which occurred in 1853; that no letters of administration or testamentary were ever issued upon the estate of said Loughrey, and that after his death, the notes came to the hands of said Mary Loughrey, without any legal right or title to the same; and that while said notes were so wrongfully in the hands of said Mary, she having no title to the same, the defendant renewed said notes, and attempted to cancel the same by giving to the plaintiff the note sued on, in lieu of said three old notes; that the consideration of said notes sued on, in the declaration, was the said three notes, made to said Loughrey, and no other consideration; and that defendant is still liable for the amount of said three notes to the representatives of said Loughrey's estate, and that said Mary Loughrey, of whose estate plaintiff is administrator, had no legal right to cancel the old notes above mentioned, and de-

fendant is still liable to pay the amount of said old notes to the legal representatives of said Loughrey, deceased, etc.

To this plea plaintiff filed a demurrer, assigning as a special cause that it stated conclusions of law and not facts. The court sustained the demurrer, and the defendant abided by his plea, and withdrew his plea of the general issue, and notice of set-off. The court, without the intervention of a jury, and without any order to the clerk to assess, and without the cause having been submitted to the court, or a jury waived, considered that plaintiff ought to recover of defendant $184.18, debt, and $121.24, damages, for the detention of the same, and rendered judgment against defendant for $184.18, debt, and $121.24, damages and for costs.

The defendant prayed an appeal, which was allowed.

The errors assigned are as follows:

1st. The court below erred in sustaining the demurrer to appellant's amended plea.

2nd. The court below erred in rendering judgment without the intervention of a jury, and without an order to the clerk to assess.

3rd. The court erred in rendering said judgment in manner aforesaid.

W. H. L. Wallace, for Appellant.

Peters & Farwell, for Appellee.

Breese, J. The amended special plea sets up no legal defense to the action on the note, even if it was well pleaded. A surrender by the widow of the payee of the notes, and taking the note sued on to herself, would be good and binding on the appellant for *quo ad hoc*, she may be regarded as an executrix *de son tort*. Whatever is honestly done by one acting in that character, and not contrary to law, is binding between the parties. A settlement made in good faith with such an executor is valid. Bacon's Abr., Executors and Administrators, 27; *Hawkins* v. *Johnson*, 4 Blackf. 21.

But there is another ground on which her title may be based. The plea does not allege there were any children of the marriage, or creditors, and we will intend therefore, there were none. The widow then, is the heir to all the personal estate of the intestate, choses in action included. Being such statutory heir, her right to the notes is unquestioned, and her surrender of them and taking the note sued on in place of them, cannot be disputed.

There being other counts in the declaration besides the special count on the note, and the plea of *nil debet* having been pleaded,

it was error for the court on overruling the demurrer to the special plea, to give judgment in chief, and assess the damages. The issue presented by the plea, should have been tried by a jury, and the damages assessed by them.

For this error the judgment is reversed and the cause remanded for further proceedings, in conformity to this opinion.

Judgment reversed.

James W. Garfield, Appellant, *v.* John G. Douglass, Appellee.

APPEAL FROM LA SALLE.

The entry of a justice of the peace, in his docket, cannot be controverted by parol testimony; the record is more trustworthy than parol testimony.

If the justice acts corruptly, he can be made to answer, criminally and civilly.

This suit was commenced before a justice of the peace. The plaintiff's cause of action was the following note:

"$100. *La Salle, June 14th,* 1854.

Eight months after date I promise to pay to the order of John Coles, one hundred dollars, without defalcation, for value received, at the Bank of Heman Baldwin.

J. W. GARFIELD."

The note was endorsed to plaintiff. Garfield denied the execution of the note, by plea in writing, under oath, and also insisted that a former suit tried before that time, between same parties, was a bar to this suit. The justice decided in favor of Garfield, and Douglass appealed to the Circuit Court.

Defendant gave in evidence a transcript from the docket of Edwin R. Moffatt, police magistrate of the city of La Salle, in said county, which was as follows:

"John G. Douglass
vs.
James W. Garfield. } Nov. 25th, 1855. Summons issued to Robert B. Cogswell, returnable on the 8th day of December, 1855, at 1 o'clock, P. M. Demand, $100; M. Neustall, security for costs. Summons returned, served by reading to the within named defendant, this 30th day of November, 1855. R. B. Cogswell, const. December 8th, 1855. Suit called; parties appear; plaintiff declared on note of hand, claimed to have been given by defendant to John Cole, dated June 14th, 1854,

and assigned to plaintiff. Defendant made oath, by affidavit, that he did not execute said note, and it appeared in court that the note had been altered. Plaintiff failed to substantiate the contrary. Judgment for defendant is therefore rendered for costs."

Which transcript was certified by the magistrate in due form. The plaintiff's counsel admitted that the note mentioned in said transcript, is the note which has been given in evidence in this suit.

The plaintiff then offered in evidence, a statement of *D. P. Jenkins*, which was as follows; which statement it was agreed should be evidence:

The facts of this cause, so far as I know them, are as follows: On the trial of the first cause between the parties, I acted as attorney for the plaintiff, and brought suit on a promissory note. Defendant, Garfield, appeared and plead *non est factum*. Issue taken on that, and trial had. After hearing the evidence, the court (being E. R. Moffatt, police magistrate of the city of La Salle,) intimated an opinion, or expressed an opinion, in favor of the defendant. Thereupon, as attorney for the plaintiff, I asked for a non-suit, to the granting of which the defendant, by his attorneys, objected, on the ground that it was too late, and after some little discussion, I left, and before any final opinion was announced. Some time after that, I was requested to go to Esq. Moffatt's office, to see what the trouble was about the plaintiff getting an appeal, and I went over and found an appeal bond ready, and understood the objection to receiving it was, that it had not been offered in twenty days. I thereupon examined the docket, and found the twenty days had expired, the judgment having been rendered on or about the 8th day of December, 1855, and it was then about the 1st of January, 1856. I then informed Morris Neustall, the party that was offering to file said appeal bond, that it was of no importance, or something to this effect, as there was a non-suit rendered, and that suit could be brought again on the same note. I had just then examined the docket of the said justice, and found that a non-suit had been entered some few days thereafter. I commenced, or caused to be commenced, another suit on said note, before Nicholas Duncan, another justice of the peace, in La Salle; and when I was in attendance at Duncan's office, to try said cause, was the next time I saw the cause on the docket of the said E. R. Moffatt, and looking it over, I found the words non-suit had been erased, and the word defendant inserted instead, and perhaps the words for costs added, but I am not sure; and on trial the said Duncan decided it was not competent for plaintiff to prove the alteration aforesaid, and found in favor of defendant,

from which an appeal was taken, and is the same cause now pending at term of the La Salle Circuit Court, June 11th, 1857.

To the introduction of which testimony the defendant objected; the court overruled the objection, and permitted the paper to be offered in evidence, to which decision the defendant then and there excepted.

Among the errors assigned was the following:

The court erred in admitting the statement of D. P. Jenkins, as evidence.

GLOVER & COOK, for Appellant.

D. L. HOUGH, for Appellee.

CATON, C. J. The entry upon the justice's docket was a judgment in bar; and the policy of the law forbids that parol proof should be admitted to show, that the justice originally entered a judgment of non-suit and afterwards changed it, to a judgment in bar. The record or entry of the justice, is higher and more trust-worthy than any parol evidence can be. If one record is open to be questioned by parol evidence then another must be, and all security and confidence in the stability of records are gone. If the justice corruptly, or from improper motives, changed the original entry made by him, he may be prosecuted both civilly and criminally, but the record must stand as the solemn truth, attesting beyond controversy what the judgment was, which the justice pronounced.

This is not like the case supposed, of an alteration made by another. That would be a forgery and not a record at all, and might be shown as well of a record in this court, as of that. The parol evidence was improperly admitted; for which reason, the judgment must be reversed, and the cause remanded.

Judgment reversed.

LUCIUS L. DAY, impleaded with Larkin B. Day and James T. Robinson, Appellant, *v.* HUGH GELSTON, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

If a party relies upon the promise of a witness to be present at a trial, he cannot obtain a continuance if the witness does not attend.

If three parties are served with process, and only one appears and pleads, the others being in default, on a judgment being entered against the party pleading, if he appeals, it is no defense to either of the others that such appeal is pending; that fact does not deprive the Circuit Court of jurisdiction as to the other defendants. In such a case a *scire facias* need not be issued against the parties in default; proceedings can be had against them upon the process of summons already served.

GELSTON filed his declaration in Peoria County Court against Lucius L. Day, Larkin B. Day and James T. Robinson.

The declaration has one count, on a note dated November 25, 1856, for $1,281.90 at twelve months.

Appellant filed three pleas.

1. General issue.
2. Payment.
3. That the note sued on was given for carpets, which at the time were represented and warranted, by appellee, to be sound and in good order, perfect in style and pattern; and that appellant relied on the warranty, and was thereby induced to purchase the carpets. That the carpets were unsound and rotten, damaged, torn, soiled, injured and imperfect in style and pattern, by which appellant sustained damages to the amount of $1,000, which he offered to off-set, etc.

Issue was joined on the first and second pleas.

To the third plea, appellant replied that he did not make any false, fraudulent or deceitful representations, and did not represent the carpets to be sound and in good order, or perfect in style and pattern.

The second replication to the third plea was withdrawn.

At the June term, 1858, the cause was continued by agreement of the parties.

At the July term, 1858, Larkin B. Day moved for a continuance, and filed his affidavit in support of the motion. The affidavit was as follows:

L. B. Day, on oath says, that he cannot safely proceed to trial at this term of this court, on account of absence of H. C. Willard, who is a material witness for him; that he expects to prove by said witness that the carpets mentioned in the pleas were not perfect in pattern, etc.

He further states that said witness is a resident of this city, and promised deponent to attend this court as a witness, and deponent relied on said promise, and did not cause him to be summoned; that he has no other witness by which he can so fully prove the same fact. That some few days since said witness left the city of Peoria unexpectedly to deponent, and before deponent had any knowledge of such intention on the part of witness, and before deponent had a summons issued. That deponent is informed and believes said witness is only

temporarily absent, and will return in time to attend at next term of this court, etc.

The court overruled the motion, and defendant excepted.

The court then called the case for trial, and a jury being waived, the court found for the plaintiff below, and rendered judgment against Lucius L. Day, alone, for $551.95; and he excepted.

Lucius L. Day entered a motion for a new trial, which was overruled. He then prayed an appeal, and filed bond. On the 26th day of July, 1858, a *scire facias* issued for Larkin B. Day and James T. Robinson, and returned served July 29, 1858.

Larkin B. Day and James T. Robinson filed two pleas.

1. That they ought not to be made parties to said judgment against Lucius L. Day, because said judgment is appealed from and is pending in the Supreme Court.

2. That they are not indebted to said Gelston.

The court sustained a demurrer to the first plea, and defendants excepted.

On a trial of the cause to the court, the plaintiff below offered in evidence the judgment against Lucius L. Day, and the note; the defendant excepted.

The court then ordered L. B. Day and Robinson to be made parties to the judgment, and the latter excepted.

Appellant now assigns the following errors on the record:

1. The court below erred in overruling the motion for a continuance.

2. The court below erred in rendering judgment against appellant without taking a default or dismissing the cause as to Larkin B. Day and Robinson.

3. The judgment was too much.

4. The court below erred in overruling a motion for a new trial.

5. The court below erred in sustaining the demurrer to the first plea of L. B. Day and Robinson.

6. The court below erred in rendering judgment against L. B. Day and Robinson.

7. The court below erred in not extending the demurrer back to the *scire facias*.

8. The court below admitted improper evidence on the part of the appellee.

H. Grove, for Appellant.

H. M. Wead, for Appellee.

Caton, C. J. L. B. Day, one of the defendants below, moved for a continuance of the cause on the ground that a material witness was absent who had promised to attend, but had not been subpœnaed. The court overruled the motion, and we think properly. If a party chooses to take the promise of a witness that he will attend, and on that account neglects to subpœna him, he has no right to ask a continuance on account of his non-attendance. If he will rely upon the promise, he must run the hazard of its being broken.

All three of the defendants were served with process. L. L. Day alone appeared and pleaded, and upon the trial the issues were found against him. By some omission no default was taken against the other defendants, and judgment was rendered against L. L. Day alone, who appealed that judgment to this court. A *scire facias* was then sued out to the next term of the Circuit Court against the other defendants, which was served and one of them appeared and filed two pleas, first, that L. L. Day had appealed the judgment against him to the Supreme Court where it was still pending, and second, non-assumpsit. To the first plea, a demurrer was sustained, and the issue on the second, was found for the plaintiff; whereupon the court made the two last defendants parties to the judgment, formerly rendered against L. L. Day. The demurrer was properly sustained to the first plea. The pendency of the appeal upon the judgment against L. L. Day, did not deprive the court below, of jurisdiction as to the other defendants. As to them, the cause was still undisposed of in the Circuit Court, and it stood continued under the general order, and it was unnecessary to have brought them in by *scire facias*. They were still in court, and at the next term it was the duty of the court to dispose of the case finally, either by defaulting them, or trying such pleas as they should present. We find no error in the record, and the judgment is affirmed.

Judgment affirmed.

The Chicago and Rock Island Railroad Company, Appellant, *v.* Warren W. Whipple, Appellee.

APPEAL FROM PEORIA.

In this State the common law writ of *certiorari* may issue to all inferior tribunals, where such tribunals proceed illegally, and there is no mode of appeal from such tribunals, or other way of reviewing their proceedings.

Chicago and Rock Island Railroad Co. *v.* Whipple.

On such a writ issues of fact are not to be tried; only by the record in return to the writ, are the questions of jurisdiction or regularity to be inquired into.

By certiorari the evidence taken in the inferior tribunal is not to be brought before the court, nor can it be shown.

The corporators of a railroad, are liable, if its lessees should commit a trespass. So if the road is operated by contractors, while constructing it.

The fact that a justice of the peace renders a judgment in debt, in an action of trespass, is no ground for a reversal—it is otherwise if rendered in the Circuit Court.

THIS suit was commenced in the Circuit Court of La Salle county, and by change of venue removed to Peoria county.

On the 11th December, 1856, the plaintiff filed a petition in the Circuit Court of La Salle county, for a common law writ of certiorari against the defendant, for the purpose of reviewing the decision and judgment of N. DUNCAN, a justice of the peace of said county, rendered in favor of the defendant against the plaintiff, on the 12th November, 1853, for $71.20 and costs.

The petition states, in substance, that the "Chicago and Rock Island Railroad Company," were duly organized under an act of 27th February, 1847, and an act of February 7th, 1851. That they, during the year 1853, were constructing and operating their said road by contractors.

That Whipple sued plaintiffs below before N. Duncan, a justice of the peace of La Salle county, in November, 1853. Upon the summons the constable returned, that he had served the same by leaving a copy with George H. Buck, an agent of said company, the president of said company not residing in his county, on the 7th November, 1853.

That the plaintiff's claim was for cattle killed upon the road before that time; that such action (trespass) would not lie against defendants in said suit, because they were not running, controling or managing the road, but the same was run, controled and managed by Farnham and Sheffield, contractors to build the same, for their own use and profit. That the justice had no jurisdiction of the subject matter of the suit, or person of the defendant; that the said petitioners, nor any one for them, appeared before the justice upon the day of trial, or any other time to answer to said suit; that Buck, on whom the process was served, was never their agent, and that there never was any service of process on petitioners, and they knew nothing of the suit until more than six months had elapsed after judgment was rendered against them, and not until they were again sued upon the same judgment about the middle of September, 1854. Petition further states that the judgment of the justice is unjust and erroneous, and prays for a writ of certiorari to bring up the record to review the proceedings, etc.

The petition is verified by affidavit.

Writ of certiorari was issued 27th December, 1856.

At the December term, A. D. 1857, the defendant moved to quash the writ of certiorari and dismiss this suit for the following reasons:

1. No common law writ of certiorari lies in such case.
2. The facts appearing on the face of the petition in said cause do not authorize the issuing of any such writ.
3. The transcript and papers on file show that the justice decided correctly in said cause.
4. By return of said justice it does not appear that said justice has committed any error in law.
5. The justice had jurisdiction, and did not proceed illegally, so that no such writ lies.

Upon the hearing of this motion, the defendant's counsel offered to prove that the Chicago and Rock Island Railroad Company was not in existence at the time of the rendition of said judgment in the court below, and that the said judgment and all costs had been fully paid, since the rendition of said judgment, and also that another suit had been brought on said judgment below, and a new judgment rendered upon the said judgment before A. Putnam, a justice of the peace of La Salle county, on the 30th September, 1854, for the amount of the said judgment and costs, by which subsequent judgment the defendant insisted the said original judgment had been fully satisfied, and merged in said subsequent judgment.

The court rejected the evidence offered, dismissed the writ of certiorari, and plaintiff excepted.

The errors assigned are, that:

1. The court erred in sustaining the motion to dismiss the writ of certiorari.
2. The court erred in rejecting the evidence offered by the plaintiff.
3. The court erred in not reversing the judgment of the justice of the peace, and in not rendering judgment for the appellant.

N. H. Purple, for Appellant.

D. L. Hough, for Appellee.

Walker, J. By the English practice after judgment has been rendered, by an inferior court, the common law writ of *certiorari* is allowed, for the purpose of ascertaining whether it appears from the record, that the inferior court had no jurisdiction, or has proceeded illegally in the cause. When it appears from the record returned into the superior court, that there was a want

of jurisdiction, or that the inferior court has proceeded contrary to law, the practice is to quash the judgment, but, in such cases it is not the practice to ascertain from extrinsic evidence whether the inferior court had jurisdiction or had proceeded contrary to law, but to determine these questions by the record. By the practice in this State, "the common law writ of *certiorari* may issue to all inferior tribunals and jurisdictions, in cases where they exceed their jurisdiction, and in cases where they proceed illegally, and there is no appeal or other mode given to directly review their proceedings. These are the only instances in which their proceedings can be reviewed on *certiorari*." *Doolittle* v. *Galena and Chicago Union Railroad Company*, 14 Ill. R. 381; *People* v. *Wilkinson*, 13 Ill. R. 660. The Circuit Court on the return of the record by the justice of the peace, had no power to form and try an issue of fact, in regard to the jurisdiction or regularity of the proceedings of the justice. Those questions could only be tried by the record. The court could not review the evidence heard by the justice nor inquire into the correctness of the decision on that evidence. It is no part of the office of a writ of *certiorari* to an inferior tribunal, to bring before the court from which the writ issued, the evidence heard in the court below, nor can the court receive testimony to show what that evidence was.

To hear such evidence, and reverse or affirm the judgment in this proceeding, would well nigh destroy the binding effect of all judgments of justices and inferior jurisdictions. Such a practice would tend to increase litigation, unsettle rights acquired under such judgments, and would virtually give an appeal in all cases, at any time within the period of the statute of limitations. No benefit could result, and interminable strife would be the inevitable consequence of such a practice, The Circuit Court we think did right in rejecting the evidence offered on the hearing of the motion to quash the writ of *certiorari*.

It was again urged that the appellants could not be held responsible for the injury complained of, because they allege that the company was not organized at that time. The petition on its face shows that they were then having their road constructed, and they cannot be heard to say that they were assuming rights and franchises under their charter, and yet insist that in their exercise they may exonerate themselves from liability for injuries inflicted upon others. By their own showing they were constructing this road, by persons with whom they had contracted for that purpose. And the fact that the road was then operated by these contractors can make no difference. These contractors derived all their authority from the company, and for their tortious acts while exercising the franchises granted to

the corporation by their charter, the company must be held responsible. *Chicago, St. Paul and Fond du Lac Railroad Company* v. *McCarthy*, 20 Ill. R. 385. Nor can the appellants insist that those operating the road were lessees, and that they are thereby released from liability for their wrongful acts, as the lessees occupy the relation of servants of the company, as to third persons. A railroad company cannot free themselves from liability by leasing their road to others. *Ohio and Mississippi Railroad Company* v. *Dunbar*, 20 Ill. R. 623. It then follows that the responsibility of the appellants was the same whether the road, at the time the injury was done, was being operated by themselves, their servants, agents, lessees, or the contractors for its construction. And if the record of the justice of the peace showed that the action was brought for a cause in which he had jurisdiction, then it would be error in the Circuit Court to quash the judgment. And from this record it appears that the action was brought for a trespass to personal property, and the statute expressly confers such jurisdiction upon justices of the peace.

The service of the process in this case was strictly in compliance with the requirements of the act of 8th February, 1853, (Sess. Laws, p. 258,) and is similar to the service in the case of these appellants against Mary Fell, *post*, decided at the present term of this court, in which the service was held to be sufficient. This objection is therefore not well taken.

The fact that the action was trespass and the judgment was in debt, while it is not strictly formal, is not ground for a reversal as has been repeatedly held by this court, where the action originated before a justice of the peace. Although it is otherwise in causes originating in the Circuit Court.

Upon the whole record in this case no error is perceived requiring the judgment of the Circuit Court to be reversed, and the same is therefore affirmed.

Judgment affirmed.

Henry Sidders, Appellant, *v.* Jacob Riley, Administrator of Andrew B. Hume, deceased, Appellee.

APPEAL FROM ROCK ISLAND.

It is competent for a party to show that the consideration expressed in a deed applied only to a part of the land described in it, the vendor not pretending to have a title to some of the land referred to in the deed.

Sidders *v.* Riley, Adm'r, etc.

This was an action of assumpsit commenced in Rock Island Circuit Court by said Sidders against said Riley as such administrator, on a promissory note for $750, given by said Hume to Sidders.

Declaration contains three counts: first two, charge defendant as administrator, and third, a promise to pay on his part.

The defendant filed several pleas, upon which issues were made up.

Defendant read in evidence the deed from Sidders and wife to Andrew B. Hume, and also the record and papers in the chancery suit referred to in the pleas, without objection, and rested.

Plaintiff then offered to prove that at the time plaintiff made said deed to Hume, he informed Hume that he had no title to the north half of said quarter section. Defendant objected. Court sustained objection, and plaintiff excepted.

Plaintiff then offered to prove that the note sued on was given for said south half and certain farm stock, goods and chattels, at the same time sold and delivered to Hume, and that the north half was no part of the consideration for the note. Defendant objected. Court sustained the objection, and plaintiff excepted.

Plaintiff then offered to prove that the $1,500 mentioned in the deed referred to in the pleas, was the consideration for the said south half, farm stock, goods and chattels, and that no value was put upon or price agreed to be paid for the north half. Defendant objected. Court sustained objection, and plaintiff excepted.

Plaintiff then offered to prove that, after said deed was signed and sealed, and before delivery thereof, it was agreed by the parties thereto, as a condition of the delivery, that the grantee should have no recourse, right or remedy, upon the covenants in said deed, except so far as they applied to the south half so conveyed. Defendant objected. Court sustained objection, and plaintiff excepted.

Jury found for plaintiff, $283.12.

Plaintiff moved for a new trial. Court overruled the motion, and plaintiff excepted.

The errors assigned are:

1st. Excluding the evidence offered by plaintiff below.

2nd. Overruling motion for new trial.

3rd. Verdict and judgment should have been for the plaintiff below, for the whole amount due on the note.

Leland & Leland, and E. R. Dean, for Appellant.

Glover & Cook, for Appellee.

BREESE, J. The rule contended for by the counsel for appellee cannot be denied, but its application to the present case may well be.

We do not understand the testimony offered by the plaintiff in its various phases as presented by him, contravened the rule that the terms of an instrument in writing cannot be varied by parol evidence.

It has been decided by this court, that it is competent for a party to show a different consideration from the one stated in the deed as between the parties to it, under peculiar circumstances. *Kinzie* v. *Penrose*, 2 Scam. R. 515. In that case the party was permitted to show that the consideration expressed in a deed for two lots of ground, was in reality, the consideration for one only.

So it is universally held, that a deed absolute on its face, may be shown by parol to have been intended as a mortgage.

All that the plaintiff proposed to prove was, that when defendant received the deed, it was with the express knowledge and understanding that the consideration of fifteen hundred dollars expressed in it applied only to the south half of the quarter section, the defendant well knowing at the time, that the plaintiff had no title to the north half and did not pretend to sell and convey any title to that half. The defendant accepted the deed with that understanding, and it is competent for the plaintiff to show this by parol.

In the case of *Allen*, *Adm'r*, v. *Lee*, 7 Indiana Rep., it was held that parol evidence may be given, not to contradict the terms of a written warranty, but to show that the property was taken by the purchaser subject to incumbrances which he knew to exist at the time of the purchase, though they were not mentioned in the deed, and there was a warranty against incumbrances. And so is the case of *Leland* v. *Stone*, 10 Mass. Those cases, in principle, do not differ in any essential particulars from this. The jury returned a verdict for the plaintiff for a part of his claim. It seems to us, if he was entitled to recover at all, he should recover the amount of the note and interest, if he makes out his case.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Abner B. Page, Appellant, *v.* Elijah Davidson, Appellee.

APPEAL FROM WARREN.

An executor, authorized to lease premises, who has no estate in the premises, cannot maintain an action for waste. Such action must be by a reversioner in fee.

An executor may maintain an action upon covenants in the lease, against committing waste.

This was an action of trespass on the case commenced on 4th March, 1857, by the appellee against the appellant in the Circuit Court of Warren county. The case was tried by a jury before Thompson, Judge. Judgment was rendered for the appellee for the sum of $84.50 and costs. The appellant brings the case to this court by appeal.

The declaration in the first six counts set out that the appellant was the tenant of the appellee, by virtue of a certain lease, which is set out *hæc verba* in the 4th count, as follows:

"Articles of agreement made and entered into on this seventh day of July, eighteen hundred and fifty-five, between Elijah Davidson, executor of the last will of Richard Ragland, deceased, and Abner B. Page, as follows, to wit: the said E. Davidson has this day leased to the said Page the farm on which the said Ragland resides, on the south-west quarter of section eighteen, in township number eleven north of the base line, of range one west of the fourth principal meridian, for the term of four years from the first day of March next, for the sum of two dollars per acre, to be paid on or before the first day of January of each year. The said A. B. Page is to have full possession of the house and out-buildings, together with all the improvements, and shall have liberty to use any down timber which is not suitable for saw timber or making rails, for fire wood, but shall not cut any green or standing timber for that purpose, but in case any repairs shall be necessary to be made, it shall be the duty of the said Page to inform the said Davidson, who will have the same made and paid for out of the rent. The said Page also agrees to pay all taxes or assessments which may at any time be levied on said land, either by the State of Illinois or the county of Warren, within the said term of four years from the said first day of March next, and to deliver to the said Davidson, or the person entitled to the peaceable possession, all said premises at the expiration of the said term of four years. In testimony whereof," etc.

That while the appellant was in possession of said premises, by virtue of the lease, as the tenant of the appellee, he cut down trees, tore down a hewed log barn and corn crib, and converted

them to his own use, thereby injuring the reversionary interest of the appellee in the leased premises.

The seventh count is an ordinary trover count for converting trees, logs, frame timber, and hewed timber, the goods and chattels of the appellee.

To the first six counts the defendant interposed two pleas, numbered three and four as follows, to wit:

"3. And the said defendant comes, etc., and says that the said Elijah Davidson, executor of the estate of Richard H. Ragland, deceased, was not at the time of the said several supposed grievances set out in the first six counts of the said plaintiff's declaration, seized of a reversionary interest in and to the land described in said counts of said declaration, as is averred in said declaration, and of this he puts himself on the country.

"4. And for further plea, etc., because he says that the said tract of land, described in said plaintiff's declaration, at the time when, etc., was the close, soil, and freehold of the said defendant, wherefore the said several supposed grievances in the first six counts in plaintiff's declaration, were committed by defendant, as he lawfully might, etc. And this, etc."

To each of these pleas the appellee demurred generally. The court sustained the demurrer, and the appellant stood by his pleas.

The defendant also plead the general issue to the whole declaration, on which issue was joined.

On the trial the plaintiff proved the execution of the lease before set forth, and offered to read it in evidence. The defendant objected, but the court overruled the objection, and the defendant excepted.

The plaintiff called several witnesses, who testified as to the waste committed, etc.

The defendant, in support of the issues on his part, read in evidence, a will of Richard H. Ragland, dated 25th July, 1839, and probated in Warren county, 25th November, 1839.

The will, so far as it relates to the premises, contains the following provisions, to wit:

"*Third.* I give and bequeath to my beloved wife, Nancy Ragland, all my household and kitchen furniture of every name and form, and the farm on which I now live, to her own proper use, benefit and behoof, so long as she remains my widow."

"*Fifth.* It is my desire that, as soon as my youngest heir shall arrive at lawful age, all my lands, tenements, and improvements on real estate, of which I die possessed (except the farm) be either divided and set apart to each of my heirs in equal value, or that the same be sold and the proceeds equally divided between them, as shall seem best to my executors. And upon

the death or marriage of Nancy Ragland, my widow, the farm on which I live, to be divided by lot or sold by my executors as my other lands, and divided as aforesaid; but should her death or marriage take place before the youngest heir arrives at lawful age, *I desire that my executors lease the farm for the support of the family during their minority.*"

Isaac Murphey, Peter Butler, and the plaintiff, were named as executors, and they all entered upon the discharge of their duties.

It was then admitted by the parties that Ragland died seized and in the actual possession, as his homestead, of the land described in the declaration and lease. That the plaintiff was the only surviving executor at the commencement of the suit. That the widow married Alvan Arrowsmith ten years before suit commenced. That the said Ragland left as his only children and heirs, George Ragland, Mary Smith, Sarah Ragland, John L. Ragland, Joel E. Ragland, Robert Ragland, Daniel W. Ragland, and Lucinda Ragland. That Sarah married one Burnett seven or eight years before. That Lucinda married one Hamilton. That the children are all of age except Daniel W. Ragland, who will become of age in the month of March, 1860. That Lucinda died four or five years before, leaving two children; and George Ragland died four years before, leaving one child.

It was further admitted that the land described in the declaration and lease is the same designated in the will as "my farm," and that the plaintiff claims to recover by virtue of his being surviving executor, and his lease, and that he has no other claim or title to the land.

The defendant then offered in evidence deeds properly acknowledged, proving the conveyance in fee by three of the children and heirs of Richard H. Ragland, deceased, of three-sevenths of the premises described in the declaration; two-sevenths before the date of the lease, and the other seventh a few days after the date of the lease, and before any of the acts complained of in the declaration; but the court excluded the evidence, to which the defendant excepted.

The court gave instructions, at the request of plaintiff, to each of which the defendant objected and excepted, as follows, to wit:

1. If the jury believe, from the evidence, that the defendant leased the premises described in the plaintiff's declaration, of the plaintiff, for four years, as set forth in the lease read in evidence, and that the defendant committed the grievances complained of in the declaration, the plaintiff is entitled to recover.

2. If the jury believe, from the evidence, that the lease was made and that defendant holds under it, then the plaintiff has,

as to this defendant, a reversionary interest in the premises, and is entitled to recover in the case, if he has proved an injury to such reversionary interest, if committed by defendant.

3. By the will read in evidence in this case the heirs have no right to exercise ownership over the land until it shall have been divided or sold by the executor, according to the terms of the will.

4. That in this case the plaintiff, if he recovers, will hold the money recovered in trust for the persons entitled to receive it under the will, as much so as if it was a suit upon a note of hand for money belonging to such devisees.

5. That there are no heirs, and can be no heirs, to receive the farm as such, but the heirs take as devised under the will, and can inherit or take the property only by the will, and in the manner named in the will.

6. That the will read in evidence in this case does not affect the right of the plaintiff to recover.

7. If the plaintiff has proven the facts alleged in the declaration, his right to recover in this case cannot be defeated by the will.

The court then refused to give instructions at the request of the defendant, (to which the defendant excepted,) to wit:

2. If the jury believe, from the evidence, that the only claim and title held by the plaintiff to the premises described in the declaration was, by virtue of his being executor of Richard H. Ragland, and that his interest and title terminates with the lease by him to the defendant,

3. The plaintiff cannot maintain this action by virtue of any right or power conferred by the will read in evidence.

4. The will read in evidence does not confer any right upon the plaintiff to maintain an action for damages to the reversionary interest in the premises described in the declaration.

5. By the will read in evidence and the admitted facts, the legal title to the premises would descend to the heirs of Richard H. Ragland, according to the provisions of the will, and if the jury believe, from the evidence, that the plaintiff's right to the land, as executor, terminates with the lease by the plaintiff to defendant, then the plaintiff cannot recover for damage done to the land and freehold.

6. If the jury believe, from the evidence, that the plaintiff's interest in the land in suit was limited to and expired in March, 1860, at the time of the determination of the lease to the defendant, the jury are instructed that, if the plaintiff is entitled to recover at all, he is only entitled to recover nominal damages.

The jury returned the following verdict:

"We, the jury, find the defendant guilty of the *trespass*, and

assess the plaintiff's damages at the sum of eighty-four dollars and fifty cents."

The defendant moved for a new trial and in arrest of judgment, which motions were both overruled, and exception taken.

The appellant assigns as error,

1. The Circuit Court erred in sustaining the demurrer to the second and third pleas, and each of them.
2. The Circuit Court erred in refusing to grant a new trial.
3. The Circuit Court erred in refusing to arrest the judgment; and,
4. The Circuit Court erred in rendering judgment against the appellant in favor of the appellee.

GOUDY, JUDD & BOYD, for Appellant.

H. M. WEAD, and A. G. KIRKPATRICK, for Appellee.

CATON, C. J. The first six counts in this declaration are in case for cutting down and carrying away trees, and for pulling down buildings, by a tenant, to the injury of the inheritance; and the seventh count is in trover for converting the trees and the material of the building. The defendant offered to prove that the only right or title the plaintiff had to the premises was that of an executor of the will of Ragland, with a power to lease the premises till the time when this lease would expire, and then to divide or sell the premises and distribute the proceeds as directed by the will. This defense the court refused to admit, but held that the lease alone conferred upon the plaintiff the right to maintain the action. In this the court erred. This action could only be maintained by a reversioner in fee. The proof offered would have shown that there was no reversionary interest in the plaintiff. Indeed, he never had any interest in the premises. His powers were not inherent, but representative. He had a power to lease for a time and afterwards to divide or sell the premises, but that gave him no more right to maintain this action than would a power of attorney executed by a person still *in esse* conferring the same authority. Had the will devised the land to him, with directions to lease and sell, then he would have taken the fee and might have maintained the action the same as if he had held the title in his own right and not in trust. The will, after vesting in the widow a temporary estate, provides that upon the determination of that estate, and the youngest heir coming of age, the lands should be divided among his children by lot, or sold and the proceeds divided, as his executors should think best. The will then provides that in case the particular estate should terminate before the youngest

heir should arrive at age, "I desire that my executors lease the farm for the support of the family during their minority." The will contains no words of grant. There is nothing to show an intention to confer any estate upon the executors. The estate descended to the heirs at law with power in the executors to divest it. In executing this lease the executor exhausted the power to lease, for the lease terminated at the same time the youngest heir would attain his majority. This lease did not deprive the tenant of the right to show the true condition of the title, which was perfectly consistent with the right assumed by the plaintiff and acknowledged by the defendant when the lease was executed. This action could only be maintained by the heirs, who held the fee and were entitled to the reversion, subject to be defeated by a sale by the executor. But the executor was not without his remedy for this injury. The defendant had covenanted in the lease not to commit this very sort of waste, and was liable to be sued on this covenant. The defense should have been admitted. We reverse the judgment and remand the cause.

Judgment reversed.

Frederick B. Head, Plaintiff in Error, *v.* Charles T. Bogue and John L. Wilson, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

An agent, acting under power of attorney, is a competent witness to prove that his principal ratified a sale made by such agent.

This was an action of replevin for two iron safes. The declaration contains one count in the detinet.

The pleas filed were—

1st. Non-detinet. 2nd. Not the property of the plaintiff. 3rd. Property of John M. Farnum.

Issues were tried by the court, J. M. Wilson, Judge, presiding, who found for the defendant.

It was admitted by defendants that the property in question was in possession of defendants at the time the writ of replevin was served in this case, under a distress warrant issued by Caroline E. Couch and others, against said Farnum, which was levied 6th day of May, A. D. 1857, which was after the bill of sale hereinafter referred to.

Plaintiff then read the following bill of sale:

No. 159 South Water Street,
Chicago, 185

Mr. Fred. W. Head, in account with John M. Farnum.

1857.	March 28.	By Cash	200.
	April,	Paid drayage, 10.50, and sund's, 3.50	14.
	May 1.	Expenses to Dubuque	42.45
		Balance due	156.27
			$412.72
To 1 large Safe			$300.
1 Fire King			112.72 $412.72

Settled as above, May, 1857.

JOHN M. FARNUM,
By Horatio Page, his Attorney.

Horatio Page testified that he executed the above bill of sale as the attorney in fact of John M. Farnum, about May 1st, 1857, and that the plaintiff at that time took possession of one set of keys of said safe; the other was in the possession of a brother of Farnum's, who was a clerk in the store; that at that time said Farnum was indebted to the plaintiff $412.72, for money advanced and services rendered by plaintiff for said Farnum; that the safes were turned out by me in satisfaction of said indebtedness; and that sum was a reasonable and fair price for the safes. Said bill of sale was executed under the written powers of attorney, which were then offered in evidence, and which are set out in the opinion of the court.

Said Page further testified, that by virtue of these powers of attorney he made sale of the safes. That at the time of said sale, Farnum was absent from Chicago at New York. That Farnum was not a dealer in safes, and they had been used by him in keeping the books of the store, but at the time of the sale they were not so used. They were in the store, and there may have been some books put in one of them. Farnum had failed in business, and the safes were left in the store where he had previously done business.

The plaintiff then offered to prove by said Page, that upon the return of Farnum to Chicago, that he stated to said Farnum he had sold the safes to the plaintiff, and that said Farnum made no objection to such sale, or questioned his power to make the sale, and that no objection has been made since the said sale and delivery to plaintiff by said Farnum.

To which testimony the defendant objected, which objection was sustained.

The court found the issue for the defendant, on which finding the plaintiff excepted. The plaintiff moved for a new trial, which motion was overruled.

The following assignment of errors is made:

The court below should have found the issues on the evidence for the plaintiff, and rendered judgment for the plaintiff.

The court erred in deciding questions of law during the trial of said cause, and excluded proper evidence.

The judgment below should have been for the plaintiff instead of the defendant.

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

SHUMWAY, WAITE & TOWNE, for Plaintiff in Error.

BECKWITH, MERRICK & CASSIN, for Defendants in Error.

CATON, C. J. These safes originally belonged to Farnum, who was indebted to Couch for rent, for which they were distrained. The whole case depends upon the question whether Page had authority from Farnum to sell the safes to Head. Farnum, a merchant in Chicago, went East and left his business in charge of Page under the following powers of attorney:

"KNOW ALL MEN BY THESE PRESENTS, That I, John M. Farnum, of Chicago, in the county of Cook, and State of Illinois, do hereby make, constitute and appoint Horatio Page, of said Chicago, to be my true and lawful attorney, with full power and authority for me, and in my name and stead, to sell, transfer and arrange any and all notes, accounts, choses in action, or other evidence of debt now due me, for such prices and considerations, and to such persons, my creditors or others, or to pledge the same as security for any indebtedness, in such manner as to my attorney shall seem fit, hereby giving my said attorney full power and authority to bind me fully in the premises. This power is intended to be in addition to that given my said attorney by deed, dated the 9th day of March, A. D. 1857."

Also the following:

"KNOW ALL MEN BY THESE PRESENTS, That we, John M. Farnum, of Chicago, in the county of Cook, and State of Illinois, and Anna D. Farnum, wife of the said John M. Farnum, do hereby make, constitute and appoint Horatio Page, of Milwaukee, in the State of Wisconsin, to be our true and lawful attorney, with full power and authority for us and in our name and stead, and as our act and deed, to enter into and take possession of all such lands, tenements and real estate whatever in the State of Illinois, wherever in said State the same may be situated, to or in which we are in any way entitled or intrusted, and to grant, bargain, sell and convey the same, or any part or parcel thereof, for such sum, price or consideration, and on such terms of payment as to him, the said Page, shall seem meet, and for us and in our names, to make, execute, acknowledge and deliver to the purchaser or purchasers thereof, good and sufficient deed or deeds and conveyances for the same, either with or without covenants and warranty on the part of the said John M. Farnum, and until the sale thereof, to let and demise the said real estate for the best rent that can be procured for the same, and to ask, demand, distrain for, collect, recover, receive, and receipt for all sums of money which shall become due and owing to us, or either of us, by means of such bargain, sale and conveyance, lease and demise.

"And I, the said John M. Farnum, do also hereby make, constitute and appoint the said Page to be my true and lawful attorney, in my name and stead, to manage, conduct, and carry on my business, at No. 159 South Water street, in said Chicago, to receive, sell, and vend all and every of the goods, wares and merchandize, which are now in, or which I may hereafter put into my said store and business, and to do any and everything in relation to my business in said store, which to my said attorney shall seem meet and proper for my interest. Also to make, execute, sign and deliver for me, and in my name, all bills, notes, drafts or instruments in writing whatsoever, which shall be proper or necessary in carrying on and managing my said business; to demand, collect, receive and receipt for all demands or debts due me, and to commence any legal proceedings therefor which my said attorney may deem necessary in the execution of the powers herein granted, hereby giving my said attorney full power and authority to do and perform all and every act and deed of whatsoever name or nature, legally appertaining to the same, binding me as firmly and irrevocably by such acts and deeds as if I were personally present consenting thereto. We, the said John M. Farnum and Anna D. Farnum, hereby ratifying and confirming all that our said attorney shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof, we have hereto set our hands and seals this ninth day of March, A. D. 1857.

JOHN M. FARNUM. [SEAL.]
ANNA D. FARNUM. [SEAL.]

Attest: C. N. HOLDEN,
WM. T. HANCOCK."

"KNOW ALL MEN BY THESE PRESENTS, That I do hereby make, constitute and appoint Horatio Page to be my true and lawful attorney, for me, and in my name, place and stead, to transact any and all mercantile business on my part and behalf, to purchase and sell for me any stocks or stock of goods upon such terms as he may deem most for my interest. Intending hereby to empower the said Page to manage my mercantile matters in the city of Chicago, during my absence, as fully as I could do were I present myself; hereby reserving the right to revoke these presents at pleasure.

Witness my hand and seal, this 7th day of March, 1857, at the city of Chicago.

JOHN M. FARNUM. [SEAL.]"

During Farnum's absence, Head presented to Page a bill against Farnum, for $412.72, a part of which had been incurred under Page's administration, after Farnum had executed these powers of attorney. Page sold the safes to Head in satisfaction of the bill, which was accordingly receipted, one set of the keys delivered to Head, and the safes left in the store for the present. The safes had been procured by Farnum for the use of the store, and not as articles of merchandize. Farnum returned while the safes were still there, and was informed of the sale by Page, and made no objections, as the plaintiff offered to prove by the testimony of Page, but this evidence the court ruled out.

In this state of affairs, the safes were seized on the distress warrant. We cannot doubt that under these powers of attorney and especially the last, Page was authorized to sell these safes,

and transfer a good title to them, from Farnum to the purchaser. It is true, that Farnum's regular business was not dealing in safes, yet the broad language in these powers of attorney, was sufficient to authorize him to dispose of a desk, or chair, or safe, which had been procured for the use of the store, but for which there was no longer occasion for the accommodation of the business. There was no appearance of fraud or unfairness in the transaction. It was evidently conducted in good faith and with a view to promote the interest of his principal. But if there were doubts, as to the extent of the original authority to make the sale, the evidence offered should have been admitted, to prove a subsequent ratification of it by Farnum. Upon his return he was advised of the sale, and he made no objection to it. This of itself, afforded strong evidence that he approved of what Page had done, and thus ratified it.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

James O. Edwards, Appellant, *v.* George J. Edwards, Appellee.

APPEAL FROM ROCK ISLAND.

The award of a new trial in a first ejectment suit, wipes out the verdict; no judgment can be rendered on it, nor is it a bar to any proceeding.

This was an action of ejectment to recover the seizin and possession of north-east quarter of section nine, and the east half of the north-west quarter of section nine, township thirteen north, range two west, fourth principal meridian.

Plea: Not guilty.

The plaintiff, to maintain the issue on his part, introduced and read in evidence a duly authenticated copy of patent from United States, granting to William Edwards the land in question, dated 6th day of July, A. D. 1818.

Next, a deed from William Edwards to George J. Edwards, dated 25th day of October, A. D. 1845, duly acknowledged, conveying said land. Recorded November 12th, 1845, in St. Clair county. Recorded July 9th, in Mercer county. The defendant below admitted himself in possession of said premises; whereupon the plaintiff rested.

The defendant then offered, and read in evidence, the original patent from the United States to William Edwards, dated 6th July, 1818, granting to him the land in controversy.

Next, a deed from said William Edwards to James O. Edwards, defendant, dated 17th June, A. D. 1851, conveying the premises in question, and recorded July 19th, 1851.

Defendant next offered in evidence a duly authenticated copy of record of the Circuit Court of Mercer county, the substance whereof is as follows:

Said record shows, that at the October term of the Circuit Court of Mercer county, A. D. 1853, the plaintiff in this suit filed his declaration in ejectment, in the manner prescribed by statute, against this defendant and William Edwards, whereby he sought to recover the seizin and possession of the same premises sought to be recovered in this suit, and therein alleging his seizin and ouster on the first day of July, A. D. 1853.

That at said term, the defendants in said suit filed their plea of not guilty in due form.

That at the April term of said court, A. D. 1854, a trial of said cause was had, which resulted in a verdict and judgment for defendants.

That at the same term of said court, the plaintiff made his motion for a new trial, according to the statute in such case provided, and, after having made proof of payment of costs, the court granted a new trial therein, according to the statute in that behalf.

That afterwards, and at the same term of court, the said plaintiff moved to dismiss his said suit, which by the court was done, agreeable to said motion; whereupon it was ordered by the court that said defendants have and recover their costs of said plaintiff.

To the introduction of which said record in evidence in this case, the plaintiff objected (waiving all objection to the informality of the certificate attached to and authenticating such record); and the court sustained such objection, and refused to permit said record to be read in evidence to the jury; to which decision of said court, excluding said record as evidence, the defendant excepted.

Beardsley & Smith, and T. L. Dickey, for Appellant.

B. C. Cook, for Appellee.

Breese, J. The ground assumed by the appellant's counsel is not tenable. The award of a new trial in the first ejectment suit, wiped out the verdict, and no judgment was or could be rendered on it. It is not a bar to anything. It might well happen that a plaintiff with a perfect title might fail in his suit, by failing to prove possession by defendant at the time of suit

brought, and a verdict pass for the defendant. In such case, or in any case, if the verdict be set aside, it could not bar another action.

Setting aside the verdict is, as if it had never been, and cannot be used anywhere, for any purpose. Followed up by a voluntary non-suit, the whole action and all its parts are null.

The judgment is affirmed.

Judgment affirmed.

J. H. Brown, Appellant, *v.* The City of Joliet, Appellee.

APPEAL FROM WILL.

A judgment for an assessment against lots or lands within a city, should be special, and a precept should issue against the lots or lands assessed. A general judgment and execution would be wrong.

On an appeal from the County to the Circuit Court, in matters of assessment, the trial is *de novo*, and the Circuit Court does not acquire by appeal any jurisdiction beyond that of the County Court.

Before a court can render judgment for an assessment, the amount assessed should appear in dollars and cents; but the return of the commissioners appointed to make the assessment, may be amended under the statute of Jeofails.

This was an appeal from County Court of Will County to the Circuit Court, showing appeal to be from a judgment rendered on a special assessment of taxes on real estate of appellant by the city of Joliet, for improvement on Jefferson street.

Philip Filer, as city collector of the city of Joliet, filed with the clerk of Will County Court, a list of real estate, upon which he alleges he has been unable to collect special taxes due thereon, with his petition for a judgment, and order of sale.

The city collector applied for judgment in Will County Court, against real estate on which special taxes have been levied, lying on both sides of Jefferson street, to improve said street from Chicago street to the river bridge.

Description of the property of Brown, appellant, against which the collector applies for judgment, with the different items of taxes, amounts, etc., as follows:

Names of Owners. Part of Lot.	Lot.	Block.	Sidewalk Tax.	Grading.	Crossing and Sewerage Tax.	Costs.	Total Tax.
Old Town of Joliet.							
22 ft. west end,	1	27			50.60	1.44	52.04
22 ft. com. 25 ft. from west end,	8	27.	11.11		61.60	2.00	74.71
15 ft. " 47 ft. " " "	8	27	7.58		42.00	1.42	51.00

Affidavit of city collector appended to the above return.

A hearing was had on said petition, the exceptions overruled, and judgment "entered against the aforesaid lots and blocks and parts of lots and blocks in favor of the city of Joliet," for the sum annexed to each lot and block, and parts of lots and parts of blocks, being the amount of taxes or assessments and costs due severally thereon, and order for sale of same.

Appeal prayed by Brown to Circuit Court of Will county, and granted.

At May term of Circuit Court, 1857, a jury was waived and agreement was made to submit case to court, DAVIS, Judge of the eighth circuit, presiding.

A judgment was rendered against Brown, for $172.89 and costs, no judgment being against the lots specifically.

Assignment of errors, as follows:

1st. That the court below allowed improper evidence to be given on the trial, by defendant in error.

2nd. That the evidence introduced in the case in the court below, was wholly insufficient to authorize the rendition of the judgment therein.

3rd. That the transcript of the County Court of Will county and evidence in the case, given in the Circuit Court on the trial of the case, showed conclusively that the County Court, from which the appeal was taken to the Circuit Court, had no jurisdiction to enter judgment, and the suit should have been dismissed in the Circuit Court, and judgment entered against the appellees for costs.

4th. That the return of Philip Filer as city collector, and his collector's warrant and delinquent list, were entirely insufficient to authorize the rendition of any judgment against the said appellant, or the property returned, and no evidence was given or offered, on the trial, supplying the defects therein, sufficient to authorize the rendition of the judgment against the appellant Brown, in said suit, and the Circuit Court was not authorized to take jurisdiction in the case.

5th. That no assessment or valuation of the property, on which a tax or assessment was purported to be levied, was ever made, and no evidence introduced showing any amount of taxes or assessments made in dollars and cents, and no characters used showing or denoting that any tax or assessments were made in dollars and cents.

6th. That the judgment was improperly and erroneously rendered against the appellant Brown, and directing execution to be issued against him, when the judgment should have been rendered against the city of Joliet for costs.

7th. That the said judgment rendered is contrary to the evidence and the law, and contrary to the constitution of the State of Illinois and of the United States, and the court had no jurisdiction to render such judgment, and other errors, etc.

U. Osgood, for Appellant.

J. E. Streeter, for Appellee.

Walker, J. It is urged that this is a special proceeding authorized only by statute, and by its provisions no authority is conferred upon the court to render a general judgment with award of execution against the goods and chattels, of defendant. The second section of the act approved March 1, 1854, (Scates' Comp. 202), authorizing the levy and collection of special assessments for improving streets, etc., in cities and towns, provides, that in case such assessments are not paid within the time fixed by the order, resolution, or ordinance making the assessment, the corporate authorities of the town or city may apply to the County Court of the proper county for judgment against such lot or real estate, for the amount of such assessment and costs; and the County Court on such application being made, shall render judgment against such lot or real estate for the amount of the assessment and costs, and shall issue its precept to the sheriff of the proper county commanding him to sell such lot or real estate, or so much thereof as may be necessary to pay the judgment and costs, in the manner and with the like effect as if sold on execution at law." By the provisions of this section authority is only conferred upon the County Court to render judgment against the land, and to issue a precept for its sale. It cannot be insisted that the court has any jurisdiction of the subject matter, or of the parties beyond that conferred by this section. No such general jurisdiction is incident to County Courts as organized in this State. And when the case comes before the Circuit Court for a trial on appeal, the trial is to be *de novo*, and the court by the appeal acquired no other or different jurisdiction of either the person or subject matter, than that possessed by the County Court. The trial in the Circuit Court, and its judgment should have been that authorized and required to have been rendered by the County Court. The statute only authorizes the rendition of a judgment against the property, and the proceeding is in *rem*, and it was error to render a general judgment and to award a *fieri facias* execution.

It was likewise insisted that neither the return of the commissioners, the order of confirmation, or judgment of the County

Court, showed an assessment in dollars and cents against this property. The return and the order of confirmation show amounts in figures opposite these lands, but there is connected with them no mark, character or word indicating what they represent. And before the court could render a judgment for the assessment it should be made to appear what amount had been assessed in dollars and cents against the property charged. The 3rd section of the statute of Amendments and Jeofails, (Scates' Comp. 250), authorizes and permits amendments in the returns of all officers and persons to process. This was a commission issued to these men to execute by levying and returning the assessment when made, and their report is the return to the commission; and it is process issued by the city council. And the provisions of this section are sufficiently comprehensive, to authorize an amendment of the return of the commissioners. But until it is so amended or it is explained by legitimate evidence, such a return is not sufficient to justify the rendition of a judgment against the land.

There is no other error perceived in the record, than that the judgment was general and awarded a *fieri facias*, instead of a special execution, for the sale of the lands.

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

Judgment reversed.

Joseph Einstein, Appellant, *v.* The City of Joliet, Appellee.

APPEAL FROM WILL.

This case, with the exception of the names of the parties, is precisely like that preceding it; and therefore it is not necessary to give anything more than the following opinion of the court:

Walker, J. The record in this case presents the same questions as those determined in the case of *Brown* v. *The City of Joliet*, *ante*, 123, at the present term of this court. We therefore regard it unnecessary to discuss them again, in this case.

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

Judgment reversed.

Miles W. Conway, Plaintiff in Error, *v.* Covell Case, Defendant in Error.

ERROR TO ROCK ISLAND.

A tender of money will be presumed sufficient if not objected to.

A party who contracts to give a deed with a covenant against incumbrances, does not meet his obligation, by offering such a deed, if the property is actually incumbered.

Proof of an incumbrance may be shown by the record. And if the mode of proof is irregular, that mode must be objected to, so that another may be adopted.

It will be presumed that all proper preliminary proof was made to the introduction of the record, as evidence, unless the contrary appears.

Parties should make specific objections in the Circuit Court to the introduction of evidence, if the propriety of its introduction is to be questioned in the Supreme Court.

The cancellation of a check upon, and its retention by, a bank, is evidence of the payment of it.

At law, time is of the essence of a contract to convey land, and if the vendor is not able to perform on the day, the vendee may consider the contract at an end.

This was an action of assumpsit counting upon the following promissory note:

$1,680. *Rock Island, March 5th*, 1856.

On or before the tenth day of October, A. D. 1857, I promise to pay Miles W. Conway, or order, at the Rock Island Bank, in the City of Rock Island, the sum of one thousand six hundred and eighty dollars, with interest, for value received.

Signed, COVELL CASE.

The declaration contained the common counts.

The defendant pleaded as follows:

1. The general issue.

2. And the said defendant, for a further plea in this behalf, by leave of the court for that purpose first had and obtained, says, *actio non*, because he says that simultaneously with the making and delivery to the said plaintiff by the said defendant, of the said promissory note in the said declaration mentioned, to wit: On the fifth day of March, A. D. 1856, at the said county of Rock Island, the said plaintiff executed and delivered to the said defendant his certain bond or writing obligatory, sealed with his seal, and now to the court here shown, the date whereof is the day and year aforesaid, whereby the said plaintiff agreed, in consideration of the payment by the said defendant to the said plaintiff, of the sum of one thousand six hundred and eighty dollars, to be paid on or before the tenth day of October, A. D. 1857, to convey to the said defendant, upon the payment of said sum of money at or before the day last aforesaid, by a good and sufficient deed, with full and proper cove-

nants of warranty, and free and clear of all incumbrance, that certain lot, piece or parcel of land situate in the city and county of Rock Island, and State of Illinois, known as lot five in block nine, in the original or old town of Stephenson, (now city of Rock Island,) as by the said bond or writing obligatory, now here brought into court, will more fully appear; and the said defendant avers that the said promissory note was made and given by the said defendant for the purchase money, price or consideration for the lot or tract of land in the said bond or writing obligatory described, and in consideration of the said agreement of the said plaintiff, by his said bond, to convey the same as aforesaid to the said defendant, and for no other purpose, intent or consideration whatever; and the said defendant further avers, that afterwards, to wit, on the said tenth day of October, A. D. 1857, and at the county aforesaid, he, the said defendant, was ready and willing and offered to pay, and then and there tendered to the said plaintiff the said sum of one thousand six hundred and eighty dollars, and then and there requested and demanded of the said plaintiff a good and sufficient deed of said lot or tract of land hereinbefore described, with full and proper covenants of warranty, and free and clear of all incumbrance, yet the said plaintiff did not nor would execute and deliver, and hath not as yet executed and delivered to the said defendant a good and sufficient deed of said lot or tract of land, with full and proper covenants of warranty, and free and clear of all incumbrance, but hath hitherto neglected and refused so to do; and this the said defendant is ready to verify; wherefore he prays judgment, etc.

And for a further plea in this behalf, by leave, etc., the said defendant says *actio non*, because he says that before the making and delivery of the said promissory note in the said declaration mentioned, to wit, on the fifth day of March, A. D. 1856, at the county of Rock Island aforesaid, the said plaintiff, in consideration of the payment to him, by the said defendant, of the sum of three hundred and sixty-six dollars, by his certain bond or writing obligatory, bearing date the day and year aforesaid, and which is now here brought into court, sealed with the seal of the said plaintiff, acknowledged himself to be held and firmly bound unto the said defendant, in the penal sum of three thousand three hundred and sixty dollars, for the payment of which well and truly to be made he thoroughly bound himself, his heirs, executors and administrators, and every of them, to which said bond or writing obligatory, there was and is annexed a recital and condition whereby it was recited that the said plaintiff had that day agreed to sell to the said defendant the following described lot or tract of land situated in the city and

county of Rock Island, and State of Illinois, known as lot five, in block nine, in the original or old town of Stephenson, (now city of Rock Island,) on condition that the said defendant should pay to said plaintiff the sum of one thousand six hundred and eighty dollars, on or before the tenth day of October, A. D. 1857, at the Rock Island Bank in the city of Rock Island aforesaid, for which the said defendant had given his promissory note, and was provided that if the said defendant should pay said note at maturity without any delay or defalcation, and should, in the meantime, pay all taxes on said land, and the said plaintiff should, upon the completion of said payment, make, execute and deliver to the said defendant, a good and sufficient deed, with full and proper covenants of warranty, free and clear of all incumbrance, then the said bond or writing obligatory should be void, otherwise should remain in full force and virtue—and that time should be deemed material and of the essence of the contract in said bond set forth. And the said defendant avers that he then and there paid to the said plaintiff the said sum of three hundred and sixty-six dollars, and made and delivered to the said plaintiff his promissory note for the said sum of one thousand six hundred and eighty dollars, payable on or before the tenth day of October, A. D. 1857, which was the same note mentioned in the said bond or writing obligatory, and in the said plaintiff's declaration herein, and was made and given for the consideration aforesaid, and none other.

And the said defendant further avers, that he paid, and was willing and liable to pay, all taxes on said land, between the day of the date of the said bond or writing obligatory and the tenth day of October, A. D. 1857, and on the said last mentioned day, was ready and willing, and offered to pay to said plaintiff at the said Rock Island Bank, in the said city and county of Rock Island, the said sum of one thousand six hundred and eighty dollars, and then and there tendered the said last mentioned sum of money to the said plaintiff, but the said plaintiff then and there neglected and refused, and hath ever since neglected and refused, to make, execute and deliver to the said plaintiff a good and sufficient deed of said lot or tract of land, with full and proper covenants of warranty, and free and clear of all incumbrance, but on the contrary thereof, the said defendant avers that at the time and place last aforesaid, the said lot or tract of land was, and for a long space of time before had been, subject to the incumbrance of a certain mortgage made and executed by the said plaintiff and his wife, to one Henry Shuster, bearing date the seventeenth day of October, A. D. 1855, to secure the payment to

the said Shuster by the said plaintiff, in two years from the date of said mortgage, the sum of fifteen hundred dollars, with interest at the rate of six per centum per annum, which said mortgage was duly filed for record in the recorder's office of said county of Rock Island, on the eighteenth day of October, A. D. 1855, and recorded in said office in book D, of Mortgages, at page four hundred and thirteen, and on the said tenth day of October, A. D. 1857, was not cancelled, released or discharged of record, but there remained, and was a subsisting and valid lien upon said lot or tract of land, to wit, at the county aforesaid; and this the said defendant is ready to verify; wherefore he prays judgment, etc.

And for a further plea in this behalf, by leave, etc., the said defendant says *actio non*, because he says that the said plaintiff, before and at the time of the commencement of this suit, to wit, at the county of Rock Island aforesaid, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of two thousand five hundred dollars, lawful money, for money lent and advanced by the said defendant to the said plaintiff, at his request; and for other money by the said defendant paid, laid out and expended for the said plaintiff, at his request; and for other money by the said plaintiff had and received to and for the use of the said defendant; and for other money, found to be due and owing from the said plaintiff to the said defendant, on an account stated between them, which said sum of money so due and owing from said plaintiff to the said defendant, as aforesaid, exceeds the damages sustained by the said plaintiff by reason of the non-performance by him, the said defendant, of the said several supposed promises and undertakings in the said accusation mentioned, and out of which said sum of money so due and owing from the plaintiff to the defendant, he, the said defendant, is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the said damages according to the form of the statute in such case made and provided; and this, he, the said defendant, is ready to verify; wherefore he prays judgment, etc.

To which pleas of said defendant the plaintiff filed the following replications:

And now said plaintiff, as to said defendant's said second plea, says *precludi non*, because he says that at the said time when, etc., and at the place when, etc., as in said plea mentioned, the said defendant did not tender to the said plaintiff the said sum of one thousand six hundred and eighty dollars, as in and by his said plea the said defendant hath alleged.

And for a further replication in this behalf as to said defendant's said second plea, by him secondly above pleaded, said

plaintiff says *precludi non*, because he says that the said writing obligatory in said plea mentioned, was not nor is the deed of said plaintiff.

And as to said defendant's fourth plea, by him fourthly above pleaded, said plaintiff says *precludi non*, because he says that he does not owe said defendant said sum of money above in said fourth plea demanded, or any part thereof, in manner and form as said defendant hath above thereof complained.

And as to said defendant's said third plea, by him thirdly above pleaded, said plaintiff says *precludi non*, because he says that at the said time when, etc., where, etc., the said defendant did not pay to said plaintiff the said sum of three hundred and sixty-six dollars, as said defendant hath in his said third plea alleged.

And for a further replication as to said defendant's said third plea, said plaintiff says *precludi non*, because he says that the said defendant did not pay all taxes on said land between the day of the date of said bond or writing obligatory and the tenth day of October, A. D. 1857, as by the said plea is alleged.

And for a further replication as to said defendant's third plea, by him thirdly above pleaded, said plaintiff says *precludi non*, because he says that at the time when, etc., where, etc., the said defendant did not tender to said plaintiff the said sum of one thousand six hundred and eighty dollars, as said defendant hath in his said third plea alleged.

And for a further replication in this behalf as to said defendant's said third plea, by him thirdly above pleaded, said plaintiff says *precludi non*, because he says that said mortgage made and executed by said plaintiff and his wife to one Henry Shuster, at the said time when, etc., where, etc., was not a subsisting and valid lien upon the lot or tract of land in said plea mentioned, as in said plea is alleged.

And for a further replication in this behalf as to said defendant's third plea by him thirdly above pleaded, said plaintiff says *precludi non*, because he says that the said supposed writing obligatory in said plea mentioned, was not nor is the deed of him the said plaintiff.

To maintain the issues on his part, the plaintiff offered and read in evidence to the jury the promissory note, of which the following is a copy:

$1,680. *Rock Island, March* 5, 1856.

On or before the 10th day of October, A. D. 1857, I promise to pay Miles W. Conway or order, at the Rock Island Bank, in the City of Rock Island, the sum of one thousand six hundred and eighty dollars, with interest, for value received.

COVELL CASE.

And the plaintiff then rested his case.

Whereupon the defendant offered in evidence at said trial, the following bond, the due execution whereof by the defendant, was admitted.

Said bond bears date the 5th day of March, A. D. 1856, and is in the penal sum of $3,360, signed by the plaintiff, and subject to the following condition: Whereas the said Miles W. Conway hath this day agreed to sell to the said Covell Case the following described lot or tract of land, situate in the city and county of Rock Island, and State of Illinois, known as lot five (5), in block nine (9), in the original or old town of Stephenson, now Rock Island, on condition that the said Covell Case shall pay the said Miles W. Conway the sum of one thousand six hundred and eighty dollars, on or before the tenth day of October, A. D. 1857, at the Rock Island Bank, in the city of Rock Island, aforesaid, for which the said Covell Case hath given his promissory note.

Now the condition of this obligation is such, that if the said Covell Case shall pay said note at maturity, without any delay or defalcation, and shall in the meantime pay all taxes on said land, and the said Miles W. Conway shall, upon the completion of said payment, make, execute and deliver, or cause to be made, executed and delivered, a good and sufficient deed, with full and proper covenants of warranty, free and clear of all incumbrance, to the said Covell Case, for said lot or tract of land, then this obligation to be void, otherwise to remain in full force and virtue.

And it is expressly agreed by and between said parties, that time is material, and is made the essence of this contract, and that in the event of the non-payment of said sum of money, or any part or portion thereof, according to the terms and effects of the said Covell Case's promissory note, that then the said Miles W. Conway may elect to consider the above contract at an end, and that the said Covell Case shall be considered the tenant of the said Miles W. Conway, holding over the termination of his lease. M. W. Conway. [L. S.]

To the introduction of which said bond as evidence, the said plaintiff objected, but the court permitted said bond to be read in evidence to the jury.

Defendant called *R. W. Smith*, who testified, that he was present at the Rock Island Bank on the day when the note (offered in evidence by plaintiff) fell due; the plaintiff and defendant, and Mr. Powers, of Davenport, were also present. Powers remarked that there was a note of defendant's given to plaintiff, that fell due there that day, and which defendant had given plaintiff for the purchase of a lot in town, and added to plaintiff, "We hold your bond for a conveyance of said lot free

of incumbrance, which we are advised you cannot do." He then said: "We tender the money," and at the same time threw down a bag of money on the counter, and gold to the amount of, perhaps, one hundred dollars fell out, the bag being untied, and further adding: "We make a tender of the amount due;" the witness, Smith, (acting for and in behalf of said plaintiff) here interposed and told him he had a deed there duly executed, which he tendered him, and would also take his money, at the same time holding out in his hand towards said Powers, a deed from said plaintiff to said defendant, of said lot, and reached for the money, but Powers grabbed the money and ran out of the bank, and witness did not get hold of it. Witness was asked if there appeared to be in the bag, containing said money, sufficient to pay said note, and replied that judging from the size of the contents of the bag, and supposing the contents to be gold, he thought there was enough. That the gold in the bag was tendered by Mr. Powers as being the amount of this note and interest, and as the amount then due on the purchase of the lot. He was not asked to count it, and no objection or doubt was expressed that it was not enough.

Said defendant then offered in evidence a deed from plaintiff to defendant, of the lot mentioned in said bond, and tendered as before mentioned by said witness (Smith), upon the occasion when said note fell due at said bank. Said deed bears date the 10th day of October, A. D. 1857—consideration, two thousand and fifty dollars—is in common form, and contains the usual covenants of a warranty deed, and is properly acknowledged by plaintiff. To the introduction of which said deed the said plaintiff objected, but the court permitted said deed to be read in evidence to the jury.

Defendant next offered in evidence the record of a mortgage deed from plaintiff to one Shuster, and which upon said record did not appear to have been discharged or canceled, the record of which deed is substantially as follows:

Dated 17th October, 1855—consideration, $1,500. Premises conveyed same as mentioned in plaintiff's bond. Condition: provided that if said Miles W. Conway, his heirs, executors or administrators, shall well and truly pay said Shuster, his heirs, administrators or assigns, the sum of fifteen hundred dollars, in two years from the date of these presents, according to the tenor and effect of his (said plaintiff's) promissory note of even date herewith, with six per cent. interest, the said bond to be void.

Said deed signed by plaintiff and acknowledged in due form.

To the introduction of which said record of deed said plaintiff objected, but the court permitted the record of said deed to be read and shown to the jury.

James M. Brawner, being sworn, was asked by plaintiff if he was clerk in the Rock Island Bank, to which he replied that he was. The following check was then exhibited to witness, and he was asked if the same pertained to the papers of said bank; to which he answered that it did. Said witness further stated that said printed check shown him was such as are kept by the bank for the use of its customers, and that defendant was a customer of said bank, and kept an account therein during the month of March, A. D. 1856.

Said check is in the words and figures following, to wit:

"*Rock Island, Ill., March* 5, 1856.

Rock Island Bank, pay in funds current at your counter, to Miles W. Conway or bearer, three hundred and sixty-six dollars.

$366. COVELL CASE."

R. W. Smith stated, that the signature of the drawer of said check was in the hand-writing of said Covell Case.

Brawner stated, that the custom of said bank was, when a check like the foregoing was presented and honored, to make a check-mark thereon, by perforating the same crosswise by an instrument for that purpose through or near the centre of the same, and then filing away the check so canceled as a voucher of its payment; and that the check aforesaid appeared to be so perforated, and that such perforation indicates presentation and payment.

Brawner stated that he was not a clerk in said bank at the date of said check, and could not state who the cashier and clerk were at that time, and could not state of his own knowledge whether said check was in fact paid or not.

Whereupon said check was offered in evidence, to which the plaintiff objected, but the court permitted said check to be read to the jury, to which decision the plaintiff excepted.

Whereupon said plaintiff requested the court to charge the jury as follows:

1. The check offered in evidence is not sufficiently authenticated and proven, to be regarded as evidence in this case under the issue tendered by plaintiff's third replication, whereby an issue is formed to the defendant's plea of offset.

2. The record of the mortgage from the plaintiff and his wife to Henry Shuster, offered in evidence by the defendant, is not of itself evidence that the lot mentioned in the second and third pleas of defendant was incumbered at the time the defendant was, by the terms of said bond, entitled to his deed.

3. The defendant is not entitled to prevail on his third plea, unless he has shown by his evidence, that he has paid all taxes on the lot or land mentioned in said bond, between the date of said bond and the tenth day of October, 1857.

4. In order to defeat the plaintiff's right of recovery under defendant's second plea, it must appear from his evidence in support thereof, that he, the defendant, has on his part performed all the conditions and stipulations assumed by him to be performed by the terms of the bond offered in evidence by defendant, in support of his said plea.

5. The defendant is not entitled to prevail under his plea of set-off, unless he has shown by his evidence that he on his part has performed all the considerations and obligations assumed by him to be performed in and by said bond offered by him in evidence.

6. In making a tender it is necessary that the person who undertakes to make it, shall give the person to whom it is made an opportunity to count the money tendered; and if the person who makes the tender, interposes obstacles to prevent such count, and does thereby prevent such count, it vitiates such tender, and a tender under such circumstances is of no binding force in law.

7. If from the evidence in this case, the jury believe the witness, Smith, while acting as the agent of the plaintiff to receive the money due on the note offered in evidence, at the time and place the same fell due, was prevented by defendant or his agent from counting the money tendered upon that occasion, then such tender is void.

8. In order to make a valid tender, it is necessary that the full amount due should be tendered, otherwise the tender is void, and the burden of proof as to amount tendered rests upon the party pleading it.

But the court refused the instructions so asked by plaintiff, numbered one and two, respectively.

And to the refusal of said court to give said instructions, numbered one and two, as aforesaid, so asked by plaintiff, said plaintiff, at the time thereof, then and there excepted.

And for refusing to give said instructions numbered three and four, five, six and seven, as asked by said plaintiff, said plaintiff then and there at the time thereof excepted.

Said court, after modifying said plaintiff's instructions, numbered three, four, five, six and seven, respectively, instructed the jury as follows, namely:

3. The defendant is not entitled to recover on his third plea unless he has shown by his evidence that he has paid all taxes on the lot or land mentioned in said bond between the date of said bond and the tenth day of October, A. D. 1857, *or that it was admitted by plaintiff that the taxes had been paid.*

4. In order to defeat the plaintiff's right of recovery under defendant's second plea, it must appear from his evidence in support

thereof, that he, the defendant, has on his part, performed, *or offered to perform*, all the considerations and stipulations assumed by him to be performed by the terms of the bond offered in evidence by defendant in support of his plea.

5. The defendant is not entitled to prevail under his plea of set-off, unless he has shown by his evidence that he on his part has performed, *or offered to perform*, all the conditions and obligations assumed by him to be performed in and by said bond offered by him in evidence.

6. In making a tender it is necessary that the person who undertakes it shall give the person to whom it is made an opportunity to count the money tendered, *if he requests to count it;* and if the person who makes the tender, interposes obstacles to prevent such count, and does thereby prevent such count, it vitiates such tender, and a tender under such circumstances is of no binding force in law.

7. If from the evidence in this case the jury believe the witness, Smith, while acting as agent of the plaintiff to receive the money due on the note offered in evidence at the time and place the same fell due, *requested to count the money*, and was prevented by the defendant or his agent from counting the money tendered upon that occasion, then such tender is void.

And for not giving said instructions numbered one and two, and for modifying and giving instructions three, four, five, six and seven, as modified, said plaintiff then and there at the time thereof excepted.

Said defendant on his behalf asked said court to instruct the jury as follows:

1. That if they believe, from the evidence, that at the maturity of the note in suit, and at the place where it was payable, the defendant was ready with the sum of money therein mentioned, and offered to pay it to the plaintiff for a proper deed of the lot in question, free of incumbrance, and that said lot was then and there incumbered by a mortgage to Shuster, they will find for the defendant.

2. The law in this case did not require the defendant to make an absolute and unconditional tender of the money, as it would in the case of a debt absolutely due—but he had a right to withhold it and to prevent the plaintiff or his agent from getting possession of it if there was a subsisting incumbrance by mortgage on the lot. It was enough, if he had the amount there and offered to pay it, for an unincumbered title only.

3. If the jury believe, from the evidence, that the defendant, at the Rock Island Bank on the 10th day of October, 1857, had a bag containing gold coin apparently to the amount of $1,680, stated to the plaintiff that it contained that sum, (show-

ing a part of it,) and offered to pay it to plaintiff, for an unincumbered title—and further believe, that the plaintiff did not then and there object that there was not that amount, or required it to be counted or fully shown, but said he would accept it for that sum, it was a sufficient tender of $1,680, on the part of the defendant, although he did not offer to pay it unconditionally, but actually refused to let the plaintiff have it; provided the jury believe, from the evidence, that the lot in question was at the time incumbered by a mortgage from said plaintiff.

4. The only issue in dispute before the jury on the second plea of defendant, is, whether defendant tendered to the plaintiff, at the time and place where the note became due, the sum of $1,680, and if the defendant has proved that fact, he is entitled to a verdict.

5. If the jury believe, from the evidence, that the defendant or his attorney tendered and offered to pay to the plaintiff or his attorney, at any time before the bringing of this suit, the amount of the note sued on, upon condition that the plaintiff would at the same time make to him a warranty deed for lot five, block nine, O. T., Rock Island, free and clear of all incumbrance, and that said plaintiff did not and could not at that time convey an unincumbered title to said lot, the jury will find a verdict for the defendant.

6. That in this case, the defendant was not bound to pay the money on the note sued on, unless he should at the same time receive an unincumbered title to the lot in question; and if the plaintiff could not, by reason of the existence of a mortgage upon said lot, convey an unincumbered title thereto, he could not require the defendant to take a deed from him for said lot and to pay him the money therefor.

To the giving of which said instructions, so asked by said defendant, the said plaintiff, then and there and at the time said instructions were so given to the jury by said court, excepted.

Whereupon the jury, after argument of said cause by counsel for said parties respectively, and after retiring to consider of their verdict, came into court with a verdict for the defendant, assessing his damages at three hundred and sixty-six dollars.

Plaintiff thereupon filed his motion for a new trial, specifying the following causes:

1. For that the court erred in admitting evidence at the trial of said case in behalf of said defendant, which said plaintiff then and there objected to.

2. For that the court erred in refusing instructions to the jury asked for by the plaintiff at said trial.

3. For that the court refused instructions to the jury as

asked by plaintiff at said trial, and modified and altered the same,.and so gave said altered instructions to the jury.

4. For that the court gave the instructions asked for by said defendant, to the jury at the trial of said cause, which said plaintiff then and there objected to, and therein erred.

5. Because said verdict is against law and evidence.

Plaintiff also at same time moved an arrest of judgment for the following reasons:

1. Because the said defendant's said several pleas filed herein marked two, three and four respectively, are insufficient in law whereon to pronounce judgment upon the verdict of the jury herein.

2. Because said pleas of said defendant, marked and numbered as aforesaid, are wholly informal and insufficient.

But the court overruled said plaintiff's said several motions for a new trial, and arrest of judgment respectively, and refused to grant a new trial of said cause, and also refused to arrest judgment herein, to which said several decisions of said court, refusing a new trial herein, as aforesaid, and refusing to arrest judgment herein, as aforesaid, said plaintiff then and there, and at the time thereof, excepted.

The court rendered judgment on said verdict, for said debt, Drury, Judge, presiding.

Beardsley & Smith, for Plaintiff in Error.

Wilkinson & Pleasants, and B. C. Cook, for Defendant in Error.

Breese, J. The defense in this action was fully made out. There was no demand by plaintiff's agent to count the money in the bag, and no objection or doubt was expressed, that it did not contain enough. The agent swears this, and also gives it as his belief there was sufficient coin in the bag to pay the amount due, if it was all gold, and the inference is fair, that it was all gold coin, as no other coin fell out of the bag but gold when it was thrown upon the counter. Here was a readiness to pay the money due, fully proved, at the time and place agreed upon. At the same time there was an offer by the plaintiff to deliver the kind of deed he had covenanted to deliver—a general warranty deed, with a covenant against incumbrances. This deed was refused by the defendant, on the alleged ground, that the property was incumbered by a mortgage of fifteen hundred dollars upon it, then subsisting in full force, and unsatisfied. Refusing the deed offered, the defendant's agent left the bank, taking with him the money.

At law, time is of the essence of a contract to convey land, and if the vendor is not able and ready to perform his part of the agreement on that day, the vendee may elect to consider the contract at an end. The contract in this case was to convey free of incumbrances. The proof establishes the fact, that on the day he offered to convey and tendered the deed, there was a subsisting mortgage upon the lot to the amount of fifteen hundred dollars. The vendor therefore was not able to perform his covenant and the vendee was not bound to receive the deed, though it did contain full covenants, for it was not the covenants for which he contracted, but for a good unincumbered estate, and this he was entitled to before he paid his money. *Tyler* v. *Young et al.*, 2 Scam. R. 447.

But it is said, the court improperly admitted evidence of a subsisting mortgage. The only evidence of the mortgage was the record of deeds, and to its introduction the plaintiff objected in general terms, not assigning any grounds therefor.

The record is made evidence by statute without further proof, but to use it the court can require certain preliminary proof, as that the original is lost or not in the power of the party to produce, and such proof, we apprehend, can be given orally to the court, and need not be preserved on the record unless exception be taken to it, or such proof may be waived by the opposite party. When this record was presented, the plaintiff admitted it was the record of the mortgage. The record in this case does not show that the requisite preliminary proof was not made before the introduction of the record of the mortgage, and we must presume, that such proof was made or waived.

It is not permitted parties to lie by, and permit evidence to be introduced without specific objections, which is competent in itself, and the objection to which is formal, and can be obviated if made, by proof, and afterwards make the introduction of such evidence ground of objection in this court. If the plaintiff was not satisfied with the record evidence of the mortgage, he should have manifested it, in order that the party producing it, might have produced the original, or accounted for its non-production.

This precise point has been decided by this court in the case of *Russell* v. *Whiteside*, 4 Scam. R. 11. The court say: "In the absence of the contrary statement in the bill of exceptions, we are to presume that proof of the hand-writing and official character of the register was made before the admission of the certificates in evidence. Nor do we perceive that the court erred in permitting the certified copy of the deed from Jackaway to be read in evidence, etc. It does not appear that any question was made in the court below, as to the loss of the original deed, or the inability of the plaintiff to produce it; and we are to

conclude that this was either admitted by the defendant, or proved by the plaintiff." See also *Gilham* v. *State Bank*, 2 Scam. R. 247, and *Harmon et al.* v. *Thornton*, ib. 355.

This decision is not at all in conflict with that of *Roberts* v. *Haskell*, 20 Ill. R. 59. In that case there was an effort to supply the preliminary proof, which we deemed insufficient.

The set-off was properly claimed. The advance payment made by the defendant for the lot could be recovered in this manner. There was the most persuasive evidence presented to the jury, that the check given for it, had been cashed by the plaintiff at the bank. He has no right to retain it, the contract being forfeited by his own act.

The judgment of the court below is affirmed.

Judgment affirmed.

Barbara Stumps, Appellant, *v.* Susanna Kelley, who sues by her next friend, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

It is not necessary that there should be a guardian, or *prochein amy*, for a minor at the time of suing out process. If it were otherwise, the exception should be taken before pleading to the merits.

A similiter may be put to a plea, at any stage, by any party; and it is not error to proceed to trial without it.

A judge may of his own motion instruct the jury, and it may often be his duty to do so.

The practice of instructing a jury to find for the defendant, as in case of a non-suit, is not adopted in this State.

The evidence is for the jury, and in case of contrariety, the Supreme Court will not interfere, except under peculiar circumstances.

A party will be liable for injuries inflicted by a cow or other animal, if the viciousness of the animal is known to the owner; and case, not trespass, is the proper remedy.

This case is fully stated in the opinion of the court. The cause was heard before J. M. Wilson, Judge, and a jury, and there was a finding and judgment for $500.00. The defendant below appealed.

Hosmer & Peck, for Appellant.

J. C. Wicker, for Appellee.

Walker, J. This was an action on the case brought in Cook County Court of Common Pleas to the September term, 1857, by appellee and against appellant. The first count of the declaration alleges, that appellant did, theretofore wrongfully and injuriously, keep a certain red and white cow, well knowing that the same was accustomed to hook, attack and push with her horns; that the cow did attack and push with her horns, the plaintiff, and greatly wounded, bruised and injured the shoulder and arm of the plaintiff, whereby she became sick, etc., for a long space of time, and was injured in consequence, in her health and constitution, and was prevented from pursuing her ordinary avocation, etc., and was put to great expense, etc., in being cured.

The second count is similar to the first, only it avers that defendant, knowing the vicious propensity of her cow, and that she was accustomed to hook mankind, did not restrain and confine her cow, but suffered her to run at large, and that the cow, on the eleventh day of August, 1857, attacked and hooked plaintiff, whereby she was greatly injured.

The defendant filed the plea of general issue, to which the similiter was added. At the November special term, 1857, the cause was tried by the court and a jury, and resulted in a verdict in favor of the plaintiff for $500.

The defendant moved the court for a new trial, which motion was overruled, and a judgment entered on the verdict against the defendant, from which she appeals to this court.

It is assigned for error, that the precipe for the summons was filed by an attorney and not by *prochein amy* or guardian. It is said in Archibald's Prac., vol. 2, p. 154, that in actions brought by infants that, "The process is the same as in ordinary cases, and may be sued out in the name of the infant before any *prochein amy* or guardian is appointed." It then appears to be unnecessary that there should be even a guardian or *prochein amy* for the minor at the time of suing out process, and that it is the same, and may issue as process in other cases. But even if it was irregular, which we by no means concede, it should have been taken advantage of, by plea in abatement or motion to quash, and was cured by pleading in bar. And that the similiter was added by attorney was not error. The defendant himself may add it to the general issue, and it is not error to proceed to trial without it. Where a plea properly concludes to the country, it is only form to add it, and it can make no difference by whom it is done.

Courts are created and established for the administration of justice, and all legal and proper means should be employed for the attainment of that end. And how it can be error for the

court to instruct the jury as to the law of the case, whether asked to do so or not, we are at a loss to conjecture. We have been referred to no authority that so holds, and we cannot imagine that such can exist. One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the duty of the judge to give such instructions. The instruction given by the court in this case, without being requested by either party, we think embraced the law as applicable to the case, and it is not denied that it does. And we have no hesitation in saying that so far from its being error, that the court acted in strict conformity with the duty imposed by the oath of the judge, and the requirements of the law.

There is no error perceived in refusing to instruct the jury to find for the defendant as in a case of non-suit. Such a practice has never obtained in this State, and this court has held that such a course is not sanctioned by our practice. Again, there was most certainly evidence tending to establish the plaintiff's demand, and whenever that is the case, however slight, it is a question solely for the jury and not for the court. To hold otherwise would be to usurp the right to try the facts in a case, by a court, when the right is vested in the parties, to have such questions determined by a jury.

It is also urged that the verdict of the jury is against the evidence, and therefore the court erred in not granting a new trial. That there was contrariety in the testimony, and that there may be doubt as to which way the weight inclines, is true. But that has never been held sufficient to disturb the finding of a jury. Before courts can interfere with their finding, it must appear to be clearly against the weight of the evidence, and such is not the case here, and we think it fully sustains the finding, and no error was committed by the court in refusing to set it aside.

The next assignment of error, is that the verdict is against the law of the case. It is a maxim of the law that every man may use his own in any manner he may choose, so that he does not thereby injure another. One person has no right, in the exercise of a trade or business, to endanger the life or health of another, nor by so doing to inflict an injury upon the person or property of another, while pursuing his lawful avocations. While appellant had the undoubted right to hold and enjoy the property, the appellee had the right to pass the public highway without being injured by the property of appellant. And appellant failing to restrain this animal, after knowing its propensity to hook persons, is liable for the injuries that may result to per-

sons by her running at large. "But if the ox were wont to push with his horns in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned and his owner shall be put to death." When it is thus commanded by the Great Jehovah, when he made his law known to man in the midst of thunders and lightnings, and the deep cloud that enveloped Sinai, attesting his visible presence, we have no right to disregard the principle of divine justice thus announced. The principle contained in this revelation, applies with its full force to a case only resulting in injury, and unquestionably requires, that it shall be compensated by payment of damages by the owner of the animal, to the person injured. By the law of the twelve tables, it was provided that "if a horse, apt to kick, should strike with his foot, or if an ox accustomed to gore, should wound any man with his horns, an action was given to the party injured." Cooper's Inst. 357. And by the common law, "the owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to the person or personal property; unless it can be shown that he previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other neglect on his part; it being in general necessary in an action for an injury committed by *such* animals, to allege and prove the scienter." 1 Chit. Pl. 82. But with the notice of the vicious propensity of the animal, the action must be case and not trespass. Thus it is seen that the principle of responsibility by an owner of an animal accustomed to commit injury to mankind, and knowing its vicious propensity, is imposed for all injuries it may inflict, and is recognized by the divine and the civil, as well as the common law. And in this case the scienter was averred and proved. The other errors assigned are already disposed of by the consideration of those discussed, and it is not deemed necessary to further notice them.

The judgment must be affirmed.

Judgment affirmed.

John Dexter, Appellant, *v.* John Parkins, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

The wife of a defendant in execution, is not a competent witness, on a trial of right of property.

A preferred creditor has no greater right to personal property, than a purchaser for a valuable consideration, as against judgment creditors.

Dexter *v.* Parkins.

On the trial of right of property, a recital in the execution of the rendition of the judgment is sufficient proof of the judgment; the claimant by giving notice, admits the regularity and existence of the proceedings against the defendant.

THE property in question was levied upon by virtue of an execution upon a judgment before a justice of the peace, in favor of John Dexter against John Smallridge, dated 5th December, 1857, on judgment recovered by said Dexter against Smallridge, on 5th December, 1857, for $110 and costs, and the property levied upon as the property of Smallridge by a constable, on the 15th day of December, 1857.

Parkins claimed the property as his, and had a trial of the right of property before the justice of the peace, on which trial the jury rendered a verdict in favor of Dexter against the claimant, from which trial an appeal was taken to the County Court of Peoria county.

At the December term of said County Court, 1857, a jury trial was had, and verdict was rendered for the claimant, from which last trial this appeal is taken.

On the trial of said cause in the said County Court, the plaintiff below offered the wife of the defendant in execution, Jane Smallridge, who acted as clerk and agent of her husband in the transaction of his business, as a witness on the trial of said cause, to which the defendant objected. The Court overruled the objection, and allowed the witness to give testimony in said cause.

The defendants below asked the Court to instruct the jury as follows:

5. That a bill of sale is fraudulent and void, as to creditors and third persons, unless possession of the property specified therein, actually followed from the vendor to the vendee, according to the terms of said bill of sale.

6. That possession is *prima facie* evidence of ownership, and in case of sale of goods or chattels, if possession of said goods remain with the seller or vender, the sale is fraudulent and void *per se* (of itself,) as to creditors and third persons, and cannot be rebutted by evidence of fair intention.

But the court refused to give the instructions asked, but modified them by addressing the following, to wit:

"Whereupon the court amended the fifth instruction by writing the words 'not being a preferred creditor,' after the word 'vendee,' in said fifth instruction, and amended the 6th instruction, by adding the words 'unless such sale was to a preferred creditor, and in payment of a just debt.'"

And now comes the said John Dexter, and assigns for error that said court erred in allowing Mrs. Smallridge, wife of the

defendant in execution, to testify in said cause; and in amending the fifth and sixth instructions, as asked for by said Dexter.

LINDSAY & LANDER, for Appellant.

H. GROVE, for Appellee.

BREESE, J. The questions arising on this record are, first, as to the admissibility of the wife of the defendant in execution, as a witness on the part of the claimant of the property under a bill of sale, made by such defendant, and second, on the instructions.

Section twelve of the act respecting the trial of the right of property, provides (Scates' Comp. 1116,) that in no case of such trial shall the defendant in execution be a competent witness.

In first Greenleaf on Evidence, Sec. 341, it is said, where the husband or wife is not a party to the record, but yet has an interest directly involved in the suit, and is therefore incompetent to testify, the other also is incompetent, and instances the case of the wife of a bankrupt being called to prove the fact of his bankruptcy which she is not permitted to do. *Ex parte James*, 1 Peere Williams, 610. Nor can the husband be a witness for or against his wife, in a question touching her separate estate even though there are other parties to the record in respect of whom he would be competent. 1 Greenleaf Ev., Sec. 335.

In *Davis* v. *Dinwoody*, 4 Durnf. & East, 370, Lord Kenyon said, Independently of the question of interest, husbands and wives are not admitted as witnesses for or against each other, from their being so nearly connected they are supposed to have such a bias upon their minds that they are not to be permitted to give evidence either for or against each other, and so said Buller, Justice, in the same case, and this is considered we believe to be well settled law.

It was argued in this case of *Davis* v. *Dinwoody* on the objection to the competency of the witness that he was interested, it was answered, that he came to speak against his interest, for that if these goods which had been seized, were not his own and could not be taken to pay *his* debt he would be liable afterwards, whereas if they could be taken in execution his debt would be discharged.

So in this case, if the goods seized by the constable were not Smallridge's and could not be taken to pay his debt he would be liable afterwards, whereas if they could be taken his debt would be discharged. But the court say, interest is not the test. It is the bias supposed to exist upon the mind of husband or wife which excludes them. But our statute expressly ex-

cludes the defendant in execution, and of course, under the rule as laid down by Greenleaf before cited, his wife is excluded also. Where one is incompetent either by the common law or by statute on account of a supposed interest or bias, the other must be also. This doctrine is fully recognized in *Vandiver* v. *Glaspy*, 7 Rich. S. C. Law R. 14, and on principle is correct.

In such cases as this of the trial of right of property a son-in-law claiming through the defendant in execution, more or less suspicion is naturally engendered, that the transaction is only colorable and it may be greatly to the interest of the defendant in the execution, that property seized as his by an execution, should belong *pro hac vice*, to the claimant. It is not difficult to imagine such cases. In such case, the wife would be testifying directly in a case where her husband's interest was deeply involved. It would be very convenient in such cases to have the wife a witness, and not an honest disinterested neighbor.

But there is another reason of policy why the wife should be excluded, and that is for the sake of domestic peace. If, called as a witness and she does not testify as her husband wants her to testify, the consequences to her may be anything but agreeable in the privacy of their homes, and its comforts forever destroyed by this one refusal of the wife, to violate her oath and conscience, to advance the interest of her husband. Rather than hazard such consequences, it is far better that they should be excluded, and we hold policy and the law does exclude them.

In this case, the evidence does not show any delivery of the property to the claimant after the execution of the bill of sale. It is absolute on its face, yet the property remained as much in the possession of Smallridge as it did in that of the claimant after as before its execution. Such circumstances are not evidence of fraud, but are fraud absolutely. *Thornton* v. *Davenport*, 1 Scam. R. 296; *Reed* v. *Eames*, 19 Ill. R. 596, and cases there cited.

The fifth and sixth instructions asked by the plaintiff in execution should have been given without any qualification, for a preferred creditor has no greater right in such cases than a purchaser for a valuable consideration, as against judgment creditors. It is objected however, that the plaintiff in execution did not show any judgment against Smallridge. He did show an execution reciting a judgment, on which the levy was made which was sufficient under this proceeding. By giving notice that he will try the right of property, the claimant admits the regularity and existence of the proceedings against the defendant.

We think there should be a new trial, and the cause is remanded for that purpose, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

The People of the State of Illinois, upon the relation of the Peoria and Oquawka Railroad Company, Complainants, *v.* The County of Tazewell, The Board of Supervisors, and The Chairman of said Board of the County of Tazewell, Respondents.

PETITION FOR A MANDAMUS.

Municipal corporations are not bound to discharge indebtedness elsewhere than at their treasuries.

Counties and cities have not the right to make bonds, issued in aid of railroads, payable in the city of New York.

Authorities representing counties and cities are not compelled, when the inhabitants thereof have voted in favor of issuing bonds to aid in constructing railroads, to issue the same, or to subscribe for the whole stock; there is a discretion resting with such authorities in that regard.

Only a proposition to aid in the construction of one railroad should be submitted to the people.

This was a petition for a mandamus which recites, That on the 12th of February, A. D. 1849, the General Assembly passed an act incorporating the Peoria and Oquawka Railroad Company, with power to construct a railroad from Peoria to Oquawka, and to Burlington, in Iowa. By amendatory acts, passed February 10th, 1851, and 22nd June, 1852, said company was further authorized to extend said road from Peoria eastward, through Tazewell county, to the Indiana State line.

That said company still exists as a corporation under said laws. Previous to August, 1853, said company had located and partly constructed its road through Tazewell county.

That Tazewell county adopted township organization at the general election in 1849, and has remained so organized ever since.

That at a meeting of the board of supervisors, held on the 23rd August, 1853, a petition was presented to said board, signed by numerous citizens of the county, praying that an election might be ordered to be held on the 24th day of September, 1853, at the usual places of holding elections, throughout the county, ordering the people to vote for and against a subscription by

the said county, of $75,000, to the Mississippi and Wabash Railroad Company, and for and against a subscription of $25,000 to the eastern extension of the Peoria and Oquawka Railroad Company. The petition suggested that payment of the subscription should be provided for by issuing a like amount of bonds of said county, bearing an annual interest of seven per cent., payable semi-annually at the American Exchange Bank, New York, having twenty years to run.

That on the same day a resolution was passed by the board, ordering an election in accordance with the prayer of the petition, and the clerk of the board directed to prepare the proper notices of the said election.

That at a meeting of said board of supervisors, held on the 26th September, 1853, the said board passed a preamble and resolution, reciting the former order for holding the said election, and declaring that the same had taken place as required by the order, and in pursuance of law; and that at said election, a majority of the votes of said county, taking as a standard the number of votes thrown at the last general election previous to said vote on said subscription, was in favor of said subscriptions, to wit, 1,824 in favor, and 710 against said subscriptions; the number of votes cast at the general election aforesaid being 2,314.

The petition further states that in fact, said petition was presented, said orders made, said election held in due form of law, and resulted as stated in said orders.

That it became the duty of the defendants to subscribe immediately to the stock of said road, pursuant to the petition, election and orders aforesaid.

That, though often requested, said defendants have refused to subscribe to said stock, or to issue any bonds in payment, as they were bound to do.

That on the 13th of September, 1858, at a regular meeting of the board of supervisors, the relators presented a petition to the board, requesting defendants to make said subscription of $25,000, and to issue their bonds, according to the vote of the people, the requirements of the law and the records and orders of the said board of supervisors.

That at the same time relators presented to said board the original stock subscription book of the said eastern extension of the Peoria and Oquawka Railroad Company, and requested the subscription of the defendants to be made in the same, and tendered to the defendants a certificate of two hundred and fifty shares of stock, at one hundred dollars per share, of the said eastern extension of said company, which defendants refused to accept.

That on the 14th September, 1858, at the same session of said board, the petition of relators having been referred to a committee, said committee reported against the same; which report was concurred in by the board, and the defendants thereby refused to subscribe to said stock or issue said bonds.

The relators then gave immediate notice to said board that they would apply at this term, to this court, for a mandamus to compel defendants to subscribe said stock and issue said bonds.

The petition concludes with a prayer for a mandamus to compel the defendants to subscribe $25,000 to the stock of said road, and to issue the bonds of the county in payment for the same, bearing date the 26th September, 1853, with seven per cent. interest per annum, payable semi-annually, at the American Exchange Bank, in the city of New York, and payable twenty years after their date.

By agreement, the petition was to stand as an alternative mandamus, and the board of supervisors were to show cause why a peremptory mandamus should not issue; waiving an issuance of the alternative writ.

The following causes were shown against the issuing of the peremptory writ:

First. The law under which the vote in the affidavit of the relators mentioned and set forth was taken, is a nullity, having been passed at the special session of the General Assembly of the State of Illinois, convened by the *proclamation* of the Governor of the State of Illinois, on the 22nd of October, 1849, when the subject of the law under which the said vote was taken, was not one of the subjects upon which the said General Assembly were specially called together to legislate by the said proclamation of the said Governor.

Second. The vote mentioned in the affidavit of the relators is void, the vote requiring the interest of the bonds to be paid at the American Exchange Bank in New York, when, by law, the county can only pay its obligations at the treasury of the county.

Third. The application by the relators to the said board of supervisors to subscribe the stock and issue the bonds in pursuance of the vote set forth in the affidavit of the relators, not having been made for more than five years after the vote was taken, is a waiver and abandonment of the right of the relators under said vote. And said application now comes too late.

Fourth. It is a matter of discretion with the said board of supervisors whether they will issue the bonds and make the subscription in pursuance of the vote.

Fifth. The Peoria and Oquawka Railroad Company are not the proper parties to be relators.

Sixth. That the relators have mortgaged their road for more than its worth since the vote has been taken, and have no longer the legal title to the same.

Seventh. The company have become insolvent, and if a subscription is made, the stock would be worthless.

Eighth. The vote mentioned and set forth in the affidavit of the relators is void, because it does not comply with the act under which the vote was taken, and is conditional.

Ninth. The vote mentioned in the affidavit of the relators is void in not conforming to the act under which the vote was taken, the act allowing the judges of the County Court, or board of supervisors, to pay for the stock purchased either by borrowing money or by issuing bonds, as said board deem most advisable. The vote allows the issuing of bonds *only*, and deprives the board of supervisors of a discretion conferred by the act, and is therefore void.

Tenth. The vote mentioned in the affidavit of the relators is void, for the reason that the vote was taken to subscribe to two roads at the same time.

The relators, to these objections filed the following traverse and demurrer:

And now come the said relators, and for traverse of so much of said defendant's return, numbered and marked "*First*," they say, that the said law of the said State of Illinois was such a law as was contemplated and included within the meaning and spirit of the proclamation, convening the said special session of the General Assembly, as will appear by the said proclamation, a certified copy whereof is hereto attached and made part of this traverse. And the relators further say, that the General Assembly of the State of Illinois, as appears by the statutes of the State, have subsequently recognized, approved, ratified, and in substance re-enacted said law; as by reference to the several acts of the said General Assembly will fully appear.

And as to so much of the said return marked "*Third*," they say, by way of traverse and also by way of demurrer to the said portion of said return, that the same is untrue in fact—inasmuch as it appears from the certified copies of the records filed with the relators' petition, that five years had not elapsed between the time of said vote being taken and the present application to the defendants to subscribe to said stock and issue their said bonds. And also, that a similar application for said subscription and for the issuing of said bonds had been made on the 7th day of March, A. D. 1854, as appears by the record attached to the petition in said cause.

And the said relators also submit by way of demurrer to said portion of said return, that the same, if true, would constitute

no defense to the relief sought and prayed for by the said relators.

The relators deny the allegation in said return, marked "*Sixth*," or so much thereof as states that "they have not the legal title to the same," and demur to so much thereof as states "that the relators have mortgaged their road for more than it is worth since the vote has been taken."

And as to all the other matters and things stated and set forth in the said return of the said defendants, the said relators say that the same are insufficient in law to bar or preclude the said relators from having and maintaining their said petition, and receiving the relief therein prayed for, and that they are not bound to answer or traverse the same; and this they are ready to verify; wherefore they pray judgment, etc.

A rejoinder and replication to these, made up the issue.

N. H. Purple, for Relators.

J. Roberts, for the Respondents.

Walker, J. At an election held in Tazewell county on the 24th day of September, 1853, for and against the county subscribing for twenty-five thousand dollars to the capital stock of relators' road, the majority required by law was favorable to such subscription. A part of the question submitted was whether an issue of bonds of the county in payment of the subscription, to draw seven per cent. interest per annum, payable semi-annually at the American Exchange Bank in New York should be made. At the September meeting, 1858, of the board of supervisors of Tazewell county, application was made to them, to subscribe for the stock, which they refused to do, and the shares of stock were tendered by the relators and refused, and the board also refused to issue the bonds of the county. And to compel a subscription and to issue county bonds in payment of the same, this application is made.

The return to the petition sets up numerous reasons why the subscription should not be made. We shall only notice a portion of them, as in the view we take of the case, it is not necessary to discuss the others. It is objected that the county had no right to issue bonds or other obligations, payable at any other place than at the county treasury. This court held in the case of *Prettyman* v. *The Board of Supervisors of Tazewell County*, 19 Ill. R. 406, that it was only by virtue of the act of February, 1857, authorizing the County Courts of each county which had subscribed to the Tonica and Petersburg road, to make the interest of their bonds payable at any place they might choose.

That act only applied to subscriptions to that particular road, and can have no application to any other. And it was there held, that the County Court had no power to issue bonds payable in the city of New York, for want of express authority by legislative enactment. States, counties and corporations, created for public convenience only, are not required to seek their creditors to discharge their indebtedness, but when payment is desired, the demand should be made at their treasury. That is the only place, at which payment can be legally insisted upon, and it is the only place, where the treasurer can legally have the public funds with which he is entrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister State or in a foreign country, necessarily imposes an obligation on the treasurer, to provide funds at that place, to meet them. And his duties requiring him at the treasury, would require the employment of agents, the transmission of the funds at a risk of loss, and at a considerable expense, in charges, insurance and discounts, which are not incident to its payment at the treasury. And the same reasons apply with equal force, to cities, counties and public corporations, of a similar character. The legislature has conferred no such general power on such bodies, and in its absence, they have no power to make their indebtedness payable at any other place, than at their treasury.

The next question we propose to consider is, whether legislative enactments, authorizing counties and cities to subscribe for such stock, are compulsory, when the citizens have by vote determined in favor of a subscription. That many acts authorized to be performed by such bodies are discretionary, and others are peremptory, will be readily conceded. That the mere grant of authority to such bodies, cannot be construed into a requirement of its performance, without discretion, is obvious. A large portion of their powers, are unquestionably of a discretionary character. But when the law has imposed a duty and required its performance, there can be no discretion exercised, unless it be as to the time or mode of its performance, when neither are pointed out by the act enjoining the duty. To attempt the exercise of all the powers conferred upon those bodies, by the legislature, would seriously involve, if it did not bankrupt, every city, county and incorporated town in the State. Yet when the duty to act is enjoined, whether in express terms or by implication, there can be no choice but to perform the duty required. Counties and cities are incorporations, created for public convenience, and to transact the public business of the communities embraced in their limits. They are dependent upon the legislature for their very creation, and from it, they derive all their authority to act. And it is therefore necessary

to examine the various legislative enactments, to determine whether the power conferred upon counties to subscribe for stock in railroad companies is imperative or is only discretionary.

The first section of the act of November, 1849, (Scates' Comp. 950,) provides, "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 said 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." The second section, authorizes cities and counties to borrow money, or to issue their bonds in payment for such stock. The third section, authorizes the railroad company to which such subscription may have been made, to receive city or county bonds at par, in discharge of such subscriptions, and to dispose of them. The fourth section, provides, that no subscription or purchase shall be made or bond issued by any county or city under the provisions of the act, whereby any debt of such city or county shall be created, to pay such subscription, unless sanctioned by a majority of the votes of the county, at an election to be held to ascertain the fact, and points out the mode of submitting the question to a vote of the city or county. And by the last clause of this section it is provided, that "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 amounts of and at the time when assessments upon all stockholders of said company shall be regularly assessed and made payable."

By an amendatory act of March 1, 1854, (Scates' Comp. 953,) the last clause of the fourth section of the act of 1849, was so modified, as to authorize the city council, or the county judges, of any city or county, having subscribed for stock in railroad companies, to issue and deliver the whole, or any portion of the bonds of such city or county, payable on such subscription, at any time when in their opinion the interest of the city or county might be promoted thereby, whether calls had been made or not, on other subscribers.

The first section gives the power to cities and counties to make such subscriptions when desired by their citizens, and it contains no other limitation, except as to amount. To authorize

their legally constituted agents to make a subscription, it was under this section, only necessary that it should be desired by their citizens, and within the limited amount. This section contains no language that can by any rule of interpretation, be held to impose it as a duty, to make such a subscription. It only confers the authority, and provides that they may subscribe for, or purchase stock, under its limitations and restrictions. Neither the context, or the language employed in the first section, makes a subscription imperative, but it is only permissive. And the second and third sections, do not alter or change the provisions of the first. The power conferred by that section, is purely discretionary in the county judges or city council, unless its requirements are changed by the fourth section.

That section, after providing for the manner of submitting the question of subscription to a vote of the city or county, and prescribing the mode of conducting the election and canvassing the vote thus taken, contains this provision, "And if a majority of the votes 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 be made by said judges or Common Council." The words "such authorized subscriptions," necessarily refers to the authority conferred by a majority of the voters, ascertained by the election, provided in this section. The vote resulting in favor of such subscription or purchase, is necessary to authorize the county judges or city council to act, and is a limitation on the discretionary power conferred by the first section; as without such vote, they could not subscribe, whatever might be the desire of the citizens of the county or city. But this provision, only requires them to make the "authorized subscription or purchase, or any part thereof." This language is not susceptible of the construction, that when the vote is taken, that they are compelled to subscribe the whole amount proposed by the vote, as it provides that the same or any part thereof, shall be made. The language clearly requires, that they shall subscribe the amount voted upon, or any part of it, and a subscription of any amount, that they may deem for the best interests of the county or city, will fully answer this requirement. A subscription of one share, would be a part of the sum authorized to be subscribed, and it is within the discretion of the county judges or the city council, whether they will subscribe beyond that amount. If the legislature had intended to make it compulsory upon them to subscribe the whole amount, they would have adopted different language from that employed. There is an evident propriety in giving the financial agents of a county or city, a large discretion in the management of its pecuniary affairs. In the change of circumstances to which rail-

road enterprises are constantly subjected, to the varying condition of the finances of the country, the success of rival enterprises, and the want of means to secure success in the construction of railroads, must have dictated the policy adopted by the legislature in leaving it a matter of discretion in the county judges or city council, to subscribe all or any part of the amount authorized. If, immediately after a vote was taken, and resulted in authorizing a subscription, and before the power to subscribe had been exercised, it were to become manifest that the road or any part of it, never could be completed, and the officers to promote private interest, or from a misguided zeal, or over confidence in what might afterwards be accomplished, were determined to push the enterprise, and waste the means of the corporation, the city or county surely ought still to have the means of avoiding the loss, by a power to refuse to make the contemplated subscription. Or, suppose the company, after the vote is had, resulting in favor of subscription, should abandon that portion of the road in which the voters had an interest, and insist upon the issue of the bonds, to be applied on a remote portion, by the completion of which, they could receive no benefit, can it be contended, that there should be no discretion in the financial agents of such municipal corporations to subscribe or not, as the interest of those bodies might require? It cannot be possible, that after a vote has resulted in favor of subscription, and before it has been made, that no change in the affairs or prospects of the road could occur, which would not release them from the duty of making such subscription. The legislature must have intended to invest the county judges and Common Council, with the discretionary power of imposing conditions to the county or city subscription, so far as it might be necessary to protect their interest, and secure the faithful application of the amount subscribed. If however, the law is peremptory, and does compel the subscription for the full amount, and leaves the agents of these bodies without any discretion, when the vote has resulted in favor of subscription, any conditions they might impose would have no binding effect, nor would any imposed by the voters be binding. The legislature has given them the control over the stock when issued, and the discretionary power to issue the bonds, whenever the interest of the county or city may in their judgment, require it. Considerations of policy, could not have induced the legislature to withhold a discretion in making such subscriptions, as these powers delegated, are as important as that of making the subscription of the whole or any part of the sum, authorized by a vote. And that the legislature intended to withhold such a discretion we are unable to believe, and until

that body shall employ different language from that used in the fourth section of this act, we cannot so hold.

Until the county or city has subscribed, there is no privity between the road, and county or city. It is the contract of subscription which compels the subscriber, for stock, to pay his money, and the company to issue to him, shares of their stock. Until the county subscribes for shares of their stock, the company hold no obligation on the county and cannot by tendering shares of stock, compel them to subscribe or to issue bonds, nor have they any power to compel the road to issue to them shares of their stock. Until the subscription is made it is entirely at the option of the road, whether they will permit such subscription. Before the subscription is made, no obligation exists between the parties. Nor can the vote be treated as an agreement between the county and the road, beyond what the law has peremptorily required to be performed. When the vote was taken and resulted in favor of subscription, it only amounted to a delegation of power to the supervisors, to make the contract of subscription, as the law then authorized them to do. The company was no party to this vote, and has no more right to insist upon the execution of the power thus delegated, than it would have in case an individual were to authorize an agent to subscribe for stock in the road and who should refuse to exercise the power for his principal.

In the case of *Fulton County* v. *The Wabash and Mississippi Railroad Co.*, 21 Ill R. 338, this court held, that the law did not authorize the submission of a proposition for subscription of a gross sum, to two roads, in the same submission, in such a manner that the voter had no option, to vote for the one, and against the other. This submission was made in that manner. It proposed to subscribe one hundred thousand dollars, one-fourth to this, and three-fourths to another road, and the voter, however much in favor of submission to one, and opposed to the other, was compelled to vote either for or against the entire subscription. That case is decisive of this, and we deem it unnecessary to again discuss the question in this case.

We are for these reasons of the opinion, that the relators have failed to show a case by their petition, which entitles them to the relief prayed, and that the demurrer to the return should be sustained to the petition. The writ of mandamus is refused.

Mandamus refused.

Sabin D. Puterbaugh, Plaintiff in Error, *v.* Joseph Elliott *et al.*, Defendants in Error.

ERROR TO TAZEWELL.

If a respondent neglects to join in a demurrer to a bill, but argues it, it will be intended that the issue of law was made up.

It is not error to dismiss a bill, on demurrer, if it is without equity. If the equities are defectively stated, the bill may be retained for amendment.

A party aggrieved has a remedy at law to compel a sheriff to correct an omission in a certificate of sale of lands made by him.

This was a bill in chancery to correct an indorsement of levy, and certificate of purchase given by a sheriff.

The bill alleges that Field, Benedict & Co. recovered a judgment against Joseph Elliott and Rufus Elliott at the April term, 1857, of Tazewell Circuit Court; and that, by virtue of an execution issued on said judgment, the sheriff of said county *duly advertised* and *sold* the following premises, on the 1st day of August, A. D. 1857, as the property of said Joseph Elliott, to wit: "Beginning seven chains and sixty-two links north of the south-west corner of the north half of the north-east quarter of section number two, township number twenty-four north, of range five west of third principal meridian; thence running north four chains and forty-seven links, to a post; thence east four chains and forty-seven links; thence south six chains and forty-seven links, to a post; thence north seventy degrees west, four chains and seventy-seven links, to place of beginning, in Tazewell county, Illinois." And that Field, Benedict & Co. became the purchasers of the same; and that the sheriff executed to them a certificate of purchase; but that the sheriff, in describing the premises sold, made a clerical error in said certificate, by leaving out the north boundary of the same.

The bill further alleges that the premises were correctly advertised and sold; and that Chapman Williamson, one of the defendants, was sheriff of said county at the date of said sale; and that the sheriff committed a clerical error in making the indorsement of the levy on said execution, leaving out the north boundary, as in his certificate of purchase.

The bill further states that, at the April term, 1858, of the Circuit Court of said Tazewell county, one Rhoda McIntire obtained a judgment against Joseph Elliott, one of the defendants to the bill; and that said Rhoda McIntire, as judgment creditor of said Joseph Elliott, caused to be sued out of said court an execution founded on said judgment, and placed the same in the hands of said sheriff; and that the same was levied

on the said premises, on the 2nd day of August, 1858; and that she then paid into the hands of said sheriff $620.30, in full of the redemption of said premises, from the sale made in favor of Field, Benedict & Co., on 1st August, 1857; and that a certificate of redemption was duly filed; and that in pursuance of law, said sheriff advertised said premises for sale, and sold the same on the 10th day of September, 1858; and that complainant, Puterbaugh, became the purchaser thereof; and that a certificate of purchase was executed to him, stating that he would be entitled to a deed in 60 days unless the same were redeemed in the meantime.

The bill states that said premises were not redeemed; and thereupon the sheriff executed to said Puterbaugh a deed for the premises so sold, in pursuance of the statute in such case made and provided.

The bill further alleges that the said complainant is in actual possession of said premises, holding under and by virtue of said sheriff's deed.

The bill alleges that the clerical errors above mentioned cloud the title of said premises; and that complainant, by reason thereof, might find it difficult to sell or dispose of the same; and also alleges that said Joseph Elliott well knew that the said premises were sold on the 1st day of August, 1857, to Field, Benedict & Co.; and knew when the redemption would expire thereon; and knew of the errors aforesaid.

The bill asks for a correction of the errors aforesaid.

The defendant, Joseph Elliott, filed a general demurrer to the bill; in which complainant joined. The demurrer was sustained, and bill dismissed.

The complainant assigns for error, the ruling of the court below on the demurrer, and contends that the demurrer ought to have been overruled; and that the court erred in dismissing the bill.

A. L. Davison, for Plaintiff in Error.

B. S. Prettyman, and J. Roberts, for Defendants in Error.

Breese, J. The object of the bill in this case, was to correct a mistake of a ministerial officer, not of contracting parties, which they may have inadvertently made.

A demurrer was interposed and on argument the bill was dismissed and an appeal taken, and now upon the appeal, the appellant says there was no formal decision upon the demurrer—it was neither overruled nor sustained. Of what consequence is that? Did the complainant join in demurrer? This was his

duty, and if he omitted that, and chose to argue the demurrer, it will be intended the issue of law was made up, and a decree, dismissing the bill is a decision upon the demurrer, and it is not error, where a bill has no equity upon its face, to dismiss it on demurrer. Having no equity, it is incapable of amendment. The rule is different when a good case is presented by the bill though defectively stated. In such cases, the bill is retained for proper amendments.

But it is insisted there is equity in the bill, and complainant was entitled to the relief for which he prayed. The argument used in support of this idea, shows if there be equity in the bill, still a court of equity cannot interfere in the case. The argument is, a court on motion would grant, or even compel the amendment to the return and certificate where the interests of third persons are concerned. If this be so, then the complainant has mistaken his remedy. His relief is at law, by motion in the court from which the *fi. fa.* issues, after notice to the sheriff and to the parties in interest, and where an adequate remedy exists at law, courts of equity do not interfere, and for this reason, the bill was properly dismissed. The case referred to by complainant was a case like this where the remedy was afforded at law. The sheriff, under a *fi. fa.* had sold three parcels of land belonging to the defendant to one of the plaintiffs, but in his certificate of sale, had, by mistake, omitted one of the parcels. The court, on motion, in behalf of the purchaser, ordered the sheriff to amend his certificate by inserting therein that he had sold the parcel omitted. *Smith & Reilay* v. *Hudson*, 1 Cowen, 430.

There is no such mistake here, as a court of equity can be called upon to reform. An adequate remedy exists at law, and to a court of law, must the complainant resort. *Hamilton* v. *Shrewsbury*, 4 Randolph, 427; *Cooper* v. *Butterfield*, 4 Ind. 423. Courts of equity have no jurisdiction in such cases.

The judgment of the court below dismissing the bill, is affirmed.

Judgment affirmed.

John Barney, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO BUREAU.

A jury should not be sworn for the term, but for the trial of each particular case.

In an indictment for rape it is erroneous to refuse to instruct the jury, that if they believe the husband of the prosecutrix, an able bodied man, was so near that he might have heard an outcry; that no outcry was made, and that the husband and wife, after the offense charged, remained for a time with the accused in friendly intercourse, that these circumstances raise a strong presumption of innocence in the accused.

This was a trial and conviction in the Bureau Circuit Court, upon an indictment which charges that the defendant, with force and arms, in and upon one Elizabeth Farnum, then and there, violently and forcibly, did make an assault, and her, the said Elizabeth Farnum, then and there, forcibly and against her will, feloniously did ravish and carnally did know.

The opinion states the objections to the trial, upon which the reversal is grounded.

Stipp & Leland, for Plaintiff in Error.

W. Bushnell, and B. C. Cook, for The People.

Caton, C. J. This was an indictment for a rape, of which the prisoner was convicted. The jury was not sworn to try this particular cause, but at the commencement of the term, the whole pannel was called up and sworn to try all causes which might be submitted to it. Although this practice may have prevailed in some of the States, at least in civil causes, it is opposed to the uniform practice in this State, and cannot meet with our approval. With some jurors and in some cases, too much solemnity cannot be observed in the conduct of the trial. The solemnity of calling the juror before the prisoner, in the presence of the court, and his there taking the solemn oath prescribed by the law, to well and truly try and true deliverance make of that prisoner, not only gives the prisoner a comfortable assurance that he is to have a fair and impartial trial, but has a salutary tendency to prepare the mind of the juror for the solemn duty he is assuming. We think the jury should be sworn in each case.

The court erred in refusing to give the thirteenth instruction, which is this: "13th. If the jury believe, from the evidence, that the husband of the prosecutrix was, at the time the rape is alleged by her to have been committed, an able-bodied man, and was at the said time within a few rods of the said place where

the rape is alleged by her to have been committed, that he might easily have heard her had she made any outery; that the prosecutrix made no outcry; that she and her husband remained for an hour or an hour and a half with the defendant, in a friendly manner, then these circumstances raise a strong presumption that no rape was committed." This instruction, when considered in connection with the evidence, as to where the husband of the prosecutrix was, and her knowledge of his position, presents a proposition which certainly should have been given to the jury. It is true that it is possible that all the circumstances which are there referred to, were true, and still a rape was committed, but those circumstances must, in all unbiased minds, raise a strong presumption against such a consummation.

Some of the other instructions asked by the prisoner, and which were refused, contain in the main correct principles of law, of which the prisoner was entitled to the benefit, but as there may have been some inaccuracy in the terms in which they were expressed, we refrain from commenting on them particularly. The judgment is reversed and the cause remanded.

Judgment reversed.

Owen Owens, Appellant, *v.* Bushrod W. Ranstead, Appellee.

APPEAL FROM KANE.

The rule that equity will not relieve against the neglect of a party in a suit at law, who has not made a proper defense, or to move for a new trial, will depend upon the fact, that he knowingly had a day in court.

The return of an officer to a writ, is only *prima facie* evidence of the facts stated by it; in a proper case made, equity will relieve against the effects of it. The remedy by action against the officer, for a false return, is not always an adequate remedy.

A judgment obtained by means of a false return and without any notice to the defendant, may be relieved against, in equity.

A Circuit Court has not the right to prevent a party from offering oral evidence, in a chancery case.

The rules and orders of a court regulating practice, should be placed upon the records of the court. Rules of court cannot rest in parol; nor can any discretion in the application of them be exercised, unless such discretion is authorized by the rules themselves.

Rules of court should have a reasonable publicity, and should only operate prospectively.

The pleadings and facts in this case are fully stated in the opinion of the court.

The decree of the Circuit Court was rendered by I. G. Wilson, Judge, at May term, 1858, of the Kane Circuit Court.

W. B. Plato, and B. C. Cook, for Appellant.

Eastman, Béveridge & Barry, for Appellee.

Breese, J. The power of a court of chancery to afford relief, in a case like this, properly made out, cannot be questioned, but it must appear to the court that the party complaining has been guilty of no laches on his part, and that he has been deprived of the opportunity of asserting his rights or making his defense through some accident, fraud or mistake, not of his own procurement, and to which he was not a willing party, for a party has no claim to come into a court of equity to ask to be saved from his own culpable misconduct.

It is well settled, as a general rule, that equity will not relieve against mispleading, or the inattention of parties in a court of law, as by neglecting a proper defense, or to move for a new trial in proper time. 1 Mad. Ch. 77. The second branch of this rule must be understood with this qualification, that the party had, knowingly, a day in court, otherwise the greatest injustice might be done.

These general principles being stated, the question is, has the appellant brought himself and his case within them.

Complainant states in his bill of complaint, that at the November term, A. D. 1857, of the Kane County Circuit Court, Bushrod W. Ranstead, recovered a judgment by default against him, for the sum of eight hundred dollars and costs—that neither the complainant or any attorney for him, appeared in said proceedings—that he had no knowledge or information whatever of the pendency of any such suit, nor of the rendition of such judgment, until after the final adjournment of the court.

That the judgment is unjust and inequitable, and wrongfully obtained, because the complainant had no knowledge or information of the pendency of any such suit or proceedings, and was not, nor is he now, indebted to Ranstead in any amount whatever.

That the declaration filed in the suit by Ranstead against complainant, was for money lent and advanced, money paid, laid out and expended, money had and received for goods, wares and merchandise sold, etc., labor and services, balance due on account stated, and for interest due; that all such claims or demands are utterly false and fictitious.

That upon the summons issued in the suit, there is a return made by Jonathan Kimball, as deputy sheriff, of service on the

complainant, which return is utterly untrue, unless the complainant misunderstood Kimball at the time of delivering him a paper as hereinafter stated.

That the only indebtedness the complainant ever incurred by reason of any dealing with said Ranstead, and for which he was ever indebted to him, at any time, is as follows, viz: On the 2nd day of October, A. D. 1855, the complainant purchased of the defendant a farm in Kane county, for the sum of $4,700, that he paid down $300, and executed to said Ranstead or order his promissory notes for the balance as follows, to wit: One for $1,000, due March 1st, 1856, which was fully paid and taken up by complainant on or before September 1st, 1856. One note for $400, due June 1st, 1856, paid and taken up by complainant on the 18th day of December, 1855. One note for $1,500, due March 1st, 1857, which was sold and transferred by Ranstead, to one William B. West, upon which the complainant paid about $1,170, and for the balance, said West obtained a judgment against complainant. And one note for $1,500, due March 1st, 1858, which has also been sold and transferred by Ranstead to said West; that the complainant executed to Ranstead a mortgage on the farm to secure the payment of the notes.

That some time in the month of October last, Kimball called upon the complainant and read him a paper, which the complainant understood to be a summons from the Circuit Court, and at the same time handed complainant a paper, purporting to be a copy of a declaration—a copy of which is hereto attached.

That the complainant is a laboring man, and unacquainted with such matters, and took the papers from Kimball without comprehending anything about it.

That the complainant read it after Kimball had gone, and understanding from that, that West had sued him for the balance due on the note, he then supposed, and still does, that the paper then read to him was the summons issued in that case—that having no defense to West's note, he took no counsel in the matter, and paid no attention to it further than to prepare and pay the judgment, which he supposed West would obtain against him.

That some time after the default was taken in the suit, Ranstead produced a young man named Charles E. Norton, as a witness, who came from Chicago with Ranstead, who testified to having heard complainant make some admissions of indebtedness to Ranstead, but at what time or place, complainant is not informed.

That if Norton or any other witness testified to any indebtedness other than the notes, due from complainant to defendant,

such testimony was and is utterly false, as could be made apparent upon an examination of such witness in court.

Complainant expressly charges that he is not, nor was he, indebted to Ranstead in any sum whatever at the time the judgment was obtained, which fact was well known to Ranstead.

That complainant would have employed counsel and defended the suit, and prevented any judgment being rendered against him for any amount by Ranstead, had he known or had the slightest information of the pendency of the suit against him.

Complainant charges that if the summons was served upon him, as the return thereon states, it was done at a time, and in such a manner, either by design or accident, as to deceive and mislead him, and therefore that the judgment was fraudulently or wrongfully obtained, without any negligence or want of diligence on his part; and that the complainant will suffer great wrong and injustice, if the judgment is allowed to be enforced and collected.

That Ranstead resides in Chicago, and complainant has not been able to see him since the rendition of the judgment.

That Ranstead has caused an execution to be issued on the judgment and placed in the hands of the sheriff of Kane county, with instructions to proceed immediately with the collection of the same, unless restrained by injunction, all of which actings and doings are contrary to equity, etc.

Prayer for answer of defendant without oath to bill of complaint, and that the judgment against the complainant may be vacated and set aside, and that Ranstead be perpetually enjoined from collecting or attempting to collect it, or that the judgment and all proceedings in the case subsequent to the filing of the declaration may be set aside, and complainant allowed to plead to and defend the suit, and for such other and further relief, etc.; and that Ranstead and the sheriff may be restrained from further proceeding to enforce the judgment; that complainant may have such writ of injunction, and also the usual writ of summons against defendant.

The bill is sworn to before the clerk of the Circuit Court.

The exhibit attached to the bill, was the declaration filed September 11th, 1857, in the name of William B. West, by Mayborne & Smith, his attorneys, in vacation after May term, 1857, and against complainant.

This declaration contains one special count on a promissory note, for $1,500, dated October 2nd, 1855, payable on the 1st day of March, A. D. 1857, to B. W. Ranstead or order, and by him assigned to William B. West. Declaration also contains the "common counts," with a notice to the defendant that the note declared on is the plaintiff's only cause of action.

On this bill an injunction was ordered, and on the 21st January, 1858, the defendant filed his answer, admitting that defendant recovered a judgment at the time and for the amount charged in the bill, but denies that the complainant had no notice of the pendency of the suit, and avers that summons was duly served more than ten days prior to the 1st day of the November term of said court for A. D. 1857. That such summons was twice read to the complainant by the deputy sheriff, and its nature fully explained. As to whether any other summons was served upon the complainant, defendant is not advised, etc.

Answer admits, that the declaration in the suit is substantially stated in the bill, but denies that the allegations in the declaration were false, but avers the same to be true and *bona fide*.

Answer admits the return on the summons as stated in the bill, but denies that such return is false, but avers the same to be true, and denies that the complainant misunderstood Kimball when such service was made.

Answer denies that the only dealings ever had between the parties to the bill were as therein stated. Admits the transactions stated in the bill are true so far as stated, and denies that such transactions are all ever had between complainant and defendant, but on the contrary avers that defendant has negotiated loans for the complainant, from time to time, for large amounts, for which complainant agreed to pay defendant large sums of money. Also, that defendant advanced large sums of money at various times for complainant at his request, all of which complainant agreed to pay defendant, but has wholly neglected so to do, though often requested.

Answer also states that defendant has expended a large amount of time, and trouble of mind and body, in and about the business of complainant, and at his request. That there is a large amount due between the parties on account stated, at the date of the commencement of the suit at law referred to in bill of complaint. That in the spring of 1857, the parties accounted together and a balance was struck, and a witness called to such settlement, to wit, Charles E. Norton, whose affidavit is hereto attached. As to the deputy sheriff's reading a declaration to complainant, defendant is not informed save from the bill, but denies that the complainant did not understand the summons in the suit, as it was repeatedly read to him, as before stated.

Answer admits that about ten days after default was taken in the suit, he did cause a witness to come from Chicago to prove up his damages, the said Charles E. Norton before referred to, who stated that at a settlement between the parties in the spring of 1857, in June, there was a balance struck between them in favor of this defendant for the sum of eight hundred

dollars, and that he was mutually called to evidence the fact. Answer denies that the witness' statements were false, but declares that sum was the true and just balance due from complainant to defendant in June last. Answer denies that complainant was not indebted to defendant at the time of the commencement of the suit at law, but avers that complainant was indebted to him as stated by the witness, and that the same has not been paid, but is now due and unpaid. Answer denies that the time and manner of serving the summons was different from the usual course authorized by law, or that it was done in a manner to deceive complainant, but on the contrary, service was made in a plain, explanatory way, as before stated.

Answer denies that the least fraud or wrong has been practiced on the complainant, but on the contrary avers the proceedings to have been full and legal, as the law points out, and that the judgment in favor of this defendant and against complainant, is just and legal, and should be paid without delay.

Answer denies all unlawful combinations charged in the bill, etc., and asks that the injunction may be dissolved, and defendant allowed to proceed in collecting his judgment.

A general replication was filed to defendant's answer in proper time.

On the 14th day of May, A. D. 1858, the defendant moved to dissolve injunction, which on the 9th June the court allowed, and dismissed the bill.

To which decree of the court in dismissing said bill and dissolving the injunction, the complainant, by his solicitor, excepted.

Whereupon the complainant prayed an appeal to the Supreme Court, which was allowed.

The errors assigned are:

1st. The court erred in refusing to permit Michael Grant, William B. West, John Owens, Ethan J. Allen and Joel D. Harvey, severally to be examined by the complainant, as witnesses on the hearing of said cause.

2nd. The court erred in refusing to hear proper evidence offered by the complainant, on the hearing of said cause.

3rd. The court erred in dismissing complainant's bill.

4th. The court erred in rendering the decree aforesaid.

The above is a full abstract of the bill and answer, and if the statements in the bill be true, there can be no question, that the complainant is entitled to relief in equity.

It is said by the defendant's counsel, that the complainant cannot contradict the return of the officer to the summons in the suit at law, *Ranstead* v. *Owens*—that such return is conclusive upon him.

A record in some cases, as to some facts, is only *prima facie* evidence, and may be contradicted at law. In Connecticut, in an action on a judgment rendered in another State, evidence on the part of the defendant, that he had no legal notice of the suit and did not appear, was held admissible, though the record stated expressly that the defendant appeared and pleaded by attorney. *Aldrich* v. *McKinney*, 4 Conn. 380. So in New York in a similar case, where the record stated that the defendant appeared to the suit, it was held that such statement was mere *prima facie* evidence of appearance, and in an action on the judgment, the defendant might aver and prove that he did not appear. *Starbuck* v. *Murray*, 5 Wendell, 148.

We would think that the return of an officer to a writ should have, on principle, no greater force and effect, than a record, and that it should be only *prima facie* evidence of the fact stated, subject to be controverted at law, but the general rule as now established, is, as stated by appellee's counsel, but it must have its exceptions in equity at least.

Suppose A, brings an action against B, and the process is actually served on C, but returned as served on B, their resemblance being so great as to deceive the officer. A judgment having passed against B, by default in a court of law, and the term having expired, before he was informed of it, cannot B, seek and obtain relief in equity, by averring and proving, that the process was not in fact served upon him but upon C? Or suppose that it could be shown, that it was physically impossible for the officer to make the service at the time stated in his return, by reason of the fact that B, at the time of issuing the process, and up to and after its return by the officer, was in a foreign and distant State, and so not within the reach of the officer. Would it not be just and equitable, that a judgment by default obtained under such circumstances, and no chance to move in the court of law to set it aside, should be relieved against? It cannot be averred, that the judgment was the result of his culpable negligence, or that his title to relief is mixed with misconduct, gross or otherwise, on his part, and not being obnoxious to that objection, and coupled with the averment, that the claim is utterly false and fictitious on which the judgment was obtained, the door of such a court ought to fly open to admit him.

But the defendant answers, the remedy in such case, is by an action against the officer for a false return. Granted such a remedy is at hand, but is it a complete remedy, as full as a court of equity can give? Is it any satisfaction to the person thus situated, whose estate is swept from him by the execution issued on such a judgment, that he may sue the officer, and

recover damages, and run the risk of being beaten on the execution, finally? There is this remedy at law, but it is wholly inadequate, and in such case the powers of a court of equity ought to be successfully invoked. Courts of equity refusing to entertain such a case, would be the reproach, as they are now the admiration of mankind.

The doctrine is, as announced by the Supreme Court of the United States in the case of the *Marine Ins. Co. of Alexandria* v. *Hodgson*, 7 Cranch, 332, that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." And this is the doctrine of all the books, elementary or otherwise—it is the principle universally recognized, and by this court. *Beams* v. *Denham et al.*, 2 Scam. R. 58; *Wierich* v. *De Zoga*, 2 Gilm. R. 385.

It is a general and almost an universal principle, that there is no wrong without an adequate remedy. If a court of law, acting by general rules cannot supply it, a court of equity must by acting on the particular case.

It would be hard indeed, and a reproach to our institutions, if no court could afford an adequate remedy against the fraud and villainy, or mistake of an officer, who shall have returned process served which he in fact never served, and when the party did not appear to the action. In the cases we have cited above, the fact of appearance was contested at law, and successfully, the ground being that where there is no service and no appearance, the court has no jurisdiction of the person. This is a principle of natural justice and of universal application.

A judgment obtained without notice, and without appearance, is an injury to the rights of a party, for which he should have adequate remedy. If it does not exist at law, it must in equity.

That a court of law cannot afford such remedy, is certain. An action for a false return may be brought against the officer, who may in divers ways escape liability by the perverseness or partiality, or prejudice of the jury, or by his own insolvency and that of his sureties. A judgment against him under such circumstances, would be a poor equivalent for the loss of a valuable estate, sold to pay the judgment his fraud or mistake had caused.

No relief can be had by writ of error, for the record on its face shows no error—none by *audita querela*, for if in use, it would be inapplicable. That remedy proceeds upon the ground of the validity of the judgment, and gives relief upon some

matter of discharge subsequent to its rendition, as a release or payment. Nor is there any efficacy in the writ of error *coram nobis*, because at law, no averment can be made in the same action against the officer's return. The fact then being that a court of law can afford no adequate remedy, is the strongest of all reasons, and the very reason why an application should be made to a court of chancery. The injury of which the party here complains, is that an execution has issued upon a judgment against him, in a case of the existence of which he had no notice, and in which he never appeared. Who can doubt that it is unjust and unconscientious to enforce a judgment so obtained?

We think, in all cases, if a sheriff or other officer, by fraud and collusion with a party, or by mistake, makes a false return, a court of equity has full power and jurisdiction to interpose and give the appropriate relief, and to permit the party injured, so that the remedy may be effective, to aver against the truth of the return, and show it to be false, although it is a matter of record, and this will be going no further than the courts went in the cases cited from 4 Conn. 380, and 5 Wend. 148.

In the case before us, the facts are all denied by the answer, and the deputy sheriff, sworn as a witness for the defendant, testifies that he did serve the process, at the time of the date of the return, and it would require testimony to overthrow this, and here we come to a most important part of the case. If the testimony of the deputy sheriff is carefully examined, it will be discovered that it is not so plain as it should be. It will be observed, the complainant introduced as evidence on his part, the summons against him in favor of West. On that summons is a full return, to wit: "Served by reading to the within named Owen Owens, Oct. the 8th, 1857, and at the same time I delivered to said defendant a certified copy of the declaration on file."

Now the deputy sheriff swears on behalf of the defendant, that he received the summons in the case of *Ranstead* v. *Owens*, on the 5th day of October, and made the return on it, and the return was in accordance with the facts. At the time he served the papers, he told Owens that it was a separate affair from another paper he served on him at the same time.

On his cross-examination he states that at the time of serving the summons in favor of Ranstead, he had another summons against complainant in favor of West, and a certified copy of the declaration, which he gave complainant—it was a twenty days' summons, and the time of service had run out, and told complainant, he could do as he pleased about answering it—did not read the West summons to Owens—served but one summons on him on said 5th day of October, and in that Ranstead was plaintiff—gave complainant a certified copy of the declaration in

West's case, but did not read the summons—did not make such a return to the clerk of the court, and don't know whether there was any return on it or not—don't think he ever requested any one to make a return on it for him—was not there at any time after the fifth.

The record of the summons in the case of West shows it was read to the complainant on the 8th of October, and is so returned. How easy was it for this deputy to mislead the complainant as to these writs and process. He gave to complainant a copy of the declaration in West's case, and read the summons in the Ranstead case—how natural, the complainant knowing he owed West, and having a copy of the declaration in his hand, that he should suppose the summons read to him was in the same case. There were the names Ranstead and West in the same connection. There is a mistake somewhere. The deputy sheriff swears he did not read the West summons to complainant, yet his return, under his own hand and filed in the clerk's office, shows he did. He swears also that he was not with Owens after the 5th of October, yet his return on the West summons is of the 8th of October. This return, indorsed on the summons, was undoubtedly put there by mistake or inadvertence, or in fraud of the complainant. If he served but one summons on the complainant, as he says he served but one, it must have been the one in West's case, for serving him with a copy of the declaration without the summons also, would have availed nothing. The complainant's narrative about this, is quite natural, and impresses strongly the belief that it was just as he states it. At any rate, he might well have been misled from all the facts as they are now detailed. The answer of the defendant is so general, so evasive, so wanting in distinctness, so uncertain and so scornful of particulars, that we are disposed to place but a slight estimate upon it. It admits the transactions with complainant as he states them in the bill of complaint, but denies that they are all ever had between them, but on the contrary avers that he has negotiated loans for the complainant from time to time, without showing particulars—with whom, when, where and for what amounts, and on what terms—and how large were the sums of money complainant agreed to pay him for such negotiations—how large were the sums of money advanced to complainant—when, where, or what amount, and on what terms. How much time has he expended—how many days, weeks, months, and how much trouble of mind and body, and why troubled? in and about the business of complainant. How large is the amount due from complainant to him, and how did it accrue—where is the statement of the account, and the balance struck as alleged, and why was not some evidence of indebtedness taken of the complainant,

and why not give a bill of particulars? The circumstances sworn to by complainant in his bill, and the vague, indefinite, and unsatisfactory character of defendant's answer, abundantly testify that defendant's claim is false and fabricated.

We have now reached the point in the case which we think quite important—the decision of the court on the objection made by defendant to the introduction, by complainant, of parol proof, to make out his case, and the reasons therefor as given by the court. On the hearing, 9th June, the complainant offered to introduce parol evidence in support of his case, having given notice he would do so, on the 28th May preceding. The defendant objected to the introduction of such proof and the court sustained the objection, as appears by the bill of exceptions. The record recites: "The court sustained the said defendant's objection and refused to allow said witnesses to be sworn and testify in said cause, there being a general rule of court requiring parties who intend to offer parol proof on the trial of chancery causes, except such parol proof as is allowable by the chancery practice irrespective of the provisions of the act of February 12, 1849, to give notice of the same ten days previous to first day of the term. But such rule had never been entered upon the records of the court, but had been announced orally from time to time, during the progress of business in open court."

To this ruling the complainant excepted, and we are called upon to pronounce upon the validity and binding effect of such a rule.

By our chancery code, chapter 21, (Scates' Comp. 138,) the Circuit Courts in all causes of chancery jurisdiction must proceed according to the mode prescribed in that code, and where no provision is made by this chapter, according to the general usage and practice of courts of equity, or agreeably to such rules as may be established by those courts in that behalf. By the seventeenth section of the same chapter (ib. 140), it is provided that the judges of the Circuit Courts, in their respective circuits, may establish rules of proceeding in chancery, and make all needful orders and regulations, consistent with the practice of courts of chancery, in cases not provided for by law. These are all the authority the Circuit Courts as courts of chancery possess, to establish rules, except that inherent power all courts have to despatch their business, by the establishing and enforcing reasonable rules. By our chancery code, first section, where no provision is made by the chapter as to the mode of proceeding, it must be governed by the general usage and practices of courts of equity, or agreeably to such rules as those courts may establish.

It is only in cases not provided for by law that the power given by the 17th section can be exercised.

By a law passed Feb. 12, 1849 (Scates' Comp. 166,) it is provided that on the trial of any suit in chancery, the evidence on the part of either plaintiff or defendant may be given orally, under the same rules and regulations as evidence in cases at common law. This short act, effected an entire change in the mode of proceeding in courts of chancery. The ancient practice was, and still is in England, to present the evidence by depositions—oral evidence was in no case heard. The act of 1849, is certainly a great improvement on the old mode, since the evidence can be, and is all preserved by the court, or master before whom the witnesses are examined and the witnesses subject to free and full cross-examination.

Such evidence, it will be seen, is to be received under the same rules and regulations as evidence in cases at common law. Can the courts limit and restrict this right given to suitors, by a rule unknown and unheard of as having ever been applied to cases at common law? We think not. By the rules and regulations of courts of common law, *no party* is required to notify his adversary of the names or number of his witnesses, or what particular facts he expects to establish by them. Each party has a perfect right to mask his own battery, and not expose it, until the day of trial is on. In criminal cases, by express statute, the prosecution is bound to give, before the trial, to the party indicted, a list of the witnesses intended to be sworn and examined, and they are those marked on the indictment, with such others as the prosecution may deem necessary. In all our practice, and it has not been limited, we have never heard or read of a rule of court, or a requirement of statutory law, of the character and purpose of the one under consideration. It is not, in our judgment, in conformity with any known rule of practice in the English chancery, or of other States having a chancery code, and it seems to us, in express violation of the act of 1849, and for its injustice should be condemned.

It is unjust in this, a party offering parol evidence, may not have obtained his knowledge of its existence until the very day of trial. Is he to be driven to the expense and suffer the delay of a continuance of the cause, in order to get in the proof, thus by such an arbitrary rule excluded, and which, if received, would determine the case, so soon as heard? The idea is preposterous. That a party should be required to know, ten days before the sitting of the court, that it would be necessary for him to use parol evidence on the hearing, and give notice to the opposite party, can be of no practical use, for he is not required to state in his notice, the names of the witnesses nor what he

will prove by them, or either of them. The only possible use, such a rule can be, is to apprise the opposite party, so that he may provide the same kind of testimony if he has it, or can get it manufactured.

But was there any such rule established by that court which suitors and counsel attending the court could, or were bound to notice? We think not.

The acts and rulings and orders of a court can be established only by the record, though a rule may be proved to exist by immemorial usage of the court, which was never upon the record. Apart from this, a rule of court cannot rest in parol or in the breast of the judge—it must appear of record. Rules of court are understood to be orders made by a court having competent jurisdiction. They are either general or special—the former are the laws by which the practice of the court is governed—the latter are special orders made in particular cases. Disobedience to these is punished by judgment against the disobedient party, or by attachment for contempt, as the case may be.

Rules of practice, and such is the rule under consideration, are certain orders made by the courts, for the purpose of regulating the practice of members of the bar and others, which, as we have said, every court has an inherent power to prescribe, being only limited to their reasonableness, and conformity to constitutional or legislative enactments. Without this power it would be impossible to despatch business—delays would be interminable, and that is quite frequently, the object of one of the parties. Such rules the courts can change, modify or rescind, but while they are in force they must be applied to all cases falling within them. No discretion can be exercised as to their application, unless such discretion be authorized by the rules themselves. That rules of this character, of such importance, affecting so deeply the rights of suitors, should be written and recorded, is a proposition too plain for argument. Such rules have the force of law, hence the necessity of recording them, so that every one may read and know them. The Roman tyrant is justly stigmatized, who wrote his edicts in small characters, and placed them out of sight of the people, on high columns.

Every court must have stated rules to go by, but can they be said to be stated, when they are not recorded, and only occasionally referred to orally, in the progress of the business of the court?

Rules of court regulating its practice, and affecting all the suitors in it, and their most important interests, ought, like the acts of the General Assembly, to have a reasonable publicity

given to them before they shall become obligatory, at least, by being entered upon the record, and should operate prospectively only. A rule locked up in the judge's breast, and only promulgated orally, as the business of the court progresses, has none of the constituents of a rule. It was not a written rule—it was not entered of record—it had no publicity, and was known only to some of the lawyers practicing in that court. The courts of this State, are, all of them, open to every licensed attorney of the State. One from a distant circuit appearing in a court of another circuit for the first time, would naturally inspect the order book to ascertain what rules the court had established, as there may be existing rules variant from those in his own immediate circuit, to which he must conform. Finding no rule of the character this is, and called to conduct a chancery case, what would be his dismay and discomfiture, when proposing under the act of 1849, to introduce parol evidence, to be met by the objection, that the rule of court requires notice of such intention to be given ten days before the term of the court! He modestly, replies, that he had carefully examined the order book, and could find no such rule, and as modestly insists, that by the act of 1849, oral evidence may be given under the same rules and regulations as evidence in cases at common law, and that in such cases, no notice is usual, necessary or required. But says the court, true, there is no such written rule on our records—none such has been made public, yet we have often orally, in the progress of our business, adverted to the existence of such a rule, and it must be enforced. Confounded, dismayed, and utterly discomfitted, the counsel and his client succumb, and a loss of thousands is the consequence, and the statute itself nullified.

We cannot consent, that a rule thus established—thus promulgated, shall have such potency. Common right and common sense is against it, and we do not hesitate to declare it invalid. It is no answer to say the complainant attempted to comply with the rule, by giving notice on the 28th May. It may have been the very moment his counsel first heard of the rule "orally pronounced in the progress of business," in another case. This cannot make against him. We condemn the rule as unjust, and as an effectual nullification of the act of 1849.

We would advise the Circuit Courts, and other courts having power to establish rules of practice, to enter them of record—to give them publicity in some proper mode, and generally, to make them prospective in their operation.

The effect of this ruling of the Circuit Court, was, to deprive the complainant of testimony he had a right to use, by which he might have established his whole case as set out in his bill

of complaint, and contradicted the testimony of the deputy sheriff, or explain the error into which he has evidently fallen. They might have proved fraud and contrivance between the deputy sheriff and Ranstead whom he had known for so many years —who was a negotiator of loans, and dealt in money—to get Allen, the former deputy, to give him the summons in Ranstead's case, as he had one in the case of West, which by mixing up, serving or not serving, shall so operate on the mind of the complainant, as to induce him to believe he was summoned only in the case of West. We cannot conjecture, what might have been proved, nor will we attempt to guess. It is sufficient, the ruling of the court has done the complainant great injustice. There is sufficient evidence already in the record, to satisfy us there is some mistake in this matter, some fraud perhaps, which demands further investigation, and we accordingly reverse the decree, dismissing the bill and dissolving the injunction, and revive the injunction, and remand the cause for further proceedings in conformity with this opinion.

Decree reversed.

The County of Knox, Plaintiff in Error, *v.* Cephas Arms, Defendant in Error.

ERROR TO KNOX.

On a judgment against a county, it is erroneous to award an execution.

Counties should pay for printed blanks, such as summons, subpœnas, etc., furnished by the clerk of the Circuit Court for the use of his office.

This was an appeal from the board of supervisors of Knox county, upon the refusal of that board to allow the clerk of the Circuit Court for the printing of blanks for the use of his office, and was tried in the Circuit Court of Knox county before a jury, at the October term, A. D. 1857. Verdict and judgment for plaintiff. Motion for a new trial by defendant, overruled.

On the trial it was agreed by the plaintiff and defendant, as evidence for the jury, that the articles charged in the bill of the plaintiff, filed in said cause to said county, were procured by the plaintiff and paid for by him, and that the amounts of blanks charged in said plaintiff's bill to said county, were printed for him for the use of the clerk's office of the Circuit Court of said county, which account is as follows:

County of Knox *v.* Arms.

KNOX COUNTY,

To C. ARMS, Dr.

April 25th, 1857,	To 33 bush. coal used in my office ..... P		$4.95
June 20th, "	" Cash paid John S. Winter for Blanks printed for and used in my office for Court purposes, as follows:		
	To 2 quires Capiases, at $1.50 per quire.....		3.00
	" 2 " Summons, " " "		3.00
	" 4 " " " " "		6.00
	" 2 " " $1.00 " "		2.00
	" 2 " Attachments for witnesses, at $1.50 per quire,		3.00
	" 4 " Supersedeas, " 1.00 " "		4.00
	" 4 " Forthwith Capias, " 1.50 " "		6.00
	" 2 " Capias for Clerk, " 1.00 " "		2.00
	" 4 " Summons for G. Jurors, " 1.00 " "		4.00
	" 4 " Writs Attachment, " 1.50 " "		6.00
	" 2 " Capias ad. respondendum, " 1.50 " "		3.00
	" 1 " Wit. Certificates, " 1.00 " "		1.00
	" 6 " Fee Bills and Executions, " 1.50 " "		9.00
	" 4 " Fi. Fas., " 1.00 " "		4.00
	" 8 " Witnesses' Affidavits.....		10.00
	" Printing 6 Alphabets for Cases,.....P		75
June 22nd, 1857,	To 2 quires Procedendoes, at $1.00 per quire.....		2.00
	" 4 " Transcript Executions, at $1.50 per quire...		6.00
July 27th, 1857,	To Cash paid C. Evans for work and material on case in office .....P		8.61
	" 1 Deed Record, pr Charles Sonne, as per bill .....P		15.50
	" Fees in Criminal Cases, as pr Statute for 1857.....P		40.00
	" 1 Bottle Ink.....P		75
	The above Bill is correct,		$144.56

C. ARMS, *Clerk.*

The plaintiff below called a witness, who testified, that he had been clerk of the Circuit Court of Henderson county, Illinois, for sixteen years; have been in Knox county for last five or six terms of Knox Court, assisting the circuit clerk; necessarily know the amount and kind of blanks required to do the business of the office; and then proposed to prove by him, that the said blanks in said bill of the plaintiff were necessary to do the business of said Circuit Court of Knox county, and asked the following question: Are the blanks charged in the bill of plaintiff necessary for the clerk in order to do the business of the court? to the answering of which question the defendant objected. Court overruled objection and permitted witness to answer. The witness then testified: I have assisted the clerk of Knox Circuit Court for five or six last terms; that the said blanks in said bill of plaintiff are necessary for said clerk; in order to transact the business of the office, it is necessary that the clerk should be furnished with blanks, and he could not do the

business of the office without them; the saving of paper in getting blanks, would more than pay for blanks or printing of blanks; one man with blanks, can perform more than ten men without blanks.

That a man could write out from twenty to fifty subpœnas in a day, and summonses about the same number; that it would take five clerks to do the business of Knox county without printed blanks.

It was admitted by the parties, that plaintiff bought and paid for the blanks that were charged in his account, for his use as circuit clerk of Knox county, and that the quantity and price were reasonable.

The defendant, to maintain the issue on its part, then called *Zelotes Cooly*, the clerk of the county court of Knox county, with the records of the proceedings of the board of supervisors of said county, who testified that he was clerk of the County Court of said county, and that as such clerk he had the records of the proceedings of board of supervisors in his possession, and that he had the records of the proceedings of the board of supervisors of Knox county in relation to the account of plaintiff, sued on in this action, and that the book he had with him contained the proceedings of said board of supervisors, in relation to said account.

The defendant offered in evidence the record of the proceedings of said board of supervisors, in relation to the account of plaintiff, sued on in this action, from which proceedings and decision the said appeal was taken to this court, and to show what items of said account were allowed by said board of supervisors of said county, and what items they refused to allow said clerk. To the giving in evidence of said record the plaintiff objected, and the court sustained said objection.

The plaintiff asked the following instructions, which the court, THOMPSON, Judge, presiding, gave to the jury:

1. The jury are instructed, that if they believe from the evidence, that the articles charged for in the plaintiff's account, were purchased and furnished by the plaintiff as the clerk of the Circuit Court of Knox county for use in his office, and that the quantity charged for is reasonable in amount, and that the articles charged for and embraced in said account, were necessary for the clerk in the performance of the duties of his office, that then the plaintiff is entitled to recover so much as said articles are reasonably worth.

2. The jury are instructed, that blanks are stationery, within the meaning of the statute.

To the giving of said instructions the defendant excepted.

The defendant asked the following instructions:

1. That if the jury believe, from the evidence, that the supervisors of Knox county allowed the plaintiff for all the items in his bill except for the printing of blanks, and passed an order for the payment of the same to said plaintiff, the jury will only find a verdict for the amount of said bill which the supervisors refused to allow, if they believe the same was necessary stationery for the use of said office.

2. If the jury believe, from the evidence, that the supervisors of Knox county allowed the bill of the plaintiff with the exception of the printed blanks, and that plaintiff, as clerk of said court, gets a fee by statute for said writs from the parties to suits, they will find for the defendant.

Which said instructions the court refused to give, and the defendant excepted.

Whereupon the jury found the issues for the plaintiff, and assessed his damages at $144.56.

The court overruled a motion for a new trial, and rendered judgment for the amount of verdict and costs of suit.

Douglass & Craig, for Plaintiff in Error.

Tyler & Sanford, for Defendant in Error.

Breese, J. It was error in this case to award an execution against the county on the judgment rendered against it. In such case our statute, (Scates' Comp. 300,) provides expressly when a judgment is so rendered, the court of the county shall order a warrant to be drawn on their treasurer for the amount of the judgment and costs, to be paid as other county debts, and "nothing herein contained shall authorize any execution to be issued against lands or other property of any county of this State."

Upon the other question presented, as to the liability of the county to pay for printed blanks, subpœnas, summons, etc., furnished by the clerk of the Circuit Court for the use of his office, we entertain no doubt.

It is contended by the county, that it is not liable, because the law allows the clerk a fee on issuing writs and other process; that he is paid for the labor of preparing them, and must perform it.

The only statute upon the subject to which reference has been made, is Ch. 41, Sec. 32, (Scates' Comp. 509.) That section is as follows: "The clerks of the Circuit and County Commissioners' Courts shall provide all the necessary books for their respective offices, and a safe press or presses with locks and keys for the safe-keeping of the archives of their respective

offices; and the County Commissioners' Courts shall make allowances for the same, and for articles of stationery, necessary for their respective courts, out of the county treasury, from time to time."

The county claim, that these printed blanks are not articles of stationery, necessary for the court; that they are only to provide for the office, and the court, the necessary articles of stationery for the use of the court and the public—such articles for which the clerk is allowed no fees for issuing, and for which no officer gets any pay, and which, therefore, the county ought to provide. That the law restricts "articles of stationery" to such as may be necessary for the court, and cannot include blanks for a clerk, which a county has no right by law to frame and to have printed and which must be framed by the clerk according to the parties and facts of each particular case, and that there is no law requiring process of any kind to be printed, and if the clerk to save time and labor procures printed forms, it is for his own profit and convenience, in which neither the county nor the public, have any concern.

This is all true, and being admitted does not determine the duty of the county as arising under, not only the proper construction of the act to which reference is made, but upon general views and principles, applicable to the case.

The county contends that stationery, as defined by lexicographers, cannot include blanks, and reference is made to Webster. He says "stationer" meant originally a bookseller from his occupying a stand or station; but at present, one who sells paper, quills, inkstands, pencils and other furniture for writing, and "stationery" means, the articles usually sold by stationers, as paper, ink, quills, etc. If this be so, and we do not doubt it, stationery must include printed blanks, as they are articles usually sold by stationers. So would steel pens, and penholders, wafers, mucilage, sand or sponge paper, and various other articles be deemed stationery. A stationer deals in blank paper, and in paper partially printed. Such is our experience, and blank forms are not unusually one of the main articles of their business. We think stationery includes blanks and are indispensable for the prompt performance of the duties of the office of clerk and therefore necessary for the court, the clerk's office being an indispensable appendage of a court.

It would seem to us, that the public have quite as great an interest that these blanks should be supplied as the clerk, for he gets his fee whether a writ is written or printed. The business of the county could not be transacted, without this facility being furnished the clerks, and it is evidently the intention of the legislature, that the county shall provide all that is neces-

sary for such purpose be it stationery or what not. The speedy dispatch of the business of the courts is a matter in which the public have a deep interest, and the county must procure all reasonable facilities for that purpose. All such stationery must be furnished as the demands of the office require, in whatever articles it may consist.

The case of *De Kalb County* v. *Beveridge*, 16 Ill. R. 312, sustains these views. See also *Armsby* v. *Warren County*, 20 ib. 126.

It is really a matter of economy to the county, that it should furnish the blanks to facilitate the public business, and thus save expense.

It has been the uniform practice of this court from its first organization to this time, to audit the bills of its clerk for blanks. This amounts to a construction of the statute by this court entitled to consideration and weight.

Such has been not only the practical construction of this court but of the subordinate tribunals, from the earliest history of this State, and with this universal contemporaneous construction before it, the legislature has in its various revisions of the laws, repeatedly re-enacted this statute, without change of its phraseology, thus in the most direct mode, sanctioning the construction, as giving the true intention of the law makers. Without this, the maxim, "*Contemporanea expositio fortistima est in lege*," would well apply.

The other question made, by the allowance of a part of the claim by the board of supervisors, does not amount to anything. They did not allow the claim, and no object could be gained by proving a tender of part, which is the utmost to which the allowance can go.

That part of the judgment awarding execution in this case, will be reversed, and affirmed as to all else.

Elliot Anthony, Impleaded, etc., Plaintiff in Error, *v.* Ephraim Ward, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where there are joint defendants, and one files an affidavit of merits to a plea in his behalf, and the other defendant does not make affidavit, the Common Pleas Court of Cook county may default the party who has not verified, even at a future term, the suit being pending, on the issues of the other defendant.

THIS was an action in covenant commenced by the defendant in error, against Elliot Anthony, plaintiff in error, and one Julius C. Smith, to recover payment of an installment due upon certain articles of agreement, made between said Ward, of the first part, and Smith and Anthony of the second part.

July 15, 1858. Defendants filed plea of *non est factum*, in the usual form.

December 14, 1858, in the November special term, the cause was regularly reached upon the docket of said court, and came on for trial. Whereupon the said plaintiff, Ward, (defendant in error) made a motion, among other things, to strike the plea, filed by both defendants, on the 15th day of July, 1858, in this cause, from the files, and for a default, so far as the defendant, Elliot Anthony, was concerned, and by him pleaded; on the ground that the affidavit of merits, filed July 9, 1858, in this cause, was not made in behalf of both defendants; which affidavit is in the words and figures following:

JULIUS C. SMITH *et al. ads.* EPHRIAM WARD. } *Cook Common Pleas.*

STATE OF ILLINOIS—COUNTY OF COOK, ss.

Julius C. Smith being duly sworn says, that he is one of the defendants in the above entitled cause, and that he has a good defense thereto, upon the merits, as he is advised and verily believes.

J. C. SMITH.

To which motion, the defendant, Elliot Anthony, objected, that said motion was made too late, and should have been made at the first term after the same was filed; but that the plea had been permitted to remain during some five terms of said court.

But the said court overruled the said objection, granted said motion, and ordered the plea of the defendant, Elliot Anthony, to be stricken out, and his default taken.

To which ruling and decision of the said court, the said defendant, Anthony, excepted.

And the cause was thereupon tried as to the other defendant, who did not appear, and damages assessed against said Anthony also; and judgment rendered therein against both defendants for the sum of one thousand nine hundred and sixty-four dollars and nine cents.

Anthony assigns for errors—

1st. The court erred in striking from the files, the affidavit of merits filed in this cause, after the lapse of several terms of the court below.

2nd. The court erred in striking from the files the plea filed in the court below.

3rd. The court erred in taking the default of defendant below.

4th. The court erred in rendering judgment for the plaintiff below.

Wherefore, for the errors aforesaid, and for other errors, the said plaintiff in error prays that said judgment may be reversed, etc.

Elliot Anthony, *Pro Se.*

H. C. Kelley, for Defendant in Error.

Breese, J. The only question presented by the record in this cause is, did the court below err in striking the plea of plaintiff in error from the files, for want of an affidavit of merits, and not permitting certain pleas afterwards filed by him to stand. The record shows a joint action against the plaintiff in error and one Smith. On being called for trial on the 14th December, 1858, in the November term, 1858, of the Cook County Court of Common Pleas, the plaintiff moved the court to strike from the file the plea of plaintiff in error impleaded with Smith, which he had filed on the 13th of December, 1858, and for a default against him, for the reason that no affidavit of merits was filed with the plea. There was an affidavit of merits filed by his co-defendant Smith, on the 9th July, 1858, and not on behalf of the plaintiff in error, and that the pleas of plaintiff in error of the 13th December were filed without leave of the court having been first asked and obtained, and after a long and unreasonable delay. The affidavit of merits by Smith is personal to himself alone, with no reference or allusion to his co-defendant.

The plaintiff in error then filed his cross-motion that the pleas so filed be permitted to stand, and presented his affidavit stating in substance that he could make and file an affidavit of merits if his pleas were allowed to remain, and objected that the motion to strike his pleas from the file was too late—that it should have been made at the first term after the plea of July 15th, was filed.

The court overruled his objections, and refused leave to file the pleas of December 13th, and ordered that they should be stricken from the files, and his default entered for want of an affidavit of merits, and the damages assessed.

By the 14th section of the act regulating the practice in the Cook Circuit and Common Pleas Courts, it is provided that in all suits arising on contracts brought to any term of said courts, the plaintiff shall be entitled to judgment unless the defendant

shall with his plea, file an affidavit of merits, etc. (Scates' Comp. 272.)

The record shows no such affidavit by the plaintiff in error. Smith's affidavit cannot aid the plaintiff in error, for his merits may have been personal to himself. It often happens that one of several co-defendants has a meritorious defense, whilst the others cannot defend. The law requiring such affidavit, and the plaintiff in error not having made one, we do not see how he can escape the consequences.

As to the suggestion that the motion was not in time, that the motion for judgment for default should have been made earlier, we have to say, that the defendant in error cannot be prejudiced by not taking a default earlier, as such a judgment is interlocutory only and there was an issue pending with his co-defendant Smith, which had to be disposed of before final judgment could be entered against the plaintiff in error. Final judgment could not rightfully be entered until the issue was disposed of. *Teal* v. *Russell*, 2 Scam. R. 319; *McConnell* v. *Swailes*, ib. 571; *Dow* v. *Rattle*, 12 Ill. R. 373.

We see no error in refusing to permit the pleas filed in December to stand. That was a matter purely within the discretion of the court, and we cannot say he has abused that discretion. *Conradi* v. *Evans*, 2 Scam. R. 185. They were not accompanied by an affidavit of merits, and there was no leave to file them at that late day.

The judgment is affirmed.

Judgment affirmed.

Robert Sedgwick, Appellant, *v.* Edward Phillips, Appellee.

APPEAL FROM ROCK ISLAND.

If exceptions are not taken to instructions, the Supreme Court cannot consider them.

This was an action of assumpsit, commenced in the Rock Island Circuit Court, by appellant against appellee, at the September term, 1858, of said court.

Plaintiff's declaration contained a special count, for lumber sold and delivered to the defendant, and the common counts for goods sold and delivered, etc. Defendant pleaded the general

issue, and filed notice that on trial he would prove an offset of $500. Issue joined.

Plaintiff offered the testimony of *Porter S. Skinner*, who said, I am one of the firm of Keator & Skinner, lumber dealers, at Moline, Illinois; our firm delivered lumber to Mr. Phillips, defendant, on the order of Abraham Hartzell, to the amount of $256.53; the order was accepted with the understanding that the value of the lumber so delivered to Phillips, should be endorsed on the note; this has been done; have been paid for the lumber in this way.

The order for the lumber was in writing; did not know Robert Sedgwick in the transaction; have no lumber charged to Robert Sedgwick.

A verdict was rendered for defendant. Plaintiff moved for a new trial; motion overruled, and plaintiff excepted. Judgment rendered for defendant, for costs.

A. Webster, for Appellant.

B. C. Cook, for Appellee.

Breese, J. The instructions given by the court were not excepted to on the trial, as the record shows, and we cannot therefore now consider their propriety. *Leigh* v. *Hodges*, 3 Scam. R. 17; *Gibbons* v. *Johnson*, ib. 63; *Hill* v. *Ward*, 2 Gilm. R. 293; *Martin* v. *The People*, 13 Ill. R. 342; *Duffield* v. *Cross*, ib. 700.

The proofs show that the defendant took the order for the lumber from Hartzell, with the distinct understanding that it was to pay Hartzell's debt to him, and to be charged to Hartzell, not to himself. On that order the defendant got the lumber, and we know of no rule of law or principle of justice by which he could be made the debtor of the plaintiff, by any arrangement made between other parties behind his back, and to which he was not assenting.

The merits are clearly with the defendant, and we affirm the judgment in his favor.

Judgment affirmed.

RUFUS L. CRAIG, Appellant, *v.* WILLIAM PEAKE *et al.*, Appellees.

APPEAL FROM BUREAU.

If on a trial of right of property, there is evidence tending to show property in the claimant, it is erroneous to instruct the jury that he fails to show any right, and they must find against him.

THIS was an appeal from the verdict of a jury, on a trial of the right of certain property, levied upon by the sheriff of Bureau county, on several attachments, in favor of the appellees, against Abner M. Moore, and which property was claimed by appellant.

The verdict of the jury empanneled by the sheriff, was in favor of the claimant, (the appellant,) and the appellees appealed to the Circuit Court of Bureau county.

The cause was tried at the April term, 1858, of the Bureau Circuit Court, before BALLOU, Judge, and a jury. The jury rendered a verdict for the defendants, (the appellees here.) The claimant moved for a new trial, which was overruled, and a judgment rendered against appellant, for costs.

The bill of exceptions shows that the appellant, on the trial, proved the execution of, and gave in evidence, a power of attorney, under seal, from Abner M. Moore to Thomas E. Morgan, dated June 12, 1857, authorizing Morgan to collect debts, give receipts, etc., and contains the following clause: "I also empower my said attorney to sell and transfer all, or any part of my stock of goods, at wholesale or retail, which I have on hand in my store in Sheffield, or otherwise, by deed or otherwise, and whatever my said attorney may or shall lawfully do in the premises, I do hereby confirm the same, as if I were present and did the same in my own proper person."

Appellant also proved and gave in evidence, a deed from Moore by Morgan, as his agent and attorney in fact, to appellant, dated June 15th, 1857, selling and transferring the goods in Moore's store at Sheffield, to appellant, in trust to sell the same, etc., and pay—

1st. Expenses of sale and collection;

2nd. Pay one certain note of $500, made by Moore and appellant, to C. T. Nash, and two other notes, payable to certain merchants in Boston, both made by Moore and appellant, "on all of which notes the said Craig is the surety of said Moore;"

3rd. Pay all other creditors of Moore, and the balance, if any, to Moore.

It was admitted on the trial, that appellant was *bona fide* liable as security of Moore, on the indebtedness mentioned in the deed.

It was proved that after the execution and delivery of the deed, appellant took possession of the goods, and removed them to another store, and was taking an inventory when they were levied on by the writs of attachment of the defendants. It was also proved that the power of attorney was executed in Iowa, and that by the laws of Iowa, a private seal is not necessary to the validity of any instrument.

It was also proved that Moore, both before and after the execution and delivery of the power of attorney, expressly requested Morgan to secure appellant against his liability, as Moore's surety, upon said goods, and that the deed was executed in pursuance of the verbal request, as well as the power of attorney. It was also proved that the goods were, before the assignment, the property of Moore.

The court was requested by the defendants, to instruct the jury "that the evidence adduced by the plaintiff clearly fails to show any right, on his part, to the property in controversy, and the jury should find for the defendants." The appellant objected to the giving of this instruction. The court overruled the objection, and gave the instruction, and appellant excepted.

After verdict appellant moved for a new trial. The court overruled the motion.

The errors assigned are,

1st. The giving of the instruction asked by defendant below.
2nd. Overruling appellant's objection to said instruction.
3rd. Overruling appellant's motion for a new trial.
4th. Rendering judgment for defendants below.

George W. Stipp, and W. H. L. Wallace, for Appellant.

Peters & Farwell, for Appellees.

Caton, C. J. This case should have been submitted to the jury. There was evidence, to say the least, tending strongly to show that the property belonged to the claimant, and he had a right to take the opinion of the jury upon the evidence as to whether it was not his property. Independent of all other evidence, the property was found in his possession, claiming title, and this was of itself sufficient to put the case to the jury. The court erred in instructing the jury to find as they did, and the judgment must be reversed and the cause remanded.

Judgment reversed.

John Bergen, Plaintiff in Error, *v.* Sarah E. Bergen, Defendant in Error.

ERROR TO WILL.

In a matter of divorce it will be presumed that the court granting it, if it received admissions as evidence, properly scrutinized the evidence, so as to be satisfied that the admissions were made in sincerity and without fraud.

The allowance of alimony is discretionary with the court; so also is the allowance for the support of infant children.

Sarah E. Bergen, the defendant in error, filed her bill of chancery, for a divorce, against John Bergen, the plaintiff in error, on the 28th day of February, 1855, in the Will Circuit Court, and obtained a summons, returnable to the following March term of said court, which summons was served and returned in time for a hearing at said March term, 1855. The bill charged said John Bergen with the commission of adultery, during the then present winter, (1854–5), at the city of Joliet, in Will county, with Phebe Bergen, his own daughter by a former wife. The bill set forth that complainant had eight children, during her marriage, by said John Bergen, three of which were living; that said Bergen was the owner of property, consisting of real estate and personal property, of the value of some $8,000 and upwards; and asked for the allowance of alimony and the custody of the children, and that a receiver be appointed. The bill was sworn to by complainant.

At March term, 1855, the complainant, Sarah E. Bergen, filed with the court in said suit her application, alleging that she had no means of support for herself and children, or to carry on her suit, reiterating the truth of the charges in her bill, and asking the court for an allowance, for the support of herself and children pending the suit, and for means to prosecute her suit.

A reference was made to the master for the purpose of ascertaining the probable amount of property belonging to said John Bergen, with an order to report the same to the court.

An injunction was granted at the time of filing the bill, restraining Bergen from selling or disposing of his property; and he appeared by his attorney, and moved to dissolve the injunction.

The case was submitted to the court, "upon the bill of complaint, taken and confessed by the said defendant, and the proofs being submitted to the court, from which it satisfactorily appears to the court, that the material facts charged in such bill are true, and that the defendant has been guilty of adultery as charged in the said complainant's bill," etc.

By the decree granting the divorce, the court committed to the complainant, Sarah E. Bergen, the custody of the children. The court also appointed Francis Goodspeed receiver, "to take an account of the property, real and personal and mixed, of the said John Bergen, and all accounts, choses in action, for him the said John Bergen, and apportion the same between the complainant and said John Bergen, in the manner following: First, the said receiver shall set off to the said complainant, all the household and kitchen furniture, and including the piano forte, provisions of every kind and nature, and all the fire wood which the said John Bergen had at the time said complainant filed her bill, or that he may now have. Second, the said receiver shall then divide the said property, real, personal and mixed, notes, accounts, choses in action, between the said complainant, Sarah E. Bergen, and the said defendant, John Bergen, as equally as the same can be done; which said division, when made, shall vest in the said Sarah E. Bergen, her heirs and assigns, a good and perfect title to the property, which shall be so set off to her; and said division shall, when made, vest in the said John Bergen the remainder of said property so set off to him, after paying the amount herein specified and required to be paid by said receiver, and the said receiver shall pay the remainder to said Bergen, his heirs and assigns. Third, By the agreement of the parties, it is ordered, adjudged and decreed, that the said receiver shall, out of the portion of said property set off to the said defendant, John Bergen, pay to Jesse O. Norton the sum of $250; to Josiah McRoberts the sum of $250, for fees, etc., in this suit, and for prosecuting in the case for incest; and also, the sum of $250 to Elisha C. Fellows, and $250 to Henry Snapp, out of said portion set off to said John Bergen, for their services, as well in defending this bill, as in defending said criminal prosecution," etc.

B. S. Morris, for Plaintiff in Error.

U. Osgood, for Defendant in Error.

Breese, J. We do not perceive any objection to the decree rendered in this cause.

The charge in the bill of complaint was, repeated acts of adultery by the defendant with his own daughter by a former wife. He was duly served with process, and had every opportunity to deny the charge, but he did not deny it, he admitted it, by suffering a default to be entered. After the bill was taken for confessed, the court heard testimony in support of the charge, from which it appeared to the court that the facts

charged were true, and that the defendant had been guilty, before the commencement of the suit, of having carnal connection with his daughter, and had committed adultery with her. The court may have been satisfied by proof of admissions of the defendant.

Our statute (Scates' Comp. 151) does not declare the admissions of a defendant shall not be received as evidence, but only that they shall be subjected to the scrutiny of the court, and if the court is satisfied they were made in sincerity and without fraud or collusion to enable a decree to pass, they are to be received as evidence.

We must suppose the court subjected all the proof to the proper scrutiny. If admissions were proved, the court must have determined that they were made in good faith and for no sinister purpose.

In Ohio,—to the decisions of her courts we have been referred,—there is a statute expressly prohibiting the courts from receiving such admissions as evidence. *Brainard* v. *Brainard*, Wright's Ohio R. 354. It is not necessary that the evidence upon which the court acts should be preserved in the record, yet the record must show that the court heard evidence and found the allegations of the bill to be true. It is sufficient in every such case, if the decree shows it was made upon proofs adduced. *Shillinger* v. *Shillinger*, 14 Ill. R. 147; *Wheeler* v. *Wheeler*, 18 ib. 39.

As to the alimony decreed, and the custody of the children, neither seemed to have been a subject of dispute in the Circuit Court. That part of the decree seems to have passed with the assent of the defendant, and also the manner in which his estate should be distributed. He was in court acting by himself and his counsel, receiving a part of the money and accounting to the receiver for money collected by himself. We have said in the case of *Foote* v. *Foote*, *post*, and such is the current of authorities, the allowance of alimony for the wife is discretionary with the court. Such is our statute, but in addition to alimony the court may allow something for the support and maintenance of the children, this is also a matter of judicial discretion, and as there were three infant children in this case, it is to be presumed the court looked to that in decreeing so large a portion of the estate to the complainant. Although it is usual to regard the income of the delinquent husband as the fund out of which alimony is to be decreed, it is by no means universal. A portion of the estate may be decreed. In the case of *Bursler* v. *Bursler*, 5 Pickering, 427, the court went beyond the income of the husband and ordered a sale of the delinquent husband's estate. In all cases, the court will look to the extent of the *delictum*,

amount of property—rank in life of the parties—the number and age of the children, and as the support of those has devolved upon the complainant, and less than one-half the estate of the husband decreed, and the *delictum* confessed of the most atrocious character, and the decree, seemingly, with the assent of the defendant, we will not interfere to disturb it, but affirm it, in all its parts.

Decree affirmed.

William H. Kennicott, Appellant, *v.* Phillip Sherwood, Appellee.

APPEAL FROM COOK.

In an action of covenant on a lease to recover damages for failure to surrender possession, where it appeared that the lessor, before the expiration of the lease sued on, had again leased to another party, who permitted a sub-tenant under the original lease, to hold over, with an understanding that possession should be held by such sub-tenant, it was held that a recovery could not be had, the defendant not being privy to the arrangement, between the second lessee and the sub-tenant.

This was an action of covenant upon a lease containing, among other things, a covenant on the part of the defendant to yield up the demised premises to the plaintiff, at the expiration of the term of the lease. The plaintiff, in his declaration, assigns a breach of this covenant, upon which the defendant takes issue. No questions arise on the pleadings, but all the questions in the case arose on the trial, and on motion for a new trial, and are all presented by the bill of exceptions.

On the 29th day of December, A. D. 1857, before Manierre, Judge of the Circuit Court, and a jury, the several issues were tried.

The plaintiff introduced a lease, made the twenty-first day of March, in the year of our Lord one thousand eight hundred and fifty-five, between William H. Kennicott, plaintiff below, and Phillip Sherwood, which set out that in consideration of the covenants and agreements therein mentioned, to be kept and performed by the said Sherwood, his executors, administrators and assigns, Kennicott had demised and leased to the said appellee, all those premises situate, lying and being in the city of Chicago, in the county of Cook, and the State of Illinois, known and described as follows, to wit: The east third (1-3) of lot three (3), block ninety-five (95), in school section of the original town of Chicago, together with the buildings thereon situated;

to have and to hold the said above described premises, with the appurtenances, unto appellee, his executors, administrators and assigns, from the first day of May, in the year of our Lord one thousand eight hundred and fifty-five, for and during and until the first day of May, A. D. eighteen hundred and fifty-six. And the appellee, in consideration of the leasing of the premises aforesaid, by the appellant, did covenant and agree with the appellant to pay him, as rent for said demised premises, the sum of six hundred dollars, payable in advance, as follows: Fifty dollars on the first day of May, A. D. eighteen hundred and fifty-five, and fifty dollars on the first day of each month thereafter until the said sum of six hundred dollars be fully paid. And the said appellee further covenanted with the said appellant, that at the expiration of the time in this lease mentioned, he would yield up the said demised premises to the said appellant, in as good condition as when they were entered upon by the said appellee, loss by fire, or inevitable accident, or ordinary wear excepted.

It was further agreed, by the said appellee, that neither he nor his legal representatives would underlet said premises, or any part thereof, or assign the lease, without the written assent of appellant, first had and obtained thereto.

The appellee called as a witness *Charles S. Bogue*, who testified as follows, to wit:

I am acquainted with the plaintiff in this suit; I was a constable in Chicago in the year 1856, and at the request of the plaintiff I served notice on John Van Buskirk, requiring him to deliver up possession of certain premises then occupied by him, and situated on Madison street; I served the notice May 6th, 1856; Van Buskirk said he was not ready to deliver up possession; he remained there until he died, about 22nd October, 1856; I know nothing of the occupation of the premises after his death; I know that the plaintiff commenced proceedings against Van Buskirk for forcible entry and detainer; I was present at the trial; Sherwood, the defendant in this suit, was also present.

On being cross-examined, witness testified as follows, viz.: I presume the date of the notice now shown me is the day I served it; I served it on Van Buskirk at the house where he resided; he said he would not give up the possession; I don't recollect that he gave any reason.

The counsel for the plaintiff also gave in evidence the notice shown to the last witness, and of which the following is a copy, viz.:

Mr. John Van Buskirk:—

Take notice that I demand immediate possession of the premises described as follows, to wit: The east ($\frac{1}{3}$) one-third, of lot (3) three, block 95, school section

addition to Chicago, known as number 174, on Madison street, in the city of Chicago. Mr. Charles Bogue, the bearer of this, is authorized to receive possession for me. WM. H. KENNICOTT.

Chicago, May 6th, 1856.

The counsel for the plaintiff also introduced evidence showing that after the serving of such notice, on the 8th day of May, 1856, the plaintiff commenced proceedings against the said Van Buskirk, before Calvin De Wolf, justice of the peace of Cook county, under the statute of forcible entry and detainer, on the ground that the plaintiff had leased the premises to the said Sherwood for the term of one year, ending on the 1st day of May, 1856, and Sherwood had underlet to Van Buskirk. But Van Buskirk wrongfully refused to deliver up possession, although the year had expired, and possession had been demanded by notice in writing. That on the trial before the justice, the verdict of the jury was in favor of said plaintiff, and thereupon the justice gave judgment that the plaintiff should have restitution of the premises and his costs, from which judgment, the said Van Buskirk appealed to the Circuit Court of Cook county, but the said Van Buskirk died before the appeal was brought to a trial, and the court then dismissed the appeal for want of prosecution.

Asa Kennicott, a witness called by the plaintiff, being sworn, testified as follows, viz.: I am acquainted with the premises in question—I have resided in Chicago during the last fifteen years, and have some knowlege of what property would rent for. The rent of these premises was worth one thousand dollars, for a year from May 1st, 1856. Rents were high that season, I negotiated a lease of these premises that season for one year from May 1st, 1856, with the privilege of five years, at a rent of one thousand dollars a year. I don't know the name of the person with whom I negotiated—I think his name was Bodwell—this was in April, 1856.

On being cross-examined by the defendant's counsel, the witness said:

I had no house of my own at the time; I frequently talked with persons having buildings, and from knowledge so obtained, and from the fact that the price so required was so readily accepted, I form my opinion of the value. There were two other persons who wished to rent the premises at that price.

A. E. Woolcot, a witness called for the plaintiff, being sworn, said: I am an attorney at law; I came to Chicago on the 8th of January, 1857, and since the 11th of January, have been boarding with Mrs. Van Buskirk. During all that time she has occupied the premises in question. I negotiated a lease from the plaintiff to Mrs. Van Buskirk, the term to commence on the

first day of May, 1857, and she has held under that lease since that time.

E. A. Bogue, a witness called by the plaintiff, being sworn, said: Sometime in April, 1856, I went with the plaintiff to serve a notice on Van Buskirk to leave the premises, on the 1st day of May, 1856. He, Van Buskirk, was not at home, and the plaintiff served the notice on Mrs. Van Buskirk.

John Maynard, a witness called by the defendant, testified as follows: I am acquainted with the premises in question—Van Buskirk occupied the premises in May and April, 1856. I had a lease to commence on the 1st day of May, 1856, but I gave it up. I demanded possession of Mrs. Van Buskirk—she said she would not give possession. Don't remember whether I had the lease with me at the time—I gave up the lease to the plaintiff after I made the demand, and on the same day, May 1st, 1856.

The counsel for the defendant, then requested the plaintiff to produce the lease mentioned by the witness Maynard, and the same being produced, was shown to the witness, who said, the instrument now shown me is the lease of which I have spoken. The counsel for the defendant then offered in evidence said lease, which is in the usual form.

Sophia Van Buskirk, a witness called by the defendant, testified as follows: I am the widow of John Van Buskirk. We occupied the premises in question up to the first day of May, 1856, under Mr. Sherwood—my husband was not in the city May 1st, 1856. In the fore part of April, Maynard told me he wanted me to remain in the house as long as I chose—saying that he had a lease—that he would give me permission to do so—that he had a lease in his pocket. We remained on account of this permission and request. We had supposed we were to have the premises of the plaintiff for another year; Mr. Sherwood made no demand of possession that I know of, but he came to me in regard to the matter the second or third day of May, and I told him I was remaining on the premises by the permission of Maynard, who had leased the premises for five years.

On being cross-examined, the witness testified: About the first day of April was the first I saw Maynard. He said he had a lease, and said that we could remain there—he said he should throw up his lease—said the house was not as good as had been represented—said he would give us permission to remain. Maynard called two or three days before the first day of May, and said he would demand possession on the first day of May, and instructed me to say that I would not give up possession—I remained for that reason.

Maynard being called by the plaintiff, testified as follows: Soon after I took the lease from the plaintiff, in the fore part of April, I called at Van Buskirk's, and we had the conversation Mrs. Van Buskirk has testified to. I told them that I would give them permission to remain in the house, and it was arranged that I should demand possession of them on the first day of May, that they should refuse to give up possession, and that then I should throw up my lease on the ground that I could not get possession. Afterwards, and a week or two previous to the first day of May, I went with Mr. Van Buskirk to a lawyer, to ascertain whether we could do as we had talked; he told us we could not do it. I then told Mr. Van Buskirk I would have nothing more to do with it. After that I gave no permission to remain. I had no authority to permit them to remain, and gave none.

At the request of the counsel for the plaintiff, the court instructed the jury as follows:

1. If the defendant or his assignee, Van Buskirk, held over the possession of the premises, and continued in possession during the year commencing May 1st, 1856, and refused to deliver possession to the plaintiff, then the plaintiff is entitled to recover the value of the use of the premises for that time.

2. If the jury find for the plaintiff, then he is entitled to recover all the damage sustained by a breach of the covenant in question, though a part may have accrued after the commencement of this suit.

And at the request of the counsel for the defendant, the court then and there gave the jury the following instructions in writing, viz.:

1. If the jury believe, from the evidence, that John Maynard received a lease of the premises in question from the plaintiff, to take effect on the first day of May, A. D. 1856; and that said Maynard instructed, requested or induced the tenant Van Buskirk to remain on said premises, after the expiration of the lease of said premises, by the defendant to her; and that she held over in consequence of such instructions, or authority, or permission, they will find for the defendant.

2. If the jury shall believe, from the evidence, that the defendant or his tenant, Van Buskirk, was ready and willing to deliver up possession of the premises at the expiration of the lease in question, but was prevented from so doing, and was authorized to continue in possession, or was prevented or requested to remain by Maynard, and that he was entitled to possession and claimed title under the plaintiff by a lease from him, then the jury will find for the defendant. To the giving of which instructions the counsel for the plaintiff excepted.

The jury rendered a verdict for the defendant, and the counsel for the plaintiff moved the court for a new trial, on the grounds:

1st. That the verdict is against the evidence.

2nd. That the instructions given by the court on the part of the defendant, were not warranted by the evidence, but tended to mislead the jury, and were erroneous.

Which motion was overruled.

GOODRICH, FARWELL & SMITH, for Appellant.

P. BASS, and J. MULVEY, for Appellee.

WALKER, J. This was an action of covenant instituted by appellant against appellee to recover damages for a failure to restore and surrender the possession of premises, at the end of the term. The appellant after leasing to appellee and before the lease had expired, executed a lease of the same premises to John Maynard for five years, to commence on the first day of May, 1856, and on the expiration of the first lease. After Maynard had obtained his lease, and early in April, he went to Van Buskirk whom he found in possession, as the under-tenant of appellee, and gave him permission to remain in possession after his lease commenced, and for the purpose of getting rid of his lease, arranged with Van Buskirk that on a demand of possession which he would make, on the first day of May, 1856, possession should not be given, but Maynard swears that after consulting counsel and finding that such an arrangement would not enable him to compel appellant to cancel his lease, he informed Van Buskirk that he would have nothing more to do with the arrangement. Mrs. Van Buskirk testifies that two or three days before the first of May, Maynard came and directed her when he should make a demand of possession on the first of May, to refuse to surrender it, and that when the demand was made at that time, in pursuance to those directions delivery of possession was refused, and that Van Buskirk continued to hold possession in pursuance of that direction. Appellee on the second or third day of May called to see why Van Buskirk had not vacated the premises, when he was informed by the family that they were then in possession under Maynard, who had a lease from the appellant. Under this evidence and the instructions of the court the jury found a verdict in favor of the appellee, and appellant entered a motion for a new trial which was overruled by the court and judgment rendered upon the verdict, from which he prosecutes this appeal.

That the arrangement made by Maynard with Van Buskirk was such as would have enabled him to recover rent, had he not

surrendered his lease there can be no question. His lease was to commence and did commence on the first day of May, and when the demand of possession was made, Maynard was entitled to the possession, and if it was retained by Van Buskirk at his request, and with the arrangement that he was to continue in the occupancy of the premises, it amounted to an attornment by Van Buskirk to Maynard the lessee, and the possession in fact by the arrangement of the parties became that of Maynard. He had such an interest in the premises as authorized him on the first day of May to receive the possession by an agent or under-tenant. The possession of Van Buskirk on the first day of May and afterwards, until the lease was cancelled, was the possession of Maynard. And there can be no doubt if the lease had not been canceled the appellant could have held Maynard liable for the payment of the rent and to a performance of all the covenants on his part contained in the lease, upon the proof of possession disclosed in this record.

Again the lease recites, and by it Maynard agrees that he has received the possession of the premises. And when it is remembered that the lease bears date on the fourth day of April, 1856, and the arrangement between Maynard and Van Buskirk, sworn to by Mrs. Van Buskirk, took place about the first of April, it is a circumstance which would seem strongly to indicate, that he had at the time of entering into the lease an arrangement with Van Buskirk for possession. That Maynard imposed upon appellant seems to be clear, but in the whole of this transaction appellee seems to have had no concern, as there is no portion of the evidence tending in the slightest degree to implicate him as taking any part in the arrangement. He was not in a position to recover possession at the expiration of the lease from himself to Van Buskirk, because upon the termination of that lease, Van Buskirk ceased to be his tenant by attorning to Maynard, and had he sued for the possession Van Buskirk could have successfully set up his lease from Maynard who had the undoubted right, to continue him in possession. And as the appellant had placed it in Maynard's power to continue Van Buskirk in possession by giving to him the lease, appellee should not be held responsible for Maynard's acts, and if loss shall be sustained by any one, it should be by appellant, who gave the power to Maynard to receive the possession. Again as Maynard became appellant's tenant by the execution of the lease, possession by himself or the under-lessees became appellant's possession. And when Maynard received the possession by the occupancy of Van Buskirk under him, appellee's covenant to restore possession was fully performed by the possession of appellant's tenant. So that in any point of view in

which we can look at the case, we are unable to perceive any grounds upon which to hold that appellee should be held liable for a breach of his covenant, unless the evidence in the case was untrue. And the credibility of the witnesses and the weight that shall be given to their testimony are questions to be determined by the jury. They in this case have decided it in favor of the appellee and with that finding we are not disposed to find fault, as the evidence so far as we can see, justifies their verdict.

The instructions given by the court both for plaintiff and defendant, present the law arising on the facts in evidence, as we believe, correctly. We are unable to perceive that they are calculated to mislead the jury or are in any other respect erroneous. We are therefore of the opinion, that the court below committed no error in giving them. The record presents no cause for reversing the judgment of the Circuit Court, and the same must therefore be affirmed.

Judgment affirmed.

Breese, J. I do not concur in affirming this judgment for the reason that the Court did not, in giving the instructions to the jury, advert to the contrivance and fraud of the parties, to deprive appellant of his just claim.

Robert Holloway and Henry M. Bogges, Appellants, *v.* Alfred Freeman, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

It will be presumed that a cross-motion made to have a previous motion stricken from the files, and referring to rules, was sustained under the rules referred to.

County Courts can establish rules of practice.

Motions to dismiss, which assume the office of a plea in abatement, should be grounded on objections, appearing on the face of the papers. If extrinsic matters are to be shown, these must be done by plea in abatement.

Pleas in abatement should be filed in "apt time," the earliest practicable moment; if after a motion seeking the same object, the right to plead may be considered as waived.

Pleas in abatement must be signed by counsel, and truly specify the parties in the cause. If such pleas show that they and jurats attached to them, have been altered, these alterations, if assigned, may be held among other reasons as justifying the court below in ruling them out.

A defendant, after he has introduced paper testimony, cannot contradict it by oral proof, when there is no allegation of fraud in the pleadings.

Holloway et al. *v.* Freeman.

THIS was an action of assumpsit on a promissory note, brought in the County Court of Peoria county, by Freeman, against Holloway & Bogges.

The summons was issued June 17, 1858, and was directed to the sheriff of *Warren* county, by whom it was served on the 23rd June, 1858, returnable on the first Monday in July. The declaration is in the usual form, and contains a copy of the note, which is as follows:

"$401. *Peoria, April 24th,* 1857.

One year after date, we promise to pay to the order of Alfred Freeman, four hundred and one dollars, for value received, bearing interest at six per cent. from date.

HOLLOWAY & BOGGES."

At the July term the defendants filed the following motion to dismiss:

And now come the defendants and move the court to dismiss this suit for the following reasons, to wit:

1. The cause of action did not arise in Peoria county, Illinois, nor was the same made specifically payable in or at Peoria county, Illinois.

2. The defendants did not, at the time of the commencement of this suit, nor at any time since the commencement of this suit, nor either of them, reside in the county of Peoria, Illinois, nor were either of them found or served in said Peoria county, Illinois, with process in said cause.

3. The said defendants and each of them reside in the county of Warren and State of Illinois, and did reside in said county of Warren at the time of the commencement of this suit, and still do each and all of them reside in said county of Warren, and both defendants were served with process in the cause, in Warren county, Illinois, and not in the county of Peoria; nor were either of them served at or in the county of Peoria, Illinois.

M. Williamson, being duly sworn, deposes and says that the matters and things set forth and averred in the foregoing motion are true in substance and in fact.

M. WILLIAMSON.

Sworn to and subscribed before me, this 6th day of July, A. D. 1858.

CHAS. KETTELLE *Clerk,*
By GEORGE KETTELLE, *Deputy.*

The plaintiff moved to strike this motion from the files, for the following reasons:

1. The motion has not been filed two days, according to rule 4 of this court.

2. Said motion has not been entered on the motion docket, according to rule 7 of this court.

3. Because the matters therein can only be made available by plea in abatement.

The motion to strike from the files was sustained by the court, and the defendant excepted.

The defendant next filed the following plea in abatement:

And the said Robert H. Holloway and Henry M. Bogges, defendants in this suit, come and defend, etc., when, etc., and pray judgment of the writ and declaration aforesaid, because they say that at the time of the commencement of this said suit, and at all times since the commencement of this suit, the said defendants and each of them were and still are residents and citizens of Warren county, Illinois, and were not and neither of them residents of the county of Peoria, State of Illinois. And the said defendants aver that the process in this said cause was served on the said defendants and each of them, at and within the county of Warren, State of Illinois, and was not served on the defendants nor either of them in or at the county of Peoria, State aforesaid. And the defendants further aver that cause of action on which this suit is brought, and each and every part thereof, arose in the county of Warren, State of Illinois, and not in or at the county of Peoria, State aforesaid; and that the same was not, nor any part thereof, made specifically payable at or in the said county of Peoria and State aforesaid. All of which the said defendants are ready to verify; whereupon the said defendants pray judgment, and that the said writ and declaration be quashed, and also for his costs.

ROBERT HOLLOWAY,
H. M. BOGGES.

ALFRED FREEMAN,
vs.
ROBERT H. HOLLOWAY and HENRY M. BOGGES.

COUNTY COURT IN AND FOR THE COUNTY OF PEORIA, STATE OF ILLINOIS.
July Term, A. D. 1858.

Robert Holloway and Henry M. Bogges, the defendants, being duly sworn, depose and say that the above plea by them pleaded is true in substance and in matters of fact.

Sworn to and subscribed before me this 6th day of July, 1858.

WM. F. SMITH,
Notary Public for the City of Monmouth, Ill.

The plaintiff then moved to strike the plea in abatement from the files for the following reasons:

1. Said plea does not purport to be filed, nor is the same signed by the defendant in this suit.
2. Said plea is not duly sworn to.
3. It is not filed in apt time.

4. Said plea and the jurat attached thereto appears to have been altered and filled up since the same was made and sworn to.

The plea in abatement was then stricken from the files by the court, and the defendants excepted.

The defendants then filed the general issue and several special pleas, setting forth that the note sued on was given in part payment for the sale of several tracts of land, in Warren and Henderson counties, and that plaintiff made false and fraudulent representations in relation to the title of the land, and its occupancy, knowing such representations to be false and untrue.

And it was agreed that all matters of proof which would be legal evidence under any special plea, well pleaded, might be given in evidence under the general issue.

The cause was tried at the February term, A. D. 1859. The plaintiff offered in evidence the note sued on, for $401, dated April 24, 1857, payable to plaintiff, and rested his case.

The defendants, after other witnesses had been sworn on their behalf, then called *John Mileham*, who testified that he was the agent of plaintiff to sell land in 1856–7, and sold lands to Holloway & Bogges, as such agent, viz.: S. W. 20, 9 N. 1 W., in Warren county; S. W. 32, 10 N. 3 W., same county; N. E. 8, 8 N. 4. W., and a quarter in Sec. 34, 13 N. 2 W., in Mercer county. He executed bonds to defendants for the lands. The bonds were then handed to witness and identified by him.

The defendants' counsel then asked the witness to state if the note sued on was one of the notes executed by defendants on the purchase of said lands?

The plaintiff objected to the question being answered by the witness, and the court sustained the objection and refused to let the witness answer the question, and defendants excepted.

The defendants then asked the following question: What representations did you, as the agent of plaintiff at said sale, make to the defendants, relative to the lands or the title thereto, so sold by you to them?

To the answering of this question the plaintiff objected, and the court sustained the objection, and defendants excepted.

This was all the evidence in the case.

The jury found a verdict for the plaintiff, and assessed his damages at $444.10.

The defendants then filed their motion for a new trial, for the following reasons:

1. The verdict is contrary to law.
2. It is contrary to evidence.
3. The court refused proper evidence offered on the part of the defendants to go to the jury.

The court overruled the motion and rendered judgment upon the verdict, and the defendants excepted. The defendants then prayed an appeal to the Supreme Court.

H. M. Wead, for Appellants.

J. K. Cooper, for Appellee.

Breese, J. The motion to dismiss, was not based upon any defects or objectionable matter appearing upon the face of the papers, and was consequently, not regular or proper. The cross-motion to strike it from the files expressly refers to rules four and seven of the court, and makes therefore, those rules a part of the motion. What those rules are, we have no means of knowing, as they are not copied into the record. We will presume however, that the court below, under those rules, had sufficient reason for entertaining the cross-motion and striking the motion to dismiss from the files.

That the County Court can establish rules of practice and proceedings to facilitate the business of the court, is undoubted, as they have powers concurrent with those of the Circuit Court, (Scates' Comp. 1226,) and that Circuit Courts have such power is unquestioned. Without this concurrence, the County Court, we apprehend, being a court of record and of large jurisdiction, would possess an inherent power to establish rules of practice. Every court of record possesses such power.

This court has said in general terms, that questions of the kind here presented, may be raised by plea in abatement or motion to dismiss, but that must be taken with this qualification; where it appears on the face of the papers, that the writ has improvidently issued, a motion to dismiss will be entertained, when it does not so appear but extrinsic matters have to be shown, that must be done by plea in abatement, so that an issue of fact may be made up and tried upon such matter. To this right the plaintiff is entitled, but from which he would be precluded, if the subject can be summarily disposed of on motion. When the defects appear on the papers, the court can determine them on inspection, and no issue is necessary—hence, the motion to dismiss in such cases will be proper. The cases of *Kenney* v. *Greer*, 13 Ill. R. 432; and *Waterman* v. *Tuttle*, 18 ib. 292, do not conflict with this view.

As to pleas in abatement, it is to be observed that great strictness is required in framing them, as they are dilatory, not going to the merits of the action. They must be signed by counsel—they must specify truly the parties in the cause. 1 Tidd's Pr. 639, 640.

In this case the action is against Robert H. Holloway and Henry M. Bogges. This plea is signed Robert Holloway and H. M. Bogges, *non constat*, that they are Robert H. Holloway and Henry M. Bogges. Nor is the plea signed by counsel.

Another objection to the plea was taken, and is given as one of the reasons why the court should strike it from the files; it is, that the plea and the jurat attached to it, showed alterations and a filling up after it was sworn to. This is stated in the motion, but as this cannot be seen by this court, we are bound to presume that those reasons existed and were the basis of the action of the court below. We have a right to suppose this, as the court ruled out the plea on that, among other reasons filed.

We do not think either, that this plea in abatement was filed "in apt time." In *Kenney* v. *Greer*, 13 Ill. R. 449, this court say, The statute gives the defendant a privilege which he can waive, and he must be regarded as having done so unless he makes his objection to the writ in apt time. Now this "apt time" clearly was, at the earliest practicable moment. The plea being dilatory, this is the rule. The defendants did not do this, but interposing an insufficient motion, they waived their right to plead in abatement.

As to the other point made by appellants, it is sufficient to say, that the oral testimony sought by the defendants from the witness, was in contradiction to the written evidence they themselves had introduced. The note sued on was for $401, payable in one year from the 24th April, 1857. The defendants introduced the witness Mileham, and proved by him two bonds for deeds executed by one F. C. Hankinson and Alfred Freeman, dated April 24, 1857, for the conveyance of certain lands by them to the defendants, one of which bonds specified the consideration to be two hundred dollars, for which three notes were executed, one for sixty-seven dollars, payable May 15th, 1857—one for sixty-eight dollars, payable in one year from date, and one for sixty-five dollars, payable in two years from date. The other bond specifies a consideration of four hundred dollars, payable by three notes, two for one hundred and thirty-three dollars, and one for one hundred and thirty-four dollars. The witness was then asked if the note sued on was the note or one of the notes given for the purchase of the land. The objection was thereupon made, and sustained, that at the then stage of the defendants' own proof such evidence was not admissible. The notes and bonds introduced proved themselves, and there was no fraud or circumvention pleaded in obtaining the execution of the notes sued on, or any mistake in the description of the notes described in the title bonds pretended. The defendants after

having introduced evidence of this kind, showing that the notes given on the purchase of the land were drawn in favor of two persons and for different amounts and payable at a time different from the note sued on, the question they put to the witness was not pertinent to the case—it was irrelevant. They could not be admitted to disprove by parol all the written testimony they had themselves introduced.

We discover no objection to any of the rulings of the court, and therefore, affirm the judgment.

Judgment affirmed.

William H. Bolton, Plaintiff in Error, *v.* William McKinley, Defendant in Error.

ERROR TO COOK.

The Circuit Court may set aside a judgment by confession, on motion, during the term at which it was rendered. This exercise of discretion is not matter for review in the Supreme Court.

If the conscience of the court in reference to the exercise of this discretion, is aided by the trial of a feigned issue, and the finding is in favor of vacating the judgment, the case then stands for pleading and trial.

This practice not approved of. Error will not lie to correct the finding under the feigned issue, the judgment thereon not being final.

This case is stated in the opinion of the court. The hearing in the Circuit Court was before Manierre, Judge.

Clarkson & Tree, for Plaintiff in Error.

E. Van Buren, for Defendant in Error.

Walker, J. The plaintiff in error obtained a judgment by confession, under a power of attorney, against the defendant in error, at the November term, 1857, of the Cook Circuit Court, for $1,818 and costs. The judgment was confessed upon a note purporting to have been executed by defendant in error to plaintiff in error, for $1,793, and the power of attorney also purported to have been given by him authorizing the confession of judgment at any time after the execution of the note. At the same term of the court defendant entered a motion to stay execution and proceeding under the judgment, and to set the same aside, and to be let in to defend, upon the grounds that the note and power of attorney were not valid and binding, but were void. The court on the motion entered an order staying all pro-

ceedings under the judgment, until the motion to vacate the judgment should be determined, and also ordered that a feigned issue be formed, to try the validity of the note. That issue was formed by filing a declaration and pleas, and the feigned issue thus formed was tried by the court and jury, and resulted in a verdict in favor of the defendant in error. The court thereupon vacated the judgment entered by confession, and quashed the execution issued thereon, from which the plaintiff in error prosecutes this writ, for the reversal of that proceeding.

The only question presented by this record, necessary to be considered, is whether the court below had the power to set aside the judgment by confession, on a motion entered at the same term at which it was rendered. The practice is too well settled to be questioned, that the court has the discretionary power, at any time during the term at which an order in a cause has been entered, whether it be interlocutory or final, to vacate and set it aside, for such cause as may be necessary to promote justice. This is constantly done in cases of judgment by default, and is sometimes done in cases of judgments by confession, and when done, it is held to be discretionary and not subject to review on writ of error or by appeal. The usual practice, and doubtless the better one, is to hear such motions on affidavits, and if the defendant shall satisfy the court that it is probable that he has suffered injustice by the entry of judgment by default or confession, the court should vacate the judgment and let the party in to plead and make his defense. But if the court should hear the motion on verbal testimony or before a jury to try a feigned issue, and should set the judgment aside, no exception can be taken to the proceeding in this court. The object of the evidence, whether by affidavit, deposition, or heard orally in court, is to inform the court of the propriety of setting aside the judgment, and the same end may be attained by either mode. Nor can it be objected that in vacating the judgment, the court acted upon the verdict of the jury on the feigned issue, as it is a matter of judicial discretion, to be exercised by the court as in other cases. And while the practice of forming a feigned issue to try such questions, is believed to be new wherever the common law practice prevails, and should not be encouraged, as tending to delay and greatly increased expense, when such a course is not excepted to by either of the parties we cannot say that the order should for that reason be reversed.

The object of the feigned issue in this case, was not to try the merits of the case in which the judgment had been rendered by confession, but must have been to inform the conscience of the court whether that judgment should be vacated. And on the trial of the issue, the court heard the evidence of both parties,

and also had the verdict of the jury to aid him in determining whether there was a reasonable probability that the judgment by confession had been improperly rendered, and upon the whole evidence and the verdict of the jury, he saw proper to exercise his discretion in vacating the judgment and quashing the execution. By this order the defendant was let in to plead, as if that judgment had not been entered, and that cause should proceed to trial and judgment as other original causes in the court.

The judgment in this proceeding is not final, and therefore neither an appeal or writ of error will lie from it. The order entered, only disposed of a motion in the case, as if a judgment by default were set aside on motion and the defendant permitted to interpose his defense. When this motion was disposed of, it removed the judgment in the case, and opened the way to proceed with the suit on the note to trial and judgment. And if that trial has not already taken place, nothing is perceived from the record in this case to prevent the parties from still proceeding to such trial.

The judgment of the court below, vacating the judgment and quashing the execution issued upon it, and permitting the defendant to plead to that action, must be affirmed.

Judgment affirmed.

James Peck *et al.*, Appellants, *v.* John L. Wilson, use, etc., Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

A writ of *retorno habendo* need not be issued and returned at length, before an action can be brought on a replevin bond. It will be sufficient if a return was adjudged, and proof is made of disobedience to the judgment.

A default admits all the facts well pleaded.

In an action on a replevin bond, the breach need not be set out broader than the condition, nor need the proof be more extensive than the breach.

A forfeited replevin bond, is not such a contract, as is contemplated by the third and fourteenth sections of the practice act for the courts of Cook county. Those sections allude to contracts for the payment of money, and a plea to an action on such a bond, should not be stricken from the files for want of an affidavit of merits.

This action was brought on a replevin bond where the action of replevin was not tried on the merits, but was dismissed for want of prosecution.

The declaration was on a replevin bond for the replevy, by Bishop, of 8,918 feet first clear lumber, 207,197 second clear

lumber, 220,540 common, 55,174 culls. Declaration contains two counts, neither of which allege the issuing of a *retorno habendo*.

The first count avers, for breach, "that the said James E. Bishop has at no time since, returned or offered to return said goods, in pursuance to the order and judgment of said court, but so to do has utterly failed and refused."

The record alleges for breach, "that the defendant, Bishop, although often requested, did not or would not, return the said goods, etc., although a return thereof was awarded, etc."

Defendants filed a plea, that the property replevied, at the time of suing out the writ, was the property of the said Bishop, and the merits of the replevin suit had not been tried, etc.

No affidavit of merits was filed with the plea.

Plaintiff amended his declaration, by leave, by increasing the damages.

The plea was struck from the files for want of an affidavit of merits, and judgment, by default, for want of plea, was entered against defendants, and a jury called, and damages assessed at $4,520.

Defendants filed a motion to *set aside the judgment*, which was sustained so far as the assessment is concerned.

The assessment was tried before a jury, and they assessed the damages at $2,702.50. Defendant moved for a new assessment, which the court overruled and gave judgment for plaintiff below.

Shumway, Waite & Towne, for Appellants.

B. F. James, for Appellee.

Breese, J. We are not of opinion that a writ of *retorno habendo*, shall actually issue and *elongata* returned, before an action can be brought on the replevin bond. It is sufficient that the judgment awarded the return, and to prove that no return was made. This it was the duty of the party to do, against whom the judgment for a return was awarded.

The party by his default, admitted all the facts well pleaded in the declaration, and the important one is, that a return was awarded, and no return of the property in fact made. That was the condition of the bond, and the breach need not be broader than the condition, nor the proof more extensive than the breach. *Hunter* v. *Sherman*, 2 Scam. R. 544.

Upon the other point we are of opinion that an action of debt upon a forfeited replevin bond, is not such an action on a contract as is contemplated by the third and fourteenth sections of the act regulating the practice in the Cook county Circuit

Court and Court of Common Pleas. (Scates' Comp. 271–2.) Those contracts, should be held to be contracts for the payment of money, as damages arising from a breach of contract. A replevin bond has not this quality. It has conditions, no one of which is to pay money. The condition is that he will prosecute the suit to effect and without delay, and make return of the property if a return thereof shall be awarded, and save and keep harmless the sheriff.

It would be a strained and forced construction of that act, which we are not disposed to give, to bring such cases within it. Its operation is already sufficiently extensive, partial as the act is and in derogation of the general law of the State. The court should not have stricken the plea from the file for want of an affidavit of merits, and for doing so the judgment is reversed and the cause remanded with directions to reinstate the plea.

We forbear touching upon the other points made by the plaintiff in error, as they bring up very important questions which we have not time now to examine fully.

Judgment reversed.

John R. Hamlin, Appellant, *v.* James L. Reynolds *et al.*, Appellees.

APPEAL FROM COOK.

In order to review a case in the Supreme Court on a judgment pronounced on demurrer, an exception to such judgment is unnecessary; nor need it be preserved in a bill of exceptions.

A party who attempts to plead that another had property, etc., sufficient to satisfy an execution, etc, must set out that such property was subject to the execution, or it will be bad on demurrer.

In an action against an indorser, if he pleads that the maker had property liable to execution, which was known to the judgment creditor and the sheriff, and that they fraudently designed, etc., to harrass the indorser, and returned an execution, no property found; it will not be demurrable. And a party after such a plea had been overruled on demurrer, might not expect to be permitted to make proof of similar facts, under a plea of the general issue.

If an execution is relied on, as proof of diligence used in the collection of a debt, the process should remain in the hands of the officer, for its whole life; or the fact of the uselessness of its so remaining, should be pleaded. No presumption will be indulged, that the money could not be made, during the remainder of the days it had to run, after return was made.

This was a suit against an indorser of a promissory note after return of *nulla bona* to *fi. fa.* against the principal.

The declaration sets out that Edward Hamlin, on the 8th May, 1857, made two promissory notes, payable to John R.

Hamlin, or order, and indorsed to Reynolds, Ely & Co., each for $362, and due sixty and ninety days, value received, payable at the office of Reynolds, Ely & Co., in Chicago; that Reynolds, Ely & Co. sued the maker of said notes, at the September term of the Cook County Court of Common Pleas, 1857, (the first term after said notes became due,) and obtained judgment in said suit at the November term, A. D. 1857, for $739.08 and costs; that execution was issued on said judgment against Edward Hamlin, at the November term, directed to sheriff of De Kalb county, of which said Edward Hamlin was a resident, and was delivered to said sheriff on the 19th Dec., 1858, and was by him returned wholly unsatisfied, "no property found," on the 29th January, A. D. 1858, by means whereof, etc.

To this are added common counts.

There is no allegation when said writ was made returnable, and no allegation that *ninety days* had expired since the issuing of the *fi. fa.* before the return of the same.

Defendant filed the following pleas:

1. General issue.

2. That at the time of the suing out of execution, and during all the time the said execution was in the hands of sheriff, and when same was returned, said Edward Hamlin owned, and was possessed of, and held in his own name, a large amount of real estate and property in the county of DeKalb, sufficient to satisfy the execution, of which the said plaintiff had notice.

3. This count sets out, that at and during same time Edward Hamlin owned and possessed, etc., a large amount of real and personal property in DeKalb county, sufficient to satisfy said execution, and that the same was subject and liable to said execution, of all which the said Reynolds, Ely & Co., and said sheriff, had notice, but that the said plaintiff and said sheriff, contriving and designing to harrass and defraud the said John R. Hamlin, and put him to great cost and trouble, designedly and fraudulently caused said execution to be returned "no property found."

The plaintiffs demurred to the 2nd and 3rd pleas, which demurrer was sustained.

There was a trial by jury, and a verdict for Reynolds, Ely & Co. Motion for new trial overruled. Final judgment for Reynolds, Ely & Co., for $798.40, MANIERRE, Judge, presiding.

Defendant below prayed an appeal.

The evidence offered on the trial was the notes as set out in declaration, also execution in case of Reynolds, Ely & Co. *v.* Edward Hamlin, dated 9th Dec., 1857, returnable ninety days. Return of sheriff on back of same: "*I return this writ not satisfied, this 29th day of Jan.* 1858. *No property found.*"

It was admitted that said execution was issued on a valid judgment, duly recovered on said notes, at the time and in the court as set forth in the said execution.

This was all the evidence introduced in the cause.

H. B. Hurd, for Appellant.

G. Payson, for Appellees.

Walker, J. It is believed that no reported case can be found, either in Great Britain or this country, in which it has been held that it is necessary to except to the judgment on a demurrer, to enable the party to have the decision reviewed in an appellate court. By the ancient practice it was the final judgment in the case, on the count or plea to which the demurrer was interposed, and leave to amend or plead over was rarely if ever given. And the judgment on demurrer, by the modern practice, is final, unless the court in the exercise of its discretion permits an amendment, or grants leave to plead over. The judgment on the demurrer is as much a part of the record as any other judgment that is rendered by the court in the cause. The office of a bill of exceptions is to preserve that of record, which otherwise would not appear of record. By the practice of courts of common law jurisdiction, the evidence in a cause, the decisions of the court in admitting or rejecting evidence, affidavits on motions, and the reasons upon which motions are made, the giving and refusing instructions, and various other matters, do not appear of record, and are no part of it, unless embodied in a bill of exceptions, and by that means made a part of the record in the case. In the decision of all such questions, the judgment of the court is not usually spread upon the roll of its proceedings. While judgments by default, on demurrer, in cases of non-suit, final judgment on verdict, etc., have by the practice at all periods, been so entered and regarded as a part of the record. It would be improper practice, to embody a judgment on a demurrer in a bill of exceptions, as it would uselessly incumber the record and unnecessarily add to the expense of litigation. The position that the judgment on the demurrer to the second and third pleas in this case, was not excepted to in the court below is wholly untenable.

The appellant's second plea, which was to the whole declaration, alleges that at the time of suing out the execution directed to the sheriff of DeKalb county, and during all the time it was in the hands of the sheriff, and when the same was returned, the said Edward Hamlin owned and was possessed of, and held in his own name, a large amount of real estate and property in the

county of De Kalb, sufficient to satisfy the execution, of which the plaintiffs had notice. The demurrer admits the truth of the facts stated in the plea. But when thus admitted, they do not constitute a defense to the action. The plea entirely fails to aver that any portion of this property was liable to execution, and it has been held by this court, that it is not necessary that the assignee should proceed to judgment and execution against a maker who only has the amount and kind of property exempt from execution, before he can charge the assignor. *Pierce* v. *Short*, 14 Ill. R. 146. For aught appearing in this plea, all of the property thus held by the maker, may have been exempt from sale on execution. The plea should have averred that it was liable, and for want of such an averment it was obnoxious to the demurrer.

The third plea was to the first count of the declaration, and in addition to the facts contained in the second, averred that the property was liable to execution, which was known to the sheriff and the plaintiffs, and that they for the purpose and design of harrassing and defrauding the defendant, designedly and fraudulently caused the execution to be returned no property found. This court, in the case of *Nixon* v. *Weyhrich*, 20 Ill. R. 600, lay down the rule, that when diligence by suit is relied upon, "the plaintiff was bound to prosecute a suit against the maker, with due diligence, not only to judgment but also to satisfaction. The intention of the law is that the amount shall be made of the maker, if by reasonable diligence that can be done. Due diligence means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. If for the want of such diligence the money is not collected of the maker, it is designed that the loss should fall upon the holder and not on the assignor." The court again say in the same case: "If the plaintiff, by reasonable diligence, might have known of property of the maker sufficient to satisfy the debt, then he could not recover." In that case the question arose on the evidence, and in this it is upon the pleadings, but they both involve the same legal proposition, and the decision in that case is decisive of this. The court below therefore erred in sustaining the demurrer to this plea.

It is also urged, that under the general issue the same defense could have been made as under this plea. The presumption is, that as the court held the plea insufficient, that proof of the same facts alleged in the plea would have been regarded as constituting no defense, and that the appellant did not therefore attempt to introduce such evidence on the trial. The question had once been presented to and decided by the court, and without some intimation of a change of opinion by the court, the

appellant would be justified in supposing the court would adhere to the decision already made. Had the plea remained unanswered, by demurrer or replication, it might be otherwise.

It is urged as a further ground for reversal, that the execution was returned by the sheriff some thirty-seven days before it expired. That the party may, after he resorts to a suit to coerce the payment of the money, abandon it, and show that its further prosecution would be unavailing, is true. *Bestor* v. *Walker et al.*, 4 Gilm. R. 3. In that case it was held by the court that the holder, after obtaining judgment, will be excused from suing out execution when such process would be wholly unavailing. And if insolvency should intervene after the commencement of the suit and by the time judgment has been recovered, so as to render every attempt to collect the money unavailing, that fact should be alleged in the declaration, to excuse from issuing execution, just as it would to excuse from instituting a suit, had insolvency existed at the maturity of the note. This doctrine seems to be reasonable and just. The maker may be solvent at the institution of the suit, and by the time judgment is obtained, he may be insolvent and further legal proceedings become useless. But when diligence is relied upon, and not insolvency, to charge the assignor, the diligence must be complete, and such as the ordinary remedies of the law afford. When the execution is issued and its return is relied upon as evidence of diligence, it is not evidence of that fact unless it has remained in the hands of the officer for the entire period of its life. If the assignee obtains judgment and fails to issue execution, to recover he must aver and prove that a *fi. fa.* would have been unavailing, and so when it has been sued out and returned *nulla bona* before the expiration of the time it had to run, he must aver and prove that its continuance in the hands of the officer would have been unavailing. When judgment is obtained, no presumption is thereby created that a *fi. fa.* would not obtain the money within ninety days, and when it is returned no property found, forty days after it is issued, although it is evidence that the maker then had no property, it does not afford evidence that he would have none within the next fifty days.

It was urged that the party had a right to recover under the common counts, and that the court will presume that the appellees under them made all the proof necessary to a recovery. No such presumption can be indulged, because all the evidence is preserved in the bill of exceptions, and it contains no evidence that the maker had no property liable to execution from the date of the return, till the expiration of ninety days, from the time it was issued. All presumptions of that character are thus cut off by the bill of exceptions. Nor was it the duty of the appel-

lant to prove that the maker had such property after the return of the writ. Before the appellees entitled themselves to a recovery, they were bound to show that they had used due diligence by suit, or that having instituted a suit, its further prosecution would have been wholly unavailing. And this they have failed to do.

The judgment of the Circuit Court must be reversed and the cause remanded.

Judgment reversed.

Franklin Parmelee *et al.*, Appellants, *v.* Peter Fischer, Appellee.

APPEAL FROM COOK.

In an action for lost baggage, it is proper to instruct that damages may be assessed for such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement or protection, having regard to the length and object of their journeys.

If a special plea and the general issue are filed, and all matters pleaded specially may be given in evidence under the general issue, it will be presumed the defendant had the benefit of such proof, unless the contrary appears. The omission to answer the plea, will not be cause for reversal of the judgment.

This action, case, was brought to the Cook Circuit Court, and was tried at the November term, A. D. 1858, before the court and a jury, Manierre, Judge, presiding.

The declaration is, in case, against the defendants as common carriers, and the original declaration contained one count against them as common carriers, and a count in trover.

The first count alleged that defendants were common carriers of goods and chattels, for hire, from the Michigan Central Railroad depot, in Chicago, to the Galena and Chicago Union Railroad depot, and that on the seventh day of June, A. D. 1856, at Chicago, the plaintiff caused to be delivered to defendants a large chest, containing the following described goods and chattels, to wit: two new feather beds and pillows, including an upper and lower feather bed as one bed, two coverlets, two bed spreads or blankets, one lady's black silk dress, ten yards of muslin de laine, one cloak, one fur muff, one large woolen shawl, one oil-cloth table cover, one woolen vest, two pairs woolen pantaloons, two frocks or lady's dresses, one umbrella, one pair of new calfskin boots, one German silver or britannia teapot, one looking-glass, one new double-barreled gun, one set of com-

mon dishes, two dozen German silver spoons, one serving-box, one woolen overcoat, one woolen dress coat, five pairs of stockings, and six towels—of great value, etc., to be safely carried by the defendants from the Michigan Central Railroad depot to the Galena and Chicago Union Railroad depot, Chicago, and there delivered to plaintiff, for certain reasonable reward, etc.

The second count is in trover, for goods of the same description.

To this declaration, the defendants filed the plea of not guilty.

On the 3rd of July, 1857, the plaintiff filed an amended declaration of one count against them as carriers, for goods of the same description, but with allegations of special damage.

To the declaration as amended, the defendants pleaded—1st, the plea of not guilty; 2nd, a special plea, as follows:

And for a further plea to said several counts of the declaration aforesaid, the said defendants say *actio non*, because they say, that at the time of the receiving of the said goods and chattels, in said several counts mentioned, which were received to be carried to the place in said first count mentioned, and not otherwise, it was in consideration thereof expressly agreed by the plaintiff, to and with the defendants, to be present at the place of delivery of said goods, when the defendants' carriage arrived at said place, and then and there demand his said goods; and if he was not there, or did not demand the same, then defendants might deliver the same to any agent at the said depot, and defendants should not in any event be liable for said property. And they aver that they took the same to said depot, and plaintiff did not appear there or demand said goods, and defendants delivered the same to the agent of said railroad, at said depot, as they lawfully might—which are the same goods and chattels in said declaration mentioned, and the grievances, etc. And this they are ready to verify, etc.

There was no replication filed to or issue taken upon either of the last named pleas.

The court instructed the jury on the part of the plaintiff, as follows:

If the jury find for the plaintiff, they will assess the damages for such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey.

To the giving of which instruction the defendants excepted.

The jury found a verdict of guilty, and assessed the plaintiff's damages at one hundred and fifty-two dollars and fifty cents.

The defendants thereupon made a motion for a new trial, and in arrest of judgment, which the court overruled.

Final judgment was rendered on the verdict, and defendants prayed an appeal, etc.

Scates, McAllister & Jewett, for Appellants.

E. A. and J. Van Buren, for Appellee.

Breese, J. The objections taken by the appellants are not tenable. The instruction given on the part of the plaintiff was the law of the case. *Woods* v. *Devin*, 13 Ill. R. 746; *Davis* v. *Michigan Southern and Northern Indiana Railroad Co.*, *post*.

As to the other objection that the pleas to the amended declaration were not answered, it is sufficient to say, that the amendment was for special damages in traveling and paying out money searching for the lost property. The character of the case was not at all changed by it, as set out in the original narr., and to that there was an issue of not guilty, under which all the matters set out in the special plea could be given in evidence, and we will presume the court permitted the defendant to give it in evidence, the bill of exceptions not showing he was denied that privilege. *Warner* v. *Crane*, 20 Ill. R. 151.

But if one of several pleas be not answered, and the parties go to trial without objection on the part of the defendant, the irregularity is considered as waived. *Ross* v. *Reddick*, 1 Scam. R. 74.

But a conclusive reply to all this is, that the appellant has not assigned it for error. The judgment is affirmed.

Judgment affirmed.

Nathaniel Swingley, Appellant, *v.* John Haynes, Appellee.

APPEAL FROM OGLE.

The Circuit Court has jurisdiction on appeal from a justice of the peace, where the justice had jurisdiction, however defective the service of summons by the constable may have been. And by taking an appeal, the appellant gives jurisdiction, even in cases where there was not any service.

Evidence must be heard, before it can be determined that a justice of the peace had not jurisdiction.

A party may succeed in any form of action, if the justice of the peace had jurisdiction of the subject matter.

THE facts of this case, are stated in the opinion of the court.

H. A. MIX, and B. C. COOK, for Appellant.

H. M. MILLER, for Appellee.

WALKER, J. This suit was brought by Swingley against Haynes before a justice of the peace, of Ogle county, May 17th, 1857. Summons was in the usual form, returnable on May 23rd, 1857. The following is a copy of the service of the summons:

"Served the within by leaving a copy thereof at the place of residence of the within named defendant, with a white person upwards of ten years of age, the defendant being absent. (Signed) UPTON SWINGLEY, *Constable.*"

At the trial, on May 23rd, 1857, plaintiff appeared; defendant not appearing, the justice heard the cause and rendered judgment for the plaintiff for $98.34 and costs.

The defendant appealed to the Circuit Court of Ogle county.

At the October term, 1857, the parties appeared and defendant moved to dismiss the suit for these reasons: First, from the papers in the cause it appears that the court below had no jurisdiction. Second, that the service in the court below is insufficient.

The Circuit Court sustained the motion, dismissed the suit and rendered judgment against plaintiff for costs.

The parties then executed and filed the following stipulation in the cause, which is made part of the record:

"It is hereby stipulated and agreed by the parties to the above entitled suit by their counsel, that said cause may be docketed by the clerk of the Supreme Court of the third grand division of said State, and heard and determined at the next term thereof, to be holden at Ottawa. The writ of error and the service thereof is waived, and the said parties stipulate that their appearance may be entered by the clerk of the said Supreme Court, and that the same may be heard and determined by the said Supreme Court in its regular order on the docket, without a writ of error."

The plaintiff assigns the following errors:

1st. The court erred in sustaining defendant's motion and dismissing said suit.

2nd. The court erred in rendering the judgment aforesaid in manner and form aforesaid.

By the 66th section of the act entitled Justices of the Peace and Constables, (Scates' Comp. 709), it is provided that "upon the trial of all appeals before the Circuit Court, no exception

shall be taken to the form or service of the summons issued by the justice of the peace, nor any proceedings before him; but the court shall hear and determine the same in a summary way, according to the justice of the case, without pleading in writing." And the 67th section provides that "If it shall appear, however, that the justice of the peace had no jurisdiction of the subject matter of the suit, the same shall be dismissed at the costs of the plaintiff." We are at a loss to determine how the legislature could have employed language more explicit, that no defect of any description in the service of the summons issued by the justice, should be taken on the trial of the appeal. It seems to be clear that the intention was, to invest the Circuit Court with jurisdiction, by the appeal of all cases in which the justice had jurisdiction, however defective the summons or service, or even in cases where there was no service in the justice's court. The object of the appeal, is to give a trial *de novo*, as though a trial had never been had before the justice of the peace. When the defendant files his appeal bond, he thereby enters his appearance to the cause in the Circuit Court, and by so doing, waives all defects in the process, the want of process, defects in the service of, or want of service before the justice. If the appeal is taken by the plaintiff, and service of the summons in appeal is served on the defendant, ten days before the term, he, by such service, is brought into the Circuit Court, as completely as if he had been duly served in the court below. When the defendant perfected his appeal to the Circuit Court, that court became invested with jurisdiction of his person, to authorize a trial of the case.

The 67th section provides, that if it shall appear that the justice of the peace had no jurisdiction of the subject matter of the suit, the same shall be dismissed, and this court has repeatedly held, that the evidence must be heard, before that question can be determined. When we know that the form and technical distinctions in the various actions are little understood by justices of the peace and the people generally, we must conclude that those distinctions were intended to be abolished by the legislature, and under the form of summons which they have given, that the various actions in which justices have jurisdiction, shall be tried. The form of the account, the form of the summons, or a mistake in docketing the suit, cannot affect the plaintiff's right to a judgment, if his evidence shows a right of recovery, in any form of action of which the justice of the peace has jurisdiction. And on the appeal, it is the duty of the court to hear the evidence, without reference to the justice's docket, and to render judgment in the case, unless from the evidence it appears the justice had no jurisdiction of the subject

matter. *Rogers* v. *Blanchard*, 2 Gilm. R. 335; *Ballard* v. *Mc Carty*, 11 Ill. R. 501; *Vaughan* v. *Thompson*, 15 Ill. R. 39. And by the construction given the statute by these decisions, the court below had no power to determine whether the justice had jurisdiction of the subject matter of the suit, until the evidence was heard, and if the summons on the appeal was served, or appellee's appearance had been entered in the Circuit Court, that court was authorized and even required by the statute, to proceed to try the cause without any reference to the service in the justice's court. And it was error to dismiss the suit for want of jurisdiction in the justice, until the evidence was heard.

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

Judgment reversed.

John Anderson *et al.*, Appellants, *v.* George Richards *et al.*, Appellees.

APPEAL FROM HENRY.

Where there is a general demurrer to a declaration containing several counts, some of which are good, the demurrer must be overruled.

This was an action of assumpsit. The declaration counted upon a promissory note, and also embraced several common counts. To this declaration the defendants filed a demurrer, which was overruled by the court, Drury, Judge, presiding. The defendants stood by their demurrer. A judgment was rendered against the defendants below for the sum of $3,064.44.

The causes assigned for supporting the demurrer were principally mistakes in grammar.

W. H. L. Wallace, and W. Smith, for Appellants.

B. C. Cook, for Appellees.

Breese, J. The demurrer was properly overruled, it being to the whole declaration, and the common counts therein being good. The rule is, where there is a general demurrer to a declaration containing several counts, if there be one or more good counts, the demurrer must be overruled. *Cowles* v. *Litchfield*, 2 Scam. R. 356; *Young* v. *Campbell*, 5 Gilm. R. 82; *Walter* v. *Stephenson*, 14 Ill. R. 77.

This being so, the defective special counts are both saved. Besides, "*mala grammatica non vitiat chartam.*" There being no error assigned which we can notice, the judgment of the court below is affirmed.

Judgment affirmed.

Samuel P. McLean, Appellant, *v.* John L. Griswold *et al.*, Appellees.

APPEAL FROM PEORIA COUNTY COURT.

The misjoinder of a *feme covert* as defendant, cannot be cured by entering a *nolle prosequi* as to the wife.

This suit was commenced in the court below by John L. Griswold and Matthew Griswold, plaintiffs, against Samuel P. McLean and Eliza J. McLean, and summons returned served upon both.

The Griswolds filed their declaration against both defendants in assumpsit. The first count avers that Samuel P. McLean and Eliza J. McLean executed their promissory note for $615.81, to John King, and John King indorsed and assigned the same to plaintiffs below. The common counts proceed for money paid, money had and received, and account stated.

Samuel P. McLean filed two pleas:

1. General issue.
2. That the defendant, Eliza J. McLean, at the time the note was made, and at the time the promises were made, was, and still is, married to the defendant Samuel P. McLean.

The Griswolds demurred to the second plea, and the court sustained the demurrer, and the defendant, Samuel P. McLean, excepted.

Eliza J. McLean filed a plea of coverture, supported by her affidavit.

The plaintiffs below then dismissed the suit as to Eliza J. McLean.

The plaintiffs below proved the execution of the note, and offered the same in evidence in these words:

Dollars 615.81. *Peoria, Illinois, Sept.* 26, 1856.

On or before the first day of April, A. D. 1858, we promise to pay to the order of John King, Esq., Six Hundred and Fifteen Dollars and Eighty-one Cents, for value received.

SAMUEL P. McLEAN,
ELIZA J. McLEAN.

To which S. P. McLean objected on the following grounds:

1. That said plaintiffs had no right to proceed with said cause against Samuel P. McLean, the plaintiffs having dismissed their cause as to Eliza J. McLean.

2. Because said plaintiffs having sued two defendants cannot proceed to trial and judgment against one.

3. The plaintiffs have no right to maintain this action.

4. The note is not proper evidence under the pleadings.

But the court overruled the objection and admitted the note in evidence.

The jury found for the plaintiffs below.

The defendant entered a motion for a new trial and in arrest of judgment, both of which motions were overruled.

The court then rendered judgment against Samuel P. McLean for the sum of $319 damages, and the defendant excepted.

McLean appealed to this court, and assigns the following errors:

1. The court below erred in sustaining the demurrer to S. P. McLean's second plea.

2. The court below erred in proceeding with the cause after the plaintiffs below dismissed the suit as to Eliza J. McLean.

3. The court erred in admitting the note in evidence.

4. The court erred in rendering judgment against Samuel P. McLean after dismissing the cause as to Eliza J. McLean.

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

6. The court below erred in overruling the motion in arrest of judgment.

7. The court below erred in not rendering judgment for the defendant below.

H. Grove, for Appellant.

N. H. Purple, for Appellees.

Walker, J. The only question presented by this record which we deem it necessary to determine, is whether appellees, by entering a *nolle prosequi* as to Eliza J. McLean, obviated the objection of a misjoinder of defendants. By the plea in abatement, it appeared that she was a *feme covert* at the time the promissory note was made, and was the wife of her co-defendant. In all suits for torts there can be no objection, that all the tort feasors are not joined, or that persons are joined as defendants who are not guilty, but a recovery may be had against the persons who are guilty, and an acquittal of those who are improperly sued. But in actions *ex contractu*, the rule is different, and

the plaintiff must recover against all of the defendants, or against none. To this rule, however, there are some exceptions. The rule is stated by Chitty to be that, "Although in actions of *torts* one defendant may be found guilty, and the other acquitted, yet in actions for the breach of a contract, whether it be framed in assumpsit, covenant, debt, or case, a verdict or judgment in general, cannot be given in a joint action against one defendant without the other. In an action against three persons, two only of whom were liable to be sued, the party not liable, together with one of those who was liable, suffered judgment by default, and the other party pleaded the general issue, and a verdict was found for the defendant who pleaded, on the ground that the plaintiff having declared as upon a promise by three defendants, to entitle him to recover, he should have proved a promise, either express or implied, binding upon all three. * * * * And though a contract be proved to have been in *fact*, made by all the defendants, yet if in point of law it was not obligatory on one of the defendants, either upon the ground of infancy or coverture, at the time it was entered into, the plaintiff will be nonsuited, and in this instance he cannot avoid the objection by entering a *nolle prosequi* as to the infant or *feme covert*, but must discontinue and commence a fresh action, omitting such parties; in which case, should the defendants plead the nonjoinder of the infant or *feme covert* in abatement, the plaintiff may reply the infancy or coverture." 1 Chit. Pl. 8, Am. Ed. p. 45. In cases where all of the defendants were legally liable at the time the contract was entered into, and some one of them has been discharged afterwards by operation of law, which only protects him individually, leaving the others liable on the contract, as by bankruptcy and certificate, etc., and plaintiff fails on the trial, as to him the plaintiff will not be precluded from recovering against the other parties, or a *nolle prosequi* as to him may be entered upon his plea of personal discharge. While some courts have held, when a plea of infancy was interposed, that the plaintiff may enter a *nolle prosequi* as to him and proceed to judgment against the other defendants, upon the ground that the contract of an infant is binding until it is avoided, yet we have been referred to no adjudged case, nor are we aware of any, which has held that such a course may be adopted when the contract has been entered into by a married woman, with other persons. Such a contract as to her, is not merely voidable but is absolutely void. When the coverture is pleaded, it is not interposed as a discharge from a contract once binding, but upon the grounds that no valid contract was entered into by her, when it was executed. Her contract being void, she occupies to it the relation of a stranger to the agreement, and is no more liable

to be sued upon it, than any stranger to it, and if improperly joined in the action, the misjoinder cannot be cured by a *nolle prosequi;* for the same reasons that apply to the misjoinder of other defendants. If the misjoinder in this case may be obviated by entering a *nolle prosequi* as to the *feme covert*, no reason is perceived why the same thing may not be done in every case of misjoinder of defendants. The doctrine has been too long and is too well settled, to be disturbed. The court below erred in permitting appellees to enter a *nolle prosequi* and proceed to judgment against the remaining defendant.

And that judgment must be reversed, and the cause remanded.

Judgment reversed.

The Tonica and Petersburg Railroad Company, Appellant, *v.* John Unsicker, Appellee.

APPEAL FROM TAZEWELL.

Where the question of damages for a right of way is fairly submitted to a jury, no benefit being likely to result to the owner of the land, and the company not being absolutely bound to erect a fence, etc., the Supreme Court will not disturb the verdict.

This was a proceeding by the appellant, to obtain the right of way across the land of the appellee. At the instance of the railroad company, three commissioners had been appointed, who assessed the damages to Unsicker at one dollar. From this assessment he appealed to the Circuit Court.

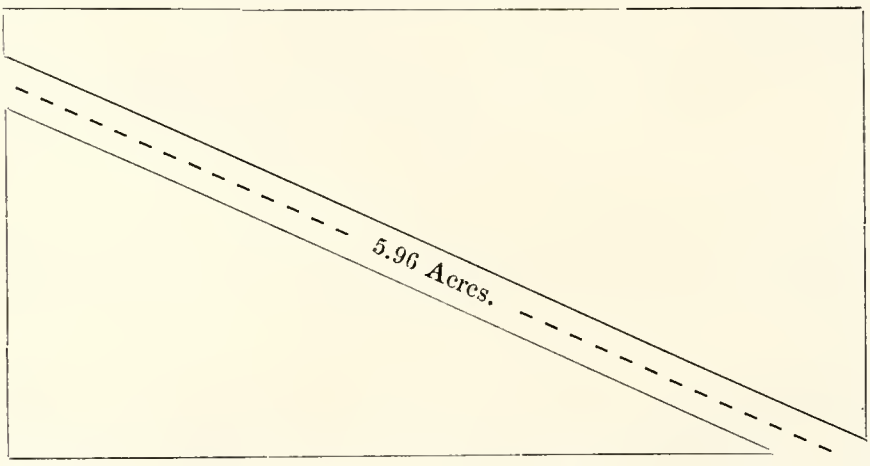
There was a hearing in the Circuit Court before Harriott, Judge, and a jury.

One *Stellanger* was sworn, and testified that he resides near Unsicker; that he knows his farm, through which the Tonica and Petersburg Railroad runs; that the farm contains about seventy-two acres, worth about forty dollars per acre; that the usual market for Unsicker and his neighbors is Peoria, about eleven miles distant; that Unsicker's farm, the one in question, is about two or three miles from Washington; that in view of the quantity of land taken by the railroad, in running their line of road through the farm of Unsicker, and the cost of making and maintaining the fences along the line of the road, and the cattle guards along the same, and their inconvenience to Unsicker by reason of the road running through his farm in the manner it does, he estimated the damages sustained by Unsicker at nine hundred dollars. Witness further stated that the following plat,

which was handed him, (which said plat is admitted to be correct by both parties to this suit,) represented, as nearly as he could recollect, the manner in which the Tonica and Petersburg Railroad runs through Unsicker's farm; and that he should think the quantity of land on said plat represented as taken up by the road, being $5\frac{96}{100}$ acres, as about the correct quantity. Witness further stated that he did not include, in his estimate of damages, the inconvenience to Unsicker, in case the railroad company should refuse to let him erect cattle-guards along the line of road through his farm.

Witness stated that the farm of Unsicker lies about four miles north-east of Morton; that he don't think the construction of the Tonica and Petersburg Railroad would benefit Unsicker, or enhance the value of his land.

Plan of Tonica and Petersburg Railroad over land of Unsicker—80 *acres.*



NOTE.—The dotted line shows the centre of the railroad track, the line of which is slightly curved.

Samuel Mowberry testified, that he knows the farm of Unsicker, over which the railroad runs; had been on it recently; resided about six miles from it; thinks the plat shown first witness shows the manner in which the railroad crosses the farm of Unsicker correctly; that the farm of Unsicker is situated about eleven miles from Peoria, three from Washington, and seventeen miles from Pekin—Peoria being the usual market for the neighborhood. Witness further stated, that the farm of Unsicker was worth thirty-five to forty dollars per acre; that the damages to Unsicker, by reason of the railroad running through his farm in the manner it does, would be eight hundred and fifty dollars; this would be a low estimate. Included in this estimate of damages, witness stated, was the cost and expense of keeping up and building fences and cattle-guards along the line of railroad through Unsicker's farm, but did not include the damage to

Unsicker in case the railroad company should refuse to allow him to put up cattle-guards along the line of road through his farm, and thus he be compelled to use gates. Witness stated that he could not estimate the damages arising from such inconvenience; it would be additional damage, but he did not know how much.

John Lowman testified, that the railroad ran through the farm in the manner shown in the plat exhibited to the previous witnesses; that the land in question was worth thirty-five dollars per acre; that the damages to Unsicker, by reason of constructing the Tonica and Petersburg Railroad through his land, as shown in the plat, would be from seven to eight hundred dollars. Witness further stated that the construction of the Tonica and Petersburg Railroad through appellant's farm could not be of any benefit to him, nor enhance the value of his property, because his market was at Peoria, only eleven miles distant; that he was within two or three miles of a depot on the Peoria and Oquawka Railroad, at Washington, and did not need any greater railroad facilities.

Several other witnesses testified to the same facts substantially.

The jury found for the appellant, and assessed his damages at eight hundred dollars.

And thereupon appellant, by its counsel, moved the court to set aside the verdict of the jury, so rendered as aforesaid, and to grant a new trial; which motion was overruled by the court, and judgment rendered on said verdict. To which judgment the appellant excepted, and prayed this appeal.

A. L. Davison, for Appellant.

J. Roberts, and B. S. Prettyman, for Appellee.

Breese, J. In this case, the question of damages was fairly submitted to the jury, and as no special benefit to result to the owner of the land was proved, but rather an injury by the construction of the road, and as the statute does not impose the duty absolutely upon railroad companies to erect fences, the jury had the right to allow as damages the expense of making and maintaining the fence, with crossings, etc.

As we estimate it, the land taken by the company was of the value of $215, the fencing would cost $400, and land wasted by the angles made by the course of the road through the lot, and the great inconvenience to which the owner is put, and dangers to which he, his family and stock are exposed in passing

from one part of his farm to the other, would amount to at least two or three hundred dollars more.

There being a railroad already in running condition but a short distance, some three miles and by a good wagon road to the depot, from the appellee's farm, a railroad through his farm cannot but prove a serious injury to him, especially as there is no depot or station proposed to be established on his land. The case does not seem to have been very fully investigated, or very elaborately tried. From all the evidence in the record, we are inclined to the opinion that the road is of serious injury to the appellee, and that eight hundred dollars is not as much as the jury might have found as compensation for damages and land taken. *Illinois and Wisconsin Railroad Co.* v. *Von Horn*, 18 Ill. R. 257; and cases there cited.

The judgment is therefore affirmed.

Judgment affirmed.

The Tonica and Petersburg Railroad Company, Appellant, *v.* John Roberts, Appellee.

APPEAL FROM TAZEWELL.

The Supreme court will not disturb the verdict, assessing damages for a right of way, merely because such damages are large; when the owner of the land is not to receive any particular benefit from the location of the road.

This was a case like the preceding one of Unsicker against the same company, and the proof shows much the same state of facts.

The jury assessed damages at one thousand dollars.

A. L. Davison, for Appellant.

B. S. Prettyman, and J. Roberts, for Appellee.

Breese, J. This case does not substantially differ from the case of the same plaintiff *v.* Unsicker, *ante*.

The verdict for damages is large, but we cannot say that it is so much so as to authorize us to disturb it.

The road as it runs through the land, is an injury, and a serious one to the owner, and as he is near a well established market

and railroad in full operation, it cannot be said, it is of any particular benefit to him, and no depot or station located on his land.

The judgment is affirmed.

Judgment affirmed.

Alexander Hawthorn, Appellant, *v.* Jonathan K. Cooper *et al.*, Appellees.

APPEAL FROM PEORIA COUNTY COURT.

A party is entitled to a continuance if a plaintiff does not file an account ten days before the term, if he has common counts in his declaration.

If the plaintiff desires to avoid a continuance, he can stipulate against using the common counts, or enter a *nolle prosequi* as to them.

The plaintiffs filed a declaration in assumpsit, containing one special count and the common counts.

The first count sets out the execution of a note by the defendant, dated September 19, 1857, for $478, payable in thirty days to R. W. Jorden, at the Bank of N. B. Curtiss & Co., and an assignment to the plaintiffs below, and a presentation of the note on the twenty-second of October, 1857, at the said bank, and the same was not paid.

The common counts set forth that the defendant below, on the day and year last aforesaid, (meaning Oct. 22, 1857,) was indebted to the plaintiffs in $600 for work and labor, etc.

The defendant below, Dec. 10, 1857, filed a plea of the general issue, and also a plea of payment.

The defendant below filed a motion for a continuance of the cause, on the ground that no copy of the indorsement of the note, nor of the account, had been filed by the plaintiffs.

The motion came on to be heard, and the court gave the plaintiffs below leave to amend.

The plaintiffs below then filed an amendment in these words:

"*The note, of which the above is a copy, contains the name of R. W. Jorden on the back of it as indorser.*"

The defendant below then renewed the motion to continue the cause for the same reason, but the court refused to continue the cause, and the defendant excepted.

The court then called the case on for trial, and the plaintiffs below offered their note in evidence.

To which the defendant objected, but the court admitted the note in evidence, and the defendant excepted.

This was all the evidence in the case.

The court found for the plaintiffs for $484.07 ; and the defendant appealed.

H. Grove, for Appellant.

J. K. Cooper, for Appellees.

Walker, J. The defendant below entered a motion for a continuance, because an account was not filed under the common counts, ten days before the commencement of the term. The court overruled his motion, which is assigned for error. This was a failure to comply with the express requirements of the statute, and by its terms the defendant below was entitled to a continuance. The plaintiffs below, however, might have avoided a continuance by filing a stipulation that they would rely alone on the note sued on as evidence on the trial, or they might have entered a *nolle prosequi* to the common counts, which would have produced the same result. But having failed to do either, it was error to overrule the motion for a continuance, for which the judgment must be reversed, and the cause remanded.

Judgment reversed.

William W. Vipond, Appellant, *v.* Ashbil Hurlburt, Appellee.

APPEAL FROM PEORIA.

Where a covenant is to be implied from statutory words, the very words of the statute must be used.

February 16th, 1858, a justice of the peace issued a *capias ad respondendum* against Henry Nash and Henry B. Roberts, which was returned same day, indorsed:

"I, Ashbil Hurlburt, acknowledge myself special bail for the appearance of the within named Henry B. Roberts.

ASHBIL HURLBURT."

"I have arrested the above Henry B. Roberts, and taken special bail as above.

G. W. CAMPBELL, *Constable.*"

On the return day Roberts appeared, waived process, and confessed judgment for $289.64.

September 10th, 1858, said justice issued a summons against Hurlburt, as special bail, in form as provided by the statute.

Upon the return of this summons, the justice rendered judgment for Vipond, for $292.89.

There was an appeal to the Circuit Court by Hurlburt, which was tried March term, 1859. Verdict and judgment for defendant, POWELL, Judge, presiding.

C. C. BONNEY, for Appellant.

H. B. HOPKINS, for Appellee.

BREESE, J. It will be seen by looking at the endorsement of bail on the *capias ad respondendum* issued by Vipond against Nash and Roberts, that it is for the appearance only of Roberts to the action—nothing more, and does not conform to the statute. The statute contemplates something more, and when the endorsement is made in conformity to it, it is to have the force and effect of a recognizance of bail, the condition of which is, that the defendant, if judgment shall be given against him, will pay the same with costs or surrender his body in execution; and in default of such payment or surrender, the goods and chattels of the bail shall be liable for the payment of the judgment and costs. (Scates' Comp. 697).

Where a covenant is to be implied from statutory words, the very words of the statute must be used to raise the covenant.

Here the words used in the endorsement, are not the words of the statute nor of kin to them, and it was no undertaking by Hurlburt, to pay the debt, for the language used independent of the statute, does not amount to a covenant to pay the debt. It is for the appearance of one of the defendants. This is fatal to the plaintiff's recovery, and the judgment must be affirmed.

Judgment affirmed.

JAMES G. MERRILL, Appellant, *v.* LEROY D. RANDALL, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

In an action on a note, a plea which sets up, that the maker being indebted to A. was to pay off any debts due to A., gave the note sued on to B. payable to C., under the belief that A. owed B. the sum payable by the note, and B. had the note indorsed after due by C. to D., who brings the action, and that no consideration passed between any of the parties, all of whom were privy to the facts, and that said note was held for the use of B., will be good on demurrer.

A plea which avers that B. undertook to collect money for A., and apply the same when collected on a note given by A. to D., by an arrangement between the parties, and that a sufficient sum had been collected to pay the note, will constitute a good plea of payment.

This was an action in assumpsit, commenced in the County Court of Peoria county, at the February term, A. D. 1858. The action was upon three promissory notes.

The defendant pleaded the general issue and the following special pleas, which are sustained by the opinion:

2. And for a further plea in this behalf the defendant says *actio non*, because he says that the cause and causes of action in said declaration mentioned are one and the same, and that the only cause and causes of action is and are the said several promissory notes, and not other or different, and that there was no consideration for the said notes, nor either of them, in this: Before the time of making said several promissory notes by defendant, he, the defendant, purchased from Caleb Whittemore and Sandford Moon, doing business under the firm name and style of Caleb Whittemore & Co., in the city of Peoria, in said county and State, a certain printing establishment known as the Peoria Daily and Weekly Transcript office, and paid therefor a valuable consideration; and at the time of such purchase, defendant further agreed with said Whittemore & Co. that he would assume and pay off the debts then justly due from said Whittemore & Co. on account of said printing establishment, to various persons then owing.

That said defendant, at the time of making the said purchase, knew nothing in regard to the amount of indebtedness owing by Whittemore & Co., nor the persons to whom such indebtedness was due, and was forced to rely upon the information that he could obtain from the said Whittemore & Co., relative to such indebtedness. That one James K. Murphy had been for a long time, and was at the time of said sale and purchase, the book-keeper of said Whittemore & Co. That defendant was referred to said Murphy, as such book-keeper, for information relative to the indebtedness of said firm of Whittemore & Co. That said James K. Murphy, to whom defendant was referred as aforesaid, then and there stated and represented to defendant that said Whittemore & Co. were indebted to him, said Murphy, as book-keeper aforesaid, for services rendered as such book-keeper, in the amount of the said several promissory notes in said declaration described and sued on in this action, which statement and representation defendant then believed to be true, and relied upon the same, and thereupon did execute the said several promissory notes to secure the said supposed indebtedness, in the following manner: That is, said Murphy stated to defendant that he was and had been for a long time indebted to various persons, in large amounts of money, then residing East, and that said Murphy wanted to take the notes as aforesaid, and make the same payable to one Gilman Merrill,

and then have the same indorsed and assigned by said Gilman Merrill to the plaintiff, who was and is the brother-in-law of said Murphy, all of which he, Murphy, desired to be done for the expressed purpose of delaying, hindering and avoiding his, said Murphy's, creditors.

That defendant did then and there execute said several notes, and make the same payable to said Gilman Merrill, at the request of said Murphy, and then and there delivered said notes to said Murphy. That said Murphy then and there obtained the indorsement and assignment of said Gilman Merrill on the back of said notes, but never delivered said notes to the plaintiff, but caused this suit to be brought in the name of said plaintiff merely to carry out his said fraudulent purposes against his, said Murphy's, creditors—and further to compel defendant to pay said notes on the ground that the same were in the hands of a *bona fide* holder before maturity.

Defendant states and avers that the statements and representations of said Murphy in regard to the indebtedness, to pay which said several notes were given, were wholly false and untrue, and that in truth and in fact, said Whittemore & Co. did not at the time of making said several notes, owe him, said Murphy, one cent. That said false statements were so made to defendant for the purpose of obtaining said notes as aforesaid, and that defendant did wholly and entirely rely upon said statements being true, and executed said several notes as aforesaid upon the sole faith that said statements were true, and said supposed indebtedness then honestly and *bona fide* existed.

Defendant further avers, that there never was any consideration of any description passed between this defendant and said Gilman Merrill, nor between said Murphy and Gilman Merrill, nor between the plaintiff and Gilman Merrill, relative to the transaction of giving, indorsing and assigning said several notes, nor either of them.

That said plaintiff had not, at the time of commencing this suit, and has no beneficial interest in said notes, nor either of them, nor had he ever any such interest, but on the contrary was and is and ever has been, a mere nominal plaintiff and holder of said several notes, to aid said Murphy in his, said Murphy's, fraudulent purposes, aforesaid; that said notes are, and ever have been, the sole and exclusive property of said Murphy, and that said several notes, and each of them, were assigned to plaintiff as aforesaid, long after they and each of them became due and payable, and were taken by the plaintiff with full notice and knowledge of all the matters aforesaid, wherefore the defendant says that there never was any considera-

tion for said notes, nor either of them; and this he is ready to verify; wherefore he prays judgment, etc.

And the said defendant comes, and by leave of the court for that purpose first had and obtained, files herein his additional plea, and says *actio non*, because he says that the said several notes are the sole and only cause and causes of action in this cause, and that the several notes and each of them, were given by defendant to the said Gilman Merrill, under the following circumstances: setting forth the same state of facts in reference to the purchase, as the foregoing plea, and the giving and transferring of the notes.

That at the time of said purchase by defendant, there was also included in the same, all the book accounts, notes, bills, bonds, choses in action and effects of every description belonging to said Whittmeore & Co., made, accrued or contracted on account of said printing establishment, and then owing from various persons to said Whittemore & Co., and held by said Whittemore & Co., the amount of which and the persons so owing, defendant never knew with any certainty, and cannot state.

That it was further agreed by and between said Murphy and defendant, after the execution of said notes, that said Murphy should, as the book-keeper of this defendant, collect from the various persons then owing defendant, and owing the said firm of Whittemore & Co., such sums as were due, and that he, Murphy, should apply a certain amount so to be collected, (not to exceed the amount of said notes,) as a payment on said notes, all of which was agreed to between the parties to said notes.

Defendant avers that long prior to the commencement of this suit, the said Murphy did, as such book-keeper, under the arrangement aforesaid, collect of various persons, the sum of twenty-six hundred and fifty dollars, money at the time owing from various persons to the said firm of Whittemore & Co. and this defendant, on account of said printing establishment, which sum should in right have been applied as a payment on said notes, under the agreement aforesaid, but that said Murphy neglected and refused to indorse and credit the said amount so collected, on said notes.

Defendant further avers that the amount so collected was and is a full payment of said notes, and that the said plaintiff in this suit has no beneficial interest whatever in this suit; that said notes were transferred to said plaintiff at the request of said Murphy, for the purpose of collection and nothing else.

That said notes and each of them were so transferred to said plaintiff, long after the same became due and payable, and were

taken by the plaintiff with a full knowledge of all the matters aforesaid.

He further avers that there never was any consideration of any description passed or moved between the said defendant and said Gilman Merrill, nor between the said Gilman Merrill and said Murphy, nor between said Gilman Merrill and the plaintiff, nor between the said defendant and plaintiff, in any manner, concerning the making or indorsing of said notes, nor either of them.

He further avers that said Murphy ever has been and is now the sole and only beneficial holder and owner of said notes, and the proceeds thereof, and that the same were given to said Gilman Merrill, and by said Gilman Merrill transferred to the plaintiff, and by the plaintiff sued in this action for the sole use and benefit of the said James K. Murphy, and for no other person, wherefore he says that said notes are fully paid; and this he is ready to verify; wherefore he prays judgment, etc.

To these pleas there was a demurrer, which was sustained.

The court rendered judgment against defendant for the sum of $2,258, to which the defendant excepted.

The defendant moved for a new trial, which was denied.

J. T. Lindsay, for Appellant.

C. C. Bonney, for Appellee.

Walker, J. The errors assigned, question the correctness of the decision of the court, in sustaining a demurrer, to the several special pleas filed by defendant below. The second is pleaded as a plea of failure of consideration. This plea avers that the maker purchased of Whittemore & Co. a printing establishment, and all the demands due the firm, and that he was to pay all their liabilities. That one Murphy, their book-keeper, claimed to have a debt against the firm, equal in amount to the notes sued on, when in fact, Whittemore & Co. did not owe him one cent; and that defendant was ignorant of their liabilities, and believing them to be indebted to Murphy, to that amount, gave the notes sued on, in liquidation of such supposed indebtedness. That, at Murphy's request, the notes were made payable to one Gilman Merrill, and that Murphy obtained the indorsement of the notes by Gilman Merrill, the payee, to Leroy D. Randall, the plaintiff, and that no consideration ever passed from defendant, to Gilman Merrill, nor between him and Murphy, nor between Gilman Merrill and plaintiff, relative to the giving, indorsing, and assigning the several notes, or either of them. That plaintiff, when suit was instituted, had no beneficial inter-

est in the notes, or either of them, nor did he ever have any interest in them, but is, and always has been a nominal plaintiff and holder, of them, to aid Murphy in his fraudulent purposes. That the notes are, and ever have been, the sole and exclusive property of Murphy, and that the notes were severally assigned to plaintiff, long after they and each of them became due, and that plaintiff had full notice, and knowledge of all the facts connected with the giving of these notes.

Had these notes been payable to Murphy, and had he instituted suit for their collection, and had the same state of facts, as to their execution, appeared in defense, as are set up in this plea, it is manifest that a recovery could not have been had. If it is true that Whittemore & Co. owed Murphy nothing, and he falsely claimed that they were indebted to him, and the plaintiff in error relied on, and believed his statements, and gave these notes, it most clearly would constitute a defense.

The plaintiff in error had bound himself to Whittemore & Co. to pay all their indebtedness on account of the printing establishment, and not knowing what it was, or to whom it was owing, relying upon the false representations of Murphy, he gives the notes, to liquidate what he was led to suppose was indebtedness which he was liable to pay and satisfy. This supposed liability of Whittemore & Co. to Murphy, the plea alleges was the only consideration for which they were given, and if no such indebtedness existed, and the notes had been payable to Murphy and sued by him, it would in such an action have constituted a total failure, or want of consideration.

Then has the form which is alleged to have been adopted, changed the rights of the parties. It is alleged that there was no consideration paid by Gilman Merrill to Murphy, for which the notes were given. And if this be true, and it is admitted by the demurrer, he took as a volunteer and has acquired no better or different right than Murphy had. If the suit had been instituted in his name, the maker certainly could have shown that no consideration had been received from the payee; and the plea here positively avers that he paid no consideration for these notes. He then held these notes subject to this defense, and it is no answer to say he was not a participant in the transaction, for he held notes for which he gave no consideration, nor was any received by the maker, or any one else, to support their execution. The plea also alleges that he was aiding and assisting Murphy to fraudulently obtain this money of plaintiff in error, and for that purpose he assigned and transferred without any consideration, these notes to the defendant in error. Then if no consideration passed from him for these notes, and they were only made payable to him to pre-

vent the defense that no consideration passed from Murphy to the plaintiff in error, he could not have had any claim to recover either in law or in justice.

The plea also avers, that the notes were assigned to the plaintiff long after they were severally due, with full knowledge and notice, of all the facts, by the assignee, and without his having paid any consideration for their assignment. If then he took these notes by assignment, after their maturity, he took them subject to any and all defenses that might be made by the maker. And if he also had notice of the fact that they were obtained without consideration, or that it had failed, and if he paid nothing for them, we do not perceive, that he can be heard to say that the maker should not be permitted to set up his defense as against him. The plea also avers that defendant in error always held the notes for the use of Murphy, and was only a nominal plaintiff, without any real interest. It is well settled, that when the plaintiff on the record, is only the trustee for another, the defendant may avail himself of any defense going to the consideration, which he might set up against the beneficial owner of the instrument, had the action been brought in his name. *McHenry* v. *Ridgley*, 2 Scam. R. 309. And the plea avers that until Gilman Merrill parted with the notes, he held them as the trustee of Murphy, and so does the defendant in error, and the defense set up in the plea would have been available in an action by Gilman Merrill, and is for the same reason equally so to this action. The demurrer to this plea should therefore have been overruled.

While the fifth plea is not very artificially drawn, we think it substantially amounts to a plea of payment. It avers that Murphy undertook to collect money due plaintiff in error, and when collected apply it in payment and discharge of these notes, and that the parties to the notes agreed to this arrangement, and that a sufficient amount had been collected to pay them before this suit was instituted. This certainly constitutes a good and valid payment.

It was not necessary that the several sums received should have been indorsed upon the notes, to constitute it a payment. The payment consisted in the receipt of the money under the agreement, and the plea avers that it was so received. If it is true that the parties to the note made the arrangement, no reason is perceived why they should not be bound by it. The holder, at the time of making such an agreement, was a party to the note; and if it is true that he entered into the agreement, Murphy thereby became his agent to receive payment in that manner, and he should be bound by the payment thus made to his agent. The plea alleges that the money when collected was by agree-

ment to be applied as a payment, and if so it was not a matter of set-off. We therefore think the demurrer should have been overruled to this plea.

The demurrer was properly sustained, however, to the third and fourth pleas.

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

Judgment reversed.

James Campbell, impleaded with John T. Gould, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO THE RECORDER'S COURT OF THE CITY OF CHICAGO.

A record should show the *scire facias*, not by recital, but by giving a copy of it; or the judgment upon it will be reversed. It is the duty of the district attorney to see to the regularity of such proceedings.

This was a proceeding by *scire facias* to recover judgment against bail, in a criminal case in the Recorder's Court of the city of Chicago.

On April 19, A. D. 1855, the grand jury presented an indictment against the said John T. Gould, for the crime of larceny.

April 24, 1855, the said John T. Gould procured said cause to be continued until the next ensuing term of the said court.

On the 26th day of April, 1856, the following recognizance was entered in and before the said court by the said Gould and Campbell:

"This day in open court, John T. Gould as principal, and James Campbell, as security, severally acknowledge themselves to owe and be indebted unto the People of the State of Illinois, in the penal sum of one thousand dollars, to be levied of their good and chattels, lands and tenements respectively.

"Yet, to be void upon the condition, that the said John T. Gould personally be and appear before the Recorder's Court of the city of Chicago, now in session at the court house, in said city, on the first day of the next term thereof, to answer unto the People of the State of Illinois, on an indictment for larceny therein pending against him, and shall abide the order of said court, and not depart the same without leave; otherwise to be and remain in full force and effect."

June 13, 1855, the following order was entered, to wit:

"This day come the said People, by Daniel McIlroy, State's

Attorney, and the said defendant, being three times solemnly called, comes not, nor any one for him, but herein fails and makes default. And now James Campbell, security of the said defendant, being three times solemnly called, and forthwith demanded to produce the body of the said defendant in court, but failing herein,

"It is ordered by the court, that the default of the said defendant, and his security be entered of record, and that the said recognizance be taken and declared as forfeited, and that a *scire facias* issue, returnable *instanter*, requiring the said defendant and his security then and there to appear, and show cause why the said People should not have execution of the said recognizance, according to the force and effect thereof.

"It is further ordered by the court, that a capias issue for the bodies of the said defendant, and his security, returnable instanter."

No *scire facias* appears of record to have been issued upon the recognizance aforesaid.

March 22, 1856, a judgment was entered in said cause against Campbell.

The errors assigned are:

1. That the said Recorder's Court erred in rendering a judgment upon the forfeiture of the recognizance aforesaid, without issuing a *scire facias* upon said recognizance, and having the same returned in due form of law.

2. The said Recorder's Court erred in rendering judgment against the said plaintiff in error, when there was no service of the *scire facias* against him, the said plaintiff in error.

3. That the said Recorder's Court erred in rendering judgment in favor of the said defendants in error, when, by the law of the land, the said judgment ought to have been rendered in favor of the said plaintiff in error.

R. S. Blackwell, for Plaintiff in Error.

W. Bushnell, District Attorney, for the People.

Breese, J. We have searched the record in this cause in vain to find the writ of *scire facias*, but discover none. Under such circumstances we can no more sustain the judgment in this case, than we could in a case where no declaration appears in the record. The office of a *scire facias* is both that of narr. and process, and the record should show, not by recital, but by its appearing in the record, that the writ was actually issued, giving a copy of it. The record furnishes no such evidence, and the judgment must be reversed.

We cannot avoid remarking here upon the apparent negligence of the State's attorney in taking a judgment under such circumstances. On discovering the defect, which he should have done, he should have moved for a continuance for the purpose of having the lost record supplied and then have brought up the amended record by *certiorari*. It is possible this may yet be done and a good judgment rendered in the Recorder's Court.

Judgment reversed.

William Greenleaf, School Commissioner, etc., Plaintiff in Error, *v.* Trustees of Township No. 41 N., R. 14 E., Defendants in Error.

ERROR TO COOK.

The legislature may unite or divide townships, and their school funds, at discretion.

This was a petition by H. B. Hurd, one of the trustees of Town 41 N., R. 14 E. of 3rd P. M.

The petition states that W. L. Greenleaf is school commissioner of Cook county, and has moneys in his hands as such, etc.

That George H. Reynolds and others are trustees of T. 41 N., R. 14 E., etc.

That by the laws of this State, of 16th February, 1857, it was provided that each congressional township, is established a township for school purposes.

That by a law of 17th of February, 1857, it was enacted, "That the town of Evanston comprises all of fractional township forty-one North, of Range fourteen East, and Sections 12, 13, 24, 25, 36, of Township 41 West, of Range 13 East, the Archange Oalmet Reserve, and fractional Sec. 22–26 and 27, in Township 42 North, Range 13 East, and that the same form and constitute a township for school purposes, to be known as Township 41 N., R. 14 E.

"That all acts conflicting therewith are repealed."

Petitioner claims that said sections above stated, and the acres and number of children therein, should be added to and made a part of the basis of distribution of said school funds to the township 41 North, Range 13 East, 3rd P. M., and that the school commissioner for Cook county, divide to the last mentioned township, whatever proportion of said school money will

be coming to said township, after the same has been so added. Prayer that a mandamus issue, commanding the school commissioner to pay same accordingly.

The answer of W. L. Greenleaf states, that he is advised that so much of the 2nd section of the act entitled "An act to establish the town of Lakeview, in Cook county, and to change the name and boundaries of the town of Ridgeville, and to constitute the same a township for school purposes," approved February 17, 1857, as purports to create a township for school purposes, by the name of "Township 41 North, Range 14 East," is repugnant to the act of Congress, approved April 18, 1818, which provides that section 16 in every township, etc., etc., shall be granted to the State for the use of the inhabitants of such township for the use of schools; and also to the act of Congress, approved February 15, 1843, in relation to school lands.

Demurrer by petitioner to the answer of the school commissioner. To this, there was a joinder.

The court, MANIERRE, Judge, presiding, sustained the demurrer, and ordered, that the money in the hands of the commissioner, be distributed in accordance with the prayer of the petition. From this decision this appeal was taken.

E. VAN BUREN, for Plaintiff in Error.

H. B. HURD, for Defendants in Error.

CATON, C. J. In the objection which is urged to this law, a very erroneous view is presented, of the power of the legislature. The donation is made to the State, for a specified use. The title to the fund is vested in the State, as completely as if the use was not declared in the law making the grant, and the administration of the fund is left to the State. This is so necessarily. Without State legislation, there is no mode of administering the fund. The State then, has complete control over it, to administer it as she pleases, in promotion of the objects of the grant. The faith of the State is no doubt impliedly pledged to apply the fund according to the trust declared in the act, but the legislature must exercise its best judgment, as to how that object can be best accomplished. No sovereign State would accept such a grant upon any other terms. Neither Congress or any court, has ever undertaken to interfere with a State government, in the administration of the school funds, arising from congressional grants. The public faith of a State, has ever been, and ever will be, a sure guarantee that these funds will be administered in good faith, and in the most beneficial manner, in promotion of the objects of the grant. To say that the legisla-

ture cannot, when it is deemed for the best interests of the cause of education, unite two townships in one, or make a township of parts of several, is asserting an impotency in a sovereign State, which would deprive it of the power to discharge the trust, as the best interests of the objects of the trust may frequently require. We have no doubt that the legislature may unite or divide townships, and their school funds, as it thinks best. The judgment must be affirmed.

Judgment affirmed.

John D. Stevenson, Appellant, *v.* Delevan O. Sherwood, Appellee.

APPEAL FROM OGLE.

To justify the continuance of a cause by reason of the absence of a witness, something more than the writing of letters and making inquiries is required.

A court trying a case in place of a jury, if on announcing a finding, a motion for a new trial and in arrest are interposed, may render a judgment at a future day, after the motions are disposed of.

If the matters alleged in a special plea, may be offered in defense under the general issue, it will be presumed they were so offered.

This was an action of assumpsit on an assigned note, brought by appellee against appellant. The declaration has one special count declaring on a note, given by Stevenson to one T. Sweet, for $700, with twelve per cent. interest, dated 16th July, 1841, and by Sweet indorsed to Sherwood.

There was a plea of the general issue, and a special plea of payment of the note to Sweet, while he was holder and owner of it. To the special plea, there was not any replication.

At June term, 1857, defendant moved for a continuance, and in support of his motion read the following affidavits:

John D. Stevenson, the above defendant, first being duly sworn, on his oath states, that he cannot safely proceed to the trial of said cause, owing to the absence of one William H. Andrews, whose attendance or deposition it is out of the power of this affiant to have or produce at the present term of this Court; that this affiant asks to refer to his affidavit of the last term, and make it a part of this his application for a continuance. And affiant further, upon his oath, states, that immediately after the last term of this court, (not having been fully advised by said Andrews, or any one else, of the name of a proper person to act as commissioner, for the purpose of taking the deposition

of said Andrews,) wrote said Andrews, requesting him to give the name of a proper person to act as commissioner. To this letter affiant received an answer from a friend of said Andrews, stating that the said Andrews, a few days before, had left that section for Kansas, stating no particular place or part of Kansas the said Andrews had removed to. That affiant thereupon wrote to the post master, and friend of said Andrews, residing in said Spencer, Massachusetts, to learn, if possible, the residence or post office address of said Andrews, in Kansas. That affiant has been unable up to this time to learn the whereabouts of the said Andrews. That he has used every consistent means in his power to obtain said knowledge, and has hitherto failed. That affiant knows of no witness by whom he can prove the payment aforesaid, but by said Andrews. And that this application is not made for delay, but that justice may be done, and that he hopes to be able to procure the attendance of said witness or his deposition, at next term of this court.

John D. Stevenson, the above defendant in this suit, first being duly sworn, on his oath deposes and says, that he cannot safely proceed to trial of the above cause, at this term of court, owing to the absence of William H. Andrews, whose attendance or deposition it is out of the power of this defendant to have at this term of court. That this affiant expects to be able to prove by the said Andrews, that the note on which the above action has been brought, has been fully paid and satisfied by this affiant. That from the time of the commencement of this suit up to the present time, this affiant has made use of the utmost vigilance to learn the residence of the said Andrews. That said Andrews, some years since, did live in the vicinity of Davenport, Iowa, which was the last knowledge this affiant had of him at the commencement of this suit. That after the commencement of this suit, he wrote to an acquaintance at Davenport, and to other places in the vicinity. That he was advised by answer he received, that said Andrews had removed to the western part of Iowa, but what particular place this affiant could not learn. This affiant further states, that after the September term of this court, 1855, affiant was advised by one Daniel Higley, who was a connexion of said Andrews, that the said Andrews was still somewhere in the western part of Iowa, and that said Higley was a brother-in-law, residing in Iowa, from whom he could learn the residence of the said Andrews. That some time afterwards said Higley advised this affiant that he had heard from his brother-in-law, who advised him that said Andrews has removed to the State of New York, but what place, said Higley was unable to advise affiant; and from that time to the present, affiant has used the utmost diligence, by inquiry and writing, to learn the residence or whereabouts of the said Andrews, none

of which proved favorable; and that affiant had despaired of learning the residence of said Andrews, when a son of said Andrews, a young man of some eighteen years of age, came to the residence of affiant, some three weeks since, and advised him that his father, the said Wm. H. Andrews, now resides in the town of Spencer, in the State of Massachusetts; that thereupon affiant wrote to said Andrews in regard to the matter of the payment of said note, and also to get from said Andrews the name of a suitable person to act as commissioner; and that within the last three days, this affiant has received a letter from said Andrews, but that he has been unable to procure his deposition at the present term of court; but that affiant will be enabled to procure it before the next term of this court; that this application is not made for delay, but that justice may be done; and that said Andrews is the only witness within the knowledge of this affiant, by whom the payment of said note could be proved.

The court overruled the motion, and defendant excepted.

There was a trial by the court, and the *issue* was found for plaintiff, whereupon defendant entered his motion in arrest of judgment, and for a new trial.

These motions were overruled.

Judgment rendered for $76.40, debt, and $153.80, damages and costs.

Defendant appealed, and for errors, assigned the following:

1st. The court erred in trying the case with the third plea unanswered.

2nd. The court erred in overruling motion for continuance.

3rd. The court erred in rendering the judgment aforesaid.

B. C. Cook, for Appellant.

M. B. Light, for Appellee.

Breese, J. The point made on the unanswered plea is disposed of by the decision of this court, in the case of *Parmelee* v. *Fischer*, *ante*, 212. As to the diligence used to obtain the testimony the appellant desired, we think none such was shown as to justify a continuance. He should not have been content with merely writing. In these days of rapid communication and cheap traveling, something more than letters and inquiries, will be required.

This case was tried by the court in place of a jury, and on announcing that the issue was found for the plaintiff, a motion for a new trial and in arrest of judgment was interposed, which on being overruled after argument at a subsequent day of the term, the court pronounced judgment for the plaintiff for seven-

ty-six dollars and forty cents, debt, and one hundred and fifty-three dollars and eighty cents, damages.

We do not see any solid objection to this. The court had possession of the whole case, and it was hardly worth while to enter a judgment on the record, when a motion for a new trial and in arrest of judgment was pending. Not until the latter motion had been disposed of, could the court regularly cause a judgment to be entered. The court had full power to render a perfect judgment on finding the issue for the plaintiff.

The matters of the special plea could be given in evidence under the general issue, and we will presume they were in evidence. *Warner* v. *Crane*, 20 Ill. R. 151.

The judgment is affirmed.

Judgment affirmed.

The People, on the relation of Jehial H. Montgomery, Complainants, *v.* James G. Barr, Clerk of the Court of Common Pleas of the City of Aurora, Respondent.

APPLICATION FOR MANDAMUS.

The Court of Common Pleas of the city of Aurora has power to issue final process to a foreign county.

Where local courts have jurisdiction to render judgment, they may issue final process, beyond the limits of their original jurisdiction, to aid in the enforcing of such judgments.

This petition by Jehial H. Montgomery, of the county of Kane, in the State of Illinois, represents, that Lyman E. Montgomery, on the 23rd day of September, A. D. 1858, in vacation after the June term of the Court of Common Pleas of the city of Aurora, A. D. 1858, by confession before Hon. A. C. Gibson, judge of the Court of Common Pleas of the city of Aurora, recovered a judgment against Robert Jones and Peter Jones, for the sum of three hundred and forty-one dollars and sixty-five cents, besides costs, in said court. That said judgment was regularly and legally obtained, and now remains in full force and effect, and unsatisfied. That an execution has issued to the sheriff of Kane county to serve, and has been returned by said sheriff, unsatisfied.

That the defendants have property in the county of Kendall, liable to execution.

That petitioner is now the owner of said judgment, the same having been assigned to him by the plaintiff in said judgment.

That on the 4th day of May, A. D. 1859, he went to the office of the clerk of the Court of Common Pleas of said city of Aurora, and requested him to issue an execution upon said judgment, directed to the sheriff of Kendall county, State of Illinois, against the goods and chattels, lands and tenements of said defendants in said judgment. That said James G. Barr, clerk of said court, then and there refused to issue said execution, directed to the sheriff of Kendall county, alleging as his reason for so refusing, that he had no authority by law to send an execution out of the county of Kane. By reason of which refusal to issue said execution, the petitioner is prevented from having satisfaction of the said judgment, as he is lawfully and justly entitled to have of the property of the said Robert Jones and Peter Jones, in said county of Kendall.

Wherefore petitioner prays the grant of a writ of mandamus under the seal of this court, directed to the said James G. Barr, clerk, as aforesaid, commanding him as such clerk, forthwith to issue an execution against the lands and tenements, goods and chattels of the said Robert Jones and Peter Jones, in the usual form of *fieri facias*, directed to the sheriff of Kendall county, in said State, to be by him executed in due form of law.

In this case, the parties agree that the facts stated in the foregoing petition are correctly stated, and that the same are truly and correctly stated, and shall be taken and considered by the court, the same as if they were returned by said Barr to an alternative mandamus.

It was agreed that all informalities shall be waived, and if in the opinion of this court, the law authorizes an execution to be issued to a foreign county, a final order shall be made, and a peremptory mandamus shall issue.

R. G. Montony, for Petitioner.

W. T. Burgess, for Respondent.

Breese, J. We do not understand that the case to which reference has been made by the defendant, *The People ex relatione Beebe* v. *Evans*, 18 Ill. R. 361, decides the question presented by this record, or as having any particular bearing on it, except as expressing the views of this court as to the territorial jurisdiction of such inferior courts as may be established by the General Assembly in the cities of this State, in pursuance of the first section of the fifth article of the constitution.

The objection which prevailed in that case was, that by the act of the General Assembly the grant of jurisdiction was not confined to the city limits of LaSalle, but extended to the towns

of LaSalle and Salisbury. No such objection is made here, but it is objected that the jurisdiction being confined to the city limits of Aurora, final process cannot issue from the Court of Common Pleas of that city as established by the act of February 11, 1857, (Session Laws of 1857, page 375,) although in a case properly arising within its acknowledged jurisdiction.

There is no question made, nor can there be, that the judgment in this case was rendered by the Court of Common Pleas of Aurora city, in a case not within the jurisdiction of that court. It is confessed, that the court had jurisdiction to render the judgment, and yet it is insisted with an appearance of earnestness, that there the power of the court ended—that although there is given to it by clear and express enactment the same power and authority and jurisdiction, and the clerk required to perform the same duties as the clerk of the Circuit Court—and all its orders, judgments and decrees to be enforced and collected in the same manner as are those of the Circuit Court, a judgment of that court cannot be enforced or collected, unless the debtor shall have real estate or goods and chattels within the city limits.

This certainly cannot be the meaning of the act, for if it were so, its passage would tend but in a very slight degree, to benefit the city and its business people, or meet their wants. Designed, as those courts are, to settle and dispose of the litigation arising in the cities, they would fall far short of the object, if a successful suitor in that court must stop on the recovery of his judgment. We hold, the court having proceeded to judgment in a case properly arising within its jurisdiction, can never be deprived of that jurisdiction.

When jurisdiction has once attached, it continues necessarily, and all the powers requisite to give it full and complete effect, can be exercised, until the end of the law shall be attained.

We do not wish to be understood as saying that this court, has jurisdiction to issue original process to be executed without the limits of the city, but we do say, where such process has been regularly issued and executed within those limits, the court cannot pause or be arrested in carrying out its jurisdiction to judgment and execution, and the clerk can and should on application being made, issue that process to any county in the State, the same, in all respects, as the clerk of the Circuit Court.

This power accorded to that court, local though it be, by no means takes from it its character as a court of inferior jurisdiction. It is such a court, but in the exercise of its admitted and conceded jurisdiction, it has all the power the Circuit Court of Kane county has, for the exercise of the jurisdiction con

ferred upon that court. Its power to issue final process to a foreign county is not denied, neither can it be denied to the Court of Common Pleas of the city of Aurora.

A peremptory mandamus will be awarded.

Peremptory mandamus awarded.

Talmadge Stevens, Appellant, *v.* Leonidas C. Bradley, for the use of B. T. Hunt, Appellee.

APPEAL FROM COOK.

Where a party sold merchandise, receiving part pay in real estate, the residue to be paid by indorsed notes, if the vendor takes notes without an indorsement, and expresses satisfaction with them, the vendor cannot afterwards recover of the purchaser the amount paid by said notes.

If any recovery could be had, it would only be upon a cancellation of or return to the purchaser, at or before trial, of the notes given; the return after the trial would be too late.

This action was assumpsit, commenced in the Cook Circuit Court by attachment.

The declaration contains two counts upon a special executory contract for the sale of goods, and the common counts.

The first special count was, in substance, that on the 29th day of December, 1856, in consideration that the plaintiff, at the request of defendant, would sell and deliver to defendant a certain quantity of goods, viz.:—all and singular the entire stock of boots and shoes, then being in a certain building, occupied by plaintiff, in the city of Chicago, at a price then agreed upon, of six thousand eight hundred and forty-one dollars, and seven cents, the said defendant undertook, etc., to pay for said goods by forthwith conveying to plaintiff his (defendant's) interest in certain real estate, situate in Chicago, with a certain building thereon, for five thousand dollars of the price of said goods, and by also making and procuring within one week from that time, nine promissory notes, dated the 25th December, 1856, made by defendant, and indorsed by one A. M. Tucker of Beaver Dam, Wisconsin, payable to the order of plaintiff—the first of said notes to be for two hundred dollars, payable in two months from date; the second for the same sum in three months; the third for the same sum in four months; the fourth for the same sum in five months; the fifth for the same sum in six months; the sixth for the same sum in seven months; the seventh for the same sum in eight months; the eighth for the same sum in nine

months; the ninth for the sum of two hundred and forty-one dollars and seven cents, payable in ten months from said date. That on the 29th December, 1856, the plaintiff, under said agreement delivered the said goods to defendant, and defendant conveyed to plaintiff said real estate and building. That after the lapse of one week the plaintiff requested the defendant to make and procure to be indorsed, and deliver to plaintiff said nine promissory notes; that defendant refused, and did not then or at any other time deliver said notes, or any or similar notes to plaintiff, and by reason thereof plaintiff had been deprived of the use and benefit of said notes.

The second count is like the first, except that it is averred that the said nine promissory notes were to be delivered to plaintiff on or before the 29th day of December, 1856, and that it was thereafter agreed that if plaintiff would deliver the possession of said goods, that defendant would procure and deliver said notes indorsed by Tucker within one week: breach the same as first count.

The defendant pleaded the general issue and a plea of set-off. To which last mentioned plea the plaintiff replied by traversing the indebtedness.

On the 9th day of January, 1858, the cause was tried before the court and a jury, MANIERRE, Judge, presiding.

The court, at the request of the plaintiff, gave the following instructions to the jury:

1st. If the jury believe, from the evidence, that the sale of goods mentioned in the declaration, was made as agreed in the declaration, and that the nine notes were by the terms of that contract of sale, to be made and delivered in one week alleged in the declaration, and that said contract was broken on the part of the defendant, and that said notes were not made and delivered as agreed upon, nor any of them, within the period agreed upon, then the jury are to find for the plaintiff, and the sale is to be treated as a cash sale, and the measure of damages is the sum total of all the notes so agreed to be delivered, with interest from and after the lapse of the day when the contract was to have been performed.

2nd. If the jury believe, from the evidence, that Stevens was to give his own notes indorsed by Tucker, within the time stated in the declaration, for $1,841.07, to Bradley, that Stevens failed to give these notes as agreed, the jury must find for the plaintiff and treat the sale as a cash sale, and assess the plaintiff's damages at the amount for which the notes were to be given, with interest on that amount from the time when the contract was broken.

3rd. If the jury find, from the evidence, that the notes given

by the defendant to the plaintiff were within the power and control of the plaintiff to be surrendered up and canceled, and have not been transfered, then the rights of the plaintiff are not to prejudiced, if he is entitled to recover on the evidence, by a failure to tender them to the defendant at this moment.

The defendant's counsel requested the court to instruct the jury as follows, which the court refused to do:

"That unless the jury believe, from the evidence, that the notes given to Bradley by Stevens were delivered back to Stevens before the commencement of this suit, then they will find for the defendant.

"That unless the jury believe, from the evidence, that the notes made by Stevens and delivered to Bradley, were delivered or tendered to Stevens before or at the trial of this cause, they will find for the defendant.

"That if the jury believe, from the evidence, that the plaintiff in this case, transferred or parted with the notes, they will find for the defendant."

The jury found for the plaintiff and assessed his damages at one thousand nine hundred fifty-one dollars and fifty-three cents.

The defendant's counsel thereupon moved the court for a new trial, which motion the court overruled.

The defendant prayed this appeal.

Scates, McAllister & Jewett, for Appellant.

Mather and Taft, for Appellee.

Walker, J. The appellant urges a reversal of the judgment in this case, because he was not in default when the suit was instituted. The evidence shows that appellee sold to appellant a stock of merchandise and received as a portion of the consideration real estate, and was to receive the balance in notes, with Tucker as security, due at different times, from two to ten months from the date of the sale. But by some subsequent arrangement, he received appellant's notes for the amount, to be held until the others were procured.

Porter testified, at the time of the purchase it was agreeed that the notes were to be given, with Tucker as security, within a week from that time.

Thomas testifies, that appellant was to give Tucker's notes indorsed by himself, and that he stated, that he expected to receive them by the time the invoice was completed. But that the notes were not received until after appellant had gone to New York, and about the 7th of January, and that witness showed them to appellee, and asked if he should send them to

New York for appellant's indorsement, when appellee said that when appellant left it was arranged that he should indorse them on his return; and appellee also stated that the notes were satisfactory, and he then received them. Appellee also informed the witness that before appellant left he had executed his notes, which he was to hold until the others were arranged, and the witness learned from him that these notes were in bank. This witness also testifies, that when appellant returned from New York he said to appellee that he was ready to do as he agreed, as to giving his indorsement on Tucker's notes, and taking up his own. That appellee said but little on that occasion. It does not appear that any of these notes were returned before or at the trial. The evidence of this witness is uncontradicted and he stands unimpeached.

Whatever may have been the first arrangement between the parties, we think it evident that, when appellee received the notes of appellant he then was to hold them until appellant's return from New York, when these notes were to be exchanged for those of Tucker indorsed by appellant. And when appellant offered to indorse them, he had fully performed his part of the agreement. If such had not been the arrangement, it is unaccountable why he should have expressed satisfaction with, and why he received Tucker's notes. It is also a pregnant fact, that the notes of appellant were placed in the bank for collection by Hunt, who must have received them from appellee. We are at a loss to perceive any, even the slightest grounds to insist upon a recovery, when he was holding the notes of Tucker for the amount of his claim, and had parted with the notes of appellant, for the same amount, to Hunt, who had placed them in the bank for collection. He knowingly and understandingly accepted Tucker's notes, and although it may have been after the day, and the notes may not have been in the form previously agreed upon, by the acceptance, he waived the right of objecting to the notes as not being in compliance with the contract. He should have refused to receive them—but neglecting to do so he cannot be heard to say the appellant has failed to perform his part of the agreement, or that the notes are insufficient.

Even if the appellant had failed to comply on his part, a recovery could not be had for the balance of the price of the goods, without a surrender and cancellation of these notes. It might have been sufficient to have done so on the trial before the case was submitted to the jury; but that was not done, and having failed to do so, the court should have excluded the appellee's evidence on the motion made for that purpose. Nor has the error been cured by surrendering them in court after the jury had returned their verdict. *Harris* v. *Johnston*, 3 Cranch,

311. The notes in this case, when the action was brought and until the first trial in this case, were in the hands of Swift, a banker, and deposited there by Hunt for collection. They do not appear to have been under the power or control of appellee, but rather under that of Hunt, but whether he held them by indorsement or as collateral security does not appear from the evidence. The evidence therefore did not warrant the giving the plaintiff's third instruction. And the instructions that in case the jury found for the plaintiff that they should give interest from the date of the sale were erroneous, as this was a sale on credit, and until the time of the credit expired, no interest was chargeable, even if the appellee had a right to maintain this action.

The judgment of the court below must be reversed and the cause remanded for further proceedings.

Judgment reversed.

Gardner P. Comstock, Appellant, *v.* Julius Ward, Appellee.

APPEAL FROM KANKAKEE.

A verbal contract, not to be performed within a year, will not sustain an action.

The statute of frauds, etc., is presumed to have been pleaded in an action before a justice of the peace.

This was an appeal from a justice, commenced November 3rd, 1858.

Justice's transcript shows that suit was brought on book account for $100.

Verdict in Circuit Court, $70, for plaintiff; motion for new trial overruled, and judgment upon the verdict.

The suit was brought to recover for work and labor, wood, rails, posts, hay, and damages for the breach of a contract for letting forty acres of land by defendant to plaintiff.

Alexander Ward testified, that he was brother of plaintiff, and that plaintiff and defendant stated over the contract to him in relation to defendant's letting plaintiff said land, and that it was as follows: that defendant was to let plaintiff have the land for one year on shares, the plaintiff to do all labor, and give one-half the crops to defendant; would have house empty as soon as he could get family out that was then in the house; the year for which the land was let, was to commence running from the

time plaintiff moved into the house, which it was expected would be about a week; contract took place about fore part of August, 1858; family in the house did not move out for several weeks after making of contract, and not until Comstock sold the land. Drawing the posts, rails, hay and wood on to the land, was all done in pursuance of the contract. Witness knows of no claims of plaintiff, except those growing out of the contract. The contract was an oral one; there were no writings connected with it.

Defendant asked the court to give the following, among other instructions, to the jury:

3. If the jury believe, from the evidence, that the full completion of the contract sued on was not to be performed within the space of one year from the making of such contract, then no action can be maintained on such contract, unless some writing was made and signed by the party to be charged therewith, upon which the action was brought. If the plaintiff has proved no demand except such as depended upon a parol contract not to be performed within a year, he cannot recover upon them, and the law is for the defendant.

The court refused to give the said instruction, and defendant excepted.

B. C. Cook, for Appellant.

W. K. McAllister, for Appellee.

Breese, J. This action was commenced before a justice, and tried on appeal *de novo*, in the Circuit Court. We are satisfied the contract proved was in relation to an interest in land, and was not to be performed within one year from the time of making it, and therefore the third instruction asked by the defendant should have been given, as it does substantially declare the law of the case.

In a justice's court, it is presumed the statute is pleaded.

The judgment is reversed.

Judgment reversed.

Nicholas Granjang, Plaintiff in Error, *v.* Margaret Merkle, Defendant in Error.

ERROR TO COOK.

To recover costs in an action against an executor or administrator, there should be proof of a compliance with the requisitions of the statute in that regard. Averments to that effect need not be made in the declaration.

A court of general jurisdiction will be presumed to have acted upon the necessary evidence.

If an administrator is sued before the expiration of the year, he can plead the fact; the declaration need not make the averment that a year has lapsed.

Execution should not be awarded against administrators.

This was an action of assumpsit by an administratrix against an executor. The plea was the general issue. There was a trial and judgment for Merkle as administratrix, against Granjang as executor. The judgment was for $236.25 and costs, with an award of execution against Granjang, as executor.

A. Windett, for Plaintiff in Error.

Nissen & Burgess, for Defendant in Error.

Walker, J. It is insisted that to entitle a plaintiff to recover his costs against an executor or administrator, there should be an averment in the declaration that the claim sued for had been presented in proper time for allowance in the Probate Court, and that a demand had been made for the debt before suit was brought. In support of this position, some portion of our statute of Wills has been referred to. The 95th section, page 557, R. S. 1845, requires executors and administrators to fix upon some term of the Probate Court, within nine months after obtaining letters, for the settlement and adjustment of all claims against the estate of decedent; and it enacts in a proviso, "That estates shall be answerable for the costs on the claims filed at or before said term, but not after." And the 101st section provides that, "No action shall be maintainable against any executor or administrator for any debt due from the testator or intestate, until the expiration of one year after the taking out of letters testamentary or administration, except as herein excepted; nor shall any person suing after that time, recover costs against such executor or administrator, unless a demand be proved before the commencement of such suit; but in all other cases, both executors and administrators shall be liable to pay costs, as other persons." It is believed that these are the only provisions of our statute having any bearing on this question; and they only entitle plaintiffs to recover costs against executors and administrators, upon a compliance with these provisions. At common law, neither plaintiffs nor defendants were entitled to recover costs. The whole question of costs in courts of law, is regulated and governed by statute. But since costs were given by statute, the form of the pleadings has remained the same as before, they do not aver that the party is entitled to or prays judgment for costs; but courts have always treated them as incident to the

judgment in the case, and have given them, when authorized by the statute, without reference to the form of the pleadings. It would be necessary, to authorize the court to render a judgment for costs against an executor or administrator, that there should be proof of a compliance with the statutory provisions. And in support of a judgment of a court of general jurisdiction, the law presumes that the court acted upon the necessary evidence. We are of opinion that there is no weight in the objection that these averments were not made in the declaration in this case.

It was insisted that the declaration should have contained an averment, that one year had expired after letters testamentary were granted to defendant, before this suit was brought. The language used is almost precisely that adopted by the legislature in the statute of Frauds and Perjuries, where it is provided that no action shall be brought whereby to charge any executor or administrator on any agreement to answer for any debt out of his own estate, or to charge any person on an agreement for the debt, default, or miscarriage of another person, unless the agreement, or some memorandum thereof shall be in writing, and signed by the party to be charged. And yet, it has never been the practice to require the plaintiff suing on such agreements, to aver that the agreement was in writing, in cases where the same would be binding independent of that statute. Gould Pl., chap. 4, sec. 43, p. 191. Statutes of limitation are all nearly in the same language, and it has always been held that to be available as a defense it must be pleaded. 1 Chitty Pl. 515. It is also a general rule of pleading, that it is not necessary for either party to allege more than will constitute *prima facie* a sufficient cause of action or defense. Gould Pl., chap. 3, sec. 193; 1 Saunders, 299. In this case, the plaintiff by her declaration *prima facie* shows a right to recover, as clearly and fully as in a case barred by the statute of limitations, or in a case prohibited by the statute of Frauds and Perjuries. This provision, like the others, is intended for the benefit of the executor or administrator, and it is intended to exempt him from being harrassed and vexed with suits and costs, until he shall have had time to convert the estate into money. If he desires to avail himself of this privilege, he must plead and rely upon the statute.

It is assigned for error that the judgment awards execution. It has been repeatedly held by this court that such judgments against executors and administrators are erroneous. *Welch* v. *Wallace*, 3 Gilm. R. 497, and cases cited.

The judgment of the Circuit Court will be reversed, with the costs of this writ of error, and a judgment will be entered in this court in favor of Merkle and against Granjang, as executor,

for the amount of the verdict, for $236.25, with interest thereon from the 28th day of December, 1855, and costs in the Circuit Court, to be paid in due course of administration.

Judgment reversed.

William Senior, Plaintiff in Error, *v.* Alexander Brebnor *et al.*, Defendants in Error.

ERROR TO PEORIA.

A mechanics' lien cannot be sustained on a contract, which does not contain a provision, that the work shall be completed within three years.

This was a petition for a mechanics' lien, filed in the Peoria Circuit Court, alleging a verbal contract made on 5th December, 1854, to furnish materials and erect a building in the town of Peoria. There was a trial by jury, and a verdict found for the defendants, in the court below. The petitioner in the court below sued out this writ of error.

C. C. Bonney, for Plaintiff in Error.

Manning & Merriman, and J. K. Cooper, for Defendants in Error.

Walker, J. The contract upon which this proceeding is based, to enforce a mechanics' lien, contains no provision that the work shall be completed within the period of three years. Under the statute, such a provision is necessary before the lien can attach. See *Cook* v. *Heald*, p. 425, and *Cook* v. *Vreeland*, p. 431, of vol. 21 of Ill. R., where the same point is presented and so decided. This proceeding is in derogation of the common law and of common right, and persons to avail themselves of the benefit of the statute, must bring themselves within its provisions. The act confers special privileges upon a particular class of citizens, and it should not be extended beyond the cases for which it has made provision.

The judgment must be affirmed, and the bill dismissed.

Decree affirmed.

NANCY J. TURNEY and WILLIAM A. TURNEY *et al.*, children of John Turney, deceased, who sue by their next friend, Appellants, *v.* ALEXANDER YOUNG, Appellee.

APPEAL FROM JO DAVIESS.

If land is sold on execution, in the lifetime of the defendant, but after his death it is redeemed by a judgment creditor, it becomes the estate of the decedent, and the title is vested in his heirs at law. The proceeds of redemption from sale, are received by the officer as a first bid, to be advanced upon by others, the land remaining, as the property of the judgment debtor.

To divest the heirs, they must have notice of some proceeding against them, for such purpose.

The revival of a judgment against the administrator, does not create such a lien against the real estate of the deceased, as that a *fi. fa.* can issue for its sale.

THIS is an action of ejectment by the appellants against the appellee, for the east or upper half of lot No. 5, between Main and Diagonal streets, commenced in the Jo Daviess Circuit Court, on March 9th, 1854.

The second trial resulted in a judgment for the defendant. From this judgment the plaintiffs below appeal to this court.

The bill of exceptions contains an agreed statement of facts, as follows:

1. That John Turney, the ancestor of the plaintiffs, was, on March 29th, 1842, and for several years prior thereto, the owner in fee of an undivided half of the lot aforesaid. Andrew Maurer being his co-tenant.

2. The plaintiffs are the only heirs of the said John Turney.

3. That the defendant, Young, was at the time of the commencement of the suit, and for six years prior thereto, in possession of the east or upper half of said lot.

4. The said Young has paid the taxes thereon.

5. November 19th, 1842, Stewart & Brown recovered a judgment against the said John Turney, for the sum of $128.47, in the Circuit Court of Jo Daviess county, which said judgment was in all respects regular.

6. On December 23rd, 1842, a regular execution was issued upon said judgment, and returned by order of plaintiffs unsatisfied, March 23, 1843. The said defendant being then sheriff of said county of Jo Daviess.

7. March 9th, 1844, the said John Turney died intestate, and on March 18th, 1844, administration was granted upon his estate to his widow, Nancy J. Turney, which administration remains unrevoked.

8. On March 29th, 1845, the following notice was served upon the said Nancy J. Turney:

To Mrs. Nancy J. Turney, administratrix of John Turney, deceased:

You are hereby notified, that in the lifetime of the said John Turney, William S. Stewart and Peter L. Brown recovered a judgment against him for one hundred and sixty dollars, debt, to be satisfied, with $128.47, damages and costs, at the October term, A. D. 1842, of the Jo Daviess Circuit Court, Illinois. Execution was issued thereon within one year thereafter, and returned unsatisfied, and the plaintiffs will apply for an execution thereon at the expiration of three months from the service of this notice, according to the statute in such cases made and provided.

A. L. HOLMES,

Galena, March, 18, 1845. *Attorney for Stewart and Brown.*

9. On June 30th, 1845, an execution issued upon the judgment aforesaid against the land and tenements of the said John Turney, deceased, which said execution was, on July 25th, 1845, levied upon the real estate in question, subject to the said widow's right of dower.

10. On August 20th, 1845, the said property was sold under said execution to Henry Clymo, and certificates of purchase issued to him in due form.

11. Clymo assigned his certificates of purchase to Orin Smith.

12. On March 29th, 1842, A. P. Gates recovered a judgment against said John Turney, for the sum of one hundred and sixty-one dollars and sixty-five cents. No execution issued upon this judgment within a year from its rendition. On September 7th, 1846, a *scire facias* issued, and was served upon the said Nancy J. Turney, administratrix, etc., reciting the amount of the original judgment as one hundred and eighty dollars and forty-six cents. Mr. Bradley, the clerk, swears that this was a mistake and points out how it occurred, and states at the same time that the judgment on March 29th, 1842, was the only judgment rendered in said court in favor of said Gates, against the said Turney. On October 27th, 1846, judgment of revivor was entered for the sum of one hundred and eighty dollars and forty-six cents. An execution issued on said revived judgment, on October 27th, 1846, which was levied upon the premises in controversy. Under this judgment and execution, there was a redemption from the sale, under the Stewart and Brown judgment, and the redemption money was received by Orin Smith, the assignee of the certificates of purchase as aforesaid. Duplicates of certificates of redemption were executed and delivered to Alexander Young, purchaser under the redemption sale.

13. On January 28, 1847, the sheriff of Jo Daviess county executed and delivered to Alexander Young, the defendant, a sheriffs' deed for the premises in controversy.

14. At the July term, 1846, a partition was had of the whole

lot in question, at the suit of Nancy J. Turney, and against Andrew Maurer and others, assigning to the heirs of the said Turney, the east or upper half of said lot No. 5, as hereinbefore described.

15. At the December term, 1850, of the Supreme Court, the said judgment in the case of Gates against Turney, Administratrix, was reversed and remanded for further proceedings. 12 Ill. R. p. 141, 142.

This is all the evidence in the cause.

The court found the issue for the defendant.

The plaintiffs moved for a new trial, which was overruled, and an exception taken.

The errors assigned are as follows:

1. The court erred in finding the issue for the defendant.
2. The court erred in overruling the plaintiffs' motion for a new trial.
3. The court erred in rendering a judgment for the said defendant, when by the laws of the land such judgment ought to have been for the said plaintiffs.

W. A. Turney, and R. S. Blackwell, for Appellants.

B. C. Cook, for Appellee.

Breese, J. This seems to be a plain case. The sale under the Stewart and Brown judgment, was a valid sale, because execution had issued on the judgment in the lifetime of the defendant, and was a lien on the estate of decedent.

The notice to the administratrix was properly given, under the statute, and the sale under this execution was valid.

But from this sale, the property was redeemed, and it became, by that operation, the estate of the decedent, with the title vested in his heirs at law. It was then as if a sale of it had never been had. The party redeeming, obtained no right to the land, nor does he in any such case. He only obtains the right to have the land, as the property of his debtor, again exposed to sale on his judgment, and the redemption money is received by the officer as the first bid, and if any one advances upon that bid and is the highest bidder, the land is stricken off to him. In legal intendment, the land being all this time the property of the judgment debtor.

Thus then stands the case. The land was sold under a regular execution, as the property of John Turney, deceased. It was redeemed from this sale by consent of the purchaser, for there is no evidence that he objected, by which his right was yielded

up and reverted to the estate of Turney, deceased. The legal title was then vested in his heirs, who are parties here.

Now to divest them of their title, it is a first and overruling principle, that they must have notice of some proceeding directly against them, for such purpose. They have had no notice, and this leads us to the consideration of the effect of Gates' judgment, so called, and the sale of the land under it.

Was this judgment revived against the administratrix, such a judgment as created a lien on the real estate of the deceased, and on which a *fi. fa.* could issue to sell it?

We think not. It is not declared by the statute to have that effect. It has no preference whatever over debts by simple contract, and can be paid, not by execution, by which a preference, in spite of the law, would be obtained, but is to be paid in due course of administration, like any other debt against the estate.

This was expressly decided by this court, in the case of *Turney* v. *Gates*, 12 Ill. R. 141, where that portion of this very judgment, authorizing this execution to issue, was reversed. We there say, that portion of the judgment awarding execution, was erroneous, but it was absolutely void, for the reason the court had no jurisdiction over the heirs to order a sale of their land, they never having been served with process of *sci. fa.*, and were, in no sense, parties to it. The judgment had ceased to be a lien upon the land of the deceased, the title to which was vested in the heirs at law, and the court had no authority to revive the lien they lost, and the attempt to do so, without notice to the heirs, and terre-tenants if there were any, or a proper appearance by them, was void for want of jurisdiction over their persons. No judgment is valid, if the court rendering it, has not jurisdiction of the *person*, as well as of the subject matter, and this, on principles of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, the claim against him to be unfounded.

The execution issuing upon this judgment therefore, gave the creditor no power to levy it on the real estate left by the deceased, the title to which, on his death, vested in his heirs at law, and they had no notice. The judgment, execution and sale, is, as to them, void.

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

Judgment reversed.

Japheth T. Morton, Plaintiff in Error, *v.* Allen McClure, Defendant in Error.

ERROR TO CARROLL.

Japheth and Japhath are too much alike, to constitute a variance.

A party cannot recover a larger amount, than he claims by his bill of particulars filed with his declaration. He may amend his bill of particulars by leave of the court.

Two unimpeached witnesses, sustaining a plea of set-off, is sufficient to sustain it.

This was an action of assumpsit brought by said McClure against said Morton, in said County Court, at March term, 1858.

Declaration contains a count alleging that on 1st February, 1858, defendant was indebted to plaintiff in $300 for use and occupation of rooms, apartments and furniture, by wife and children of defendant, and for meat, drink, attendance, and other necessaries and goods, provided for defendant's wife and children, at his request; and also the common counts for goods bargained and sold, goods sold and delivered, work done and materials furnished, money lent, money paid to use of defendant, money had and received, and money found due on account stated.

There was a plea in abatement—misnomer of defendant—demurrer to which was sustained; also a plea of non-assumpsit and set-off. General replication.

Plaintiff filed a bill of particulars amounting to $115.85.
Defendant " " " " " 64.09.

The jury found for the plaintiff, $124.23. Defendant moved for a new trial.

The court ordered judgment to be entered on the verdict, and thereupon defendant prayed an appeal.

The errors assigned are:

Admitting improper evidence on the part of defendant in error.

Rendering judgment on the verdict—verdict being for more than plaintiff's bill of particulars.

Verdict against evidence—the account of plaintiff in error, though proven, was rejected by the jury.

Refusing a new trial.

The sustaining demurrer to plea in abatement.

Wilson, and Leland & Leland, for Plaintiff in Error.

Miller & Harrington, for Defendant in Error.

Walker, J. The difference in the orthography of Japheth and Japhath is so slight, as to make no material difference in

the sound, and cannot constitute a variance. To be allowed, the variance must be substantial, and it is not fatal when so slight, as to make no perceptible difference in sound. *Stevens* v. *Stebbins*, 3 Scam. R. 25. The demurrer to the plea in abatement for the misnomer, was therefore properly sustained.

It is assigned as error that the finding of the jury was greater than the amount claimed by the bill of particulars, filed with the declaration. The practice act requires, that such a bill shall be filed, and one of its objects is, that the defendant shall be particularly apprised of what he has to meet on the trial. If the plaintiff were permitted to abandon the account filed, and rely upon an account not exhibited, the object of the enactment would be defeated. When the account has been filed, the party should be confined to the items, and the prices therein charged, unless leave is first granted by the court to amend the bill of particulars, on such terms as may be prescribed. The account filed by defendant in error in this case, was for $115.85, while the verdict was for $124.23, and the record nowhere discloses the fact, that any leave was given to amend, and the party not having obtained such leave, could not recover beyond the amount which he had claimed for his labor and property, furnished to the plaintiff in error. It was error to render judgment on this verdict.

The plaintiff in error, filed a bill of particulars under his plea of set-off, for $64.09, and on the trial called his son as a witness, who testified that he and the wife of plaintiff in error, furnished the items charged in the bill to defendant in error, as a payment on his account, for the board of the wife and family of plaintiff in error. That defendant in error admitted that he had received all but the item of five dollars in money. Another son testified that he was sent for, when he was working for wages, to go to the defendant in error, to work for his board and go to school, which he did, and that this board is charged in the account against his father. That he worked for defendant nights and mornings, to pay for his board, during the time he went to school. These two witnesses, stand uncontradicted or impeached, by anything appearing in the record. And their evidence unimpeached, was amply sufficient to establish the set-off except the item for five dollars, and also to reduce the account sued on, to the extent of the board charged as furnished to the witness. But the account of the plaintiff in error, or any part of it, was not allowed, either under the general issue as a payment, or as a set-off, under the plea of set-off. We think the evidence fails to sustain the finding of the jury.

The judgment is reversed and the cause remanded.

Judgment reversed.

James Hamilton, Appellant, *v.* Patrick Dunn, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

On an application for security for costs, the affidavits of the respective parties may have equal weight.

On a petition for a mechanics' lien, the proceedings where the statute has not otherwise provided, will be governed by chancery rules.

The pendency of a motion for security for costs in a suit pending on mechanics' lien, will not necessarily excuse a party for not filing an answer; nor will such motion prevent the rendition of a decree *pro confesso*.

This was a proceeding to enforce a mechanics' lien. The appellant appeared and moved for security for costs, on the following affidavit:

"James Hamilton personally appears, and being first duly sworn, deposes and says that he is the defendant in the above entitled suit; that he is well acquainted with, and has, for some months last past, well known the said Patrick Dunn, the plaintiff in said suit, both personally and by reputation. That the said Patrick Dunn, according to his own statements and admissions made to this affiant on or about the first day of December last past, was, and according to the best of his, this affiant's, knowledge, information and belief, still is, utterly insolvent, and has no goods, estate or effects liable to execution, wherefrom such costs, or any part thereof, as the said Patrick Dunn may be decreed or adjudged to pay in the above entitled cause, can be made, levied or satisfied. This affiant further says that he has, as he is informed by his counsel and verily believes, a good, full and sufficient defense to the above entitled suit on the merits thereof, and that his proceedings in this behalf are not in any manner interposed or intended to delay or retard the trial of the same. This affiant therefore prays that a rule may be entered in the above entitled cause, requiring the said Patrick Dunn, within such time as the court, in its discretion, shall see fit, to file good and sufficient security for such costs as may accrue therein, and in default thereof, that said suit may be dismissed, according to the form, force and effect of the statute in such case made and provided."

On the 25th day of February, A. D. 1858, the appellee filed the following affidavit:

"Patrick Dunn, of said county, being duly sworn, deposes and says, that he is a mason by trade, and that James Hamilton, the defendant in this suit, is justly indebted to this deponent in a large sum of money, to wit: the sum of about two hundred dollars, for work, labor and services done and performed by this deponent for said Hamilton, and that said suit herein was com-

menced against said Hamilton to recover said sum of money; that this deponent is not insolvent, although a poor man, and that if said Hamilton would pay this deponent what is justly his due, he could pay all the debts he owes in the world. This deponent further says, that he does not know what the costs of the court in this case may be, but that if they do not amount to a large sum of money, he will be able to pay them without difficulty, especially if said Hamilton pays him what is now justly his due. This deponent further saith, that he is now and has been for about a year a resident of the city of Chicago, and that he has no other residence whatever. And further this deponent saith not."

On the 26th day of February, A. D. 1858, the court overruled the motion for security for costs, the cause having been then called for trial, and granted motion of appellee that petition be taken *pro confesso*, for want of answer, and that a jury be forthwith impanneled to assess the damages; and overruled appellant's cross-motion for leave to file his answer instanter.

On same day, cause submitted to the jury, who returned their verdict on the 27th day of February, A. D. 1858, and assessed the appellee's damages at one hundred and ninety-four dollars.

The appellant moved to set aside the default, assessment of damages, and for leave to file his answer. Motion overruled, and decree rendered for appellee.

Appeal prayed by appellant.

W. B. Scates, and M. C. Parsons, for Appellant.

E. Anthony, for Appellee.

Breese, J. The rule upon the plaintiff to show cause why he should not give security for costs, was properly discharged by the court on the counter affidavit of the plaintiff; that should have as much weight with the court, as the defendant's affidavit. Such motions, in such cases, are not regarded in a very favorable light by courts, the object being most generally procrastination and delay. Slight evidence has been usually held sufficient to discharge such rule.

It appears from the record, that the motion for the rule and the filing the affidavit of the defendant was on the 8th day of February, and that it lay over until the 26th February, the day next following that on which the case was set for trial, it not having been called up by either party. On the 26th, the rule being discharged, the plaintiff's counsel thereupon entered his motion for a decree *pro confesso*, for want of an answer by defendant. The defendant resisted this motion, and thereupon

presented his answer and made a cross-motion for leave to file it instanter, which the court denied, and granted a decree *pro confesso*, impanneled a jury and had the damages assessed. A motion was made to set aside the assessment and the decree *pro confesso*, and for leave to file his answer, which the court denied, and also denied a separate motion entered subsequently, to set aside the assessment, and entered a final decree, all which is assigned as error.

Suits to enforce a mechanics' lien, although by statute, placed on the common law docket, are yet proceedings in chancery, and governed by the rules of that court where they apply, and where the act giving the lien has not prescribed different rules. (Scates' Comp. 156, 159, sections 6, 23.)

By the 7th section of this act, (ib. 157), the answer to the bill or petition must be under oath, and by section 8, where process has been served ten days before the return day thereof, the defendant is required to file his answer, on or before the day on which the cause shall be set for trial on the docket, and the issues then made up under the direction of the court.

The record shows, no answer was filed on or before the day set for the trial of the cause, the defendant resting upon his motion for a rule to show cause why security for costs should not be given. This was a motion the defendant had a right to make, and he also, if he did not intend delay, had a right, and it was his duty to call it up before the day fixed by law for filing his answer. It was no part of the complainant's duty to call it up. He had the statute for his guide, and knew his rights under it, and if the defendant chose to sleep upon that motion until the day for answering had expired, it was his own folly. By so doing, he put himself wholly within the power of the court, and out of the statute. After that day, it was a matter of discretion with the court, whether the answer should be received or not. The complainant, when he moved for his decree, was entitled to it under the statute, and we cannot say that the court, in refusing the answer, has abused the discretion vested in it. We think it would have been no abuse of its power, to have permitted the answer to be filed, and that a practice less sharp than the one which was indulged in, might be entirely promotive of all the ends of justice. But no rule of law or of practice has been violated that we can discover, and accordingly affirm the decree.

Decree affirmed.

Thomas F. Goodhue, Appellant, *v.* Frederic Baker, Appellee.

APPEAL FROM JO DAVIESS.

Uncontradicted proof that the defendant in an action of ejectment, commenced building a brick house on the premises, in 1848, and that he and his family had resided in the same since 1849 or 1850, the trial taking place in 1858, is sufficient evidence of possession at the time the suit was brought, which was in September, 1856.

A verdict in ejectment which finds the defendant guilty, and the estate established in the plaintiff to be an estate in fee, is responsive to the issue, and is sufficient.

The motion for a new trial in ejectment, upon common law grounds, may be granted, but if applied for under the statute, the conditions required must be complied with.

This was an action of ejectment by appellee against appellant, for the recovery of Lot 5, Block 14, in Freeport, Stephenson county, Illinois. The cause originated in Stephenson county, but went to Jo Daviess county, by change of venue. The action was commenced on the 12th September, 1856. The cause was tried on the 11th March, 1858, and a verdict had in behalf of the appellee. The appellant moved for a new trial and in arrest of judgment, and also in the course of the trial, objected to certain evidence offered by the appellee. The motions and objections offered by the appellant were overruled by the court, and a judgment rendered upon the verdict aforesaid.

The appellant reserved the objections by a bill of exceptions, and prosecutes this appeal to reverse the judgment aforesaid.

Upon examining the record one error alone is believed to be tenable, to wit: The verdict was insufficient to warrant the judgment below. The declaration is for lot 5, in block 14, town of Freeport, county of Stephenson, State of Illinois.

The verdict of the jury was and is in these words: "We, the jury, find the defendant guilty, and the estate established in the plaintiff to be an estate in fee." The appellant having moved an arrest of judgment, presents the question to this court as to the sufficiency of the verdict aforesaid.

Errors assigned: the said Circuit Court erred in overruling the said appellant's motion, in arrest of the judgment aforesaid; the court also erred in overruling the appellant's motion for a new trial.

R. S. Blackwell, and J. Marsh, for Appellant.

Leland & Leland, for Appellee.

WALKER, J. It is urged by appellant, that the evidence fails to show that he was in possession of the premises when the suit was brought, and that a new trial should for that reason, have been granted. The first witness called testified, that appellant commenced building a brick house on the premises in 1848, and had resided in the same with his family, since 1849 or 1850. The declaration and notice, were served on the 12th day of September, 1856, and the trial was had at the May term, 1858, which resulted in a verdict and judgment in favor of appellee. We are at a loss to perceive why this objection is urged, as there can be no question, that this was evidence of possession at the time the suit was instituted, and it stands uncontradicted by any other evidence in the case. Under it the jury could not have done otherwise than find that appellant was in possession.

It is again insisted that the verdict of the jury was insufficient to warrant the court in rendering a judgment of recovery upon it. It was as follows: "We, the jury, find the defendant guilty, and the estate established in the plaintiff to be an estate in fee." This verdict may not be in form, and if not so, is it substantially good? The declaration alleges that the defendant entered into and unlawfully withheld the premises from the plaintiff. To this declaration, the defendant by his plea, says he is not guilty. And the jury by their verdict, find that he is guilty. This portion of the verdict is responsive to the issue, and covers the whole of it, and is as good as if it had in terms found him guilty in manner and form as alleged in the declaration, and no other inference can be drawn. They found him guilty of what? Of the unlawful withholding the premises described in the declaration. It could have been of no other charge, as this one was what they were sworn to try, and we cannot presume that they found him guilty of any other charge.

The question is also presented, whether the finding of the estate of the plaintiff is under the statute sufficient. The seventh clause of the twenty-fourth section of the third division of the chapter entitled "Civil Procedure," (Scates' Comp. 215,) provides, that, "The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, for his own life," etc. This verdict is not in the precise language of the statute, but it finds "the estate established in the plaintiff to be an estate in fee," and certainly complies substantially with this requirement. It is true that it does not in terms say, that they find the plaintiff's estate in the premises claimed in the declaration to have been established to be a fee. But it is as explicit as if it had. They find his estate established to be a fee. What estate? Why his estate in the premises, the title

of which they were then trying. They could not have referred to any other. The verdict was spoken in response to the issue they had been sworn to try, and is, we think, substantially sufficient.

It is urged that the court erred, in not granting a new trial under the statute. The thirtieth section of the same chapter provides, that "The court in which such judgment shall be rendered, at any time within one year thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon the payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial, in such cause; and the court, upon subsequent application made within one year, after the rendering of the second judgment in said cause, if satisfied that justice will thereby be promoted and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment, and grant another new trial; but no more than two new trials shall be granted under this section." The record in this case shows but one trial, and it is under the first clause, that it is urged that the court should have allowed the motion. But according to the terms of the statute, the application must be made to the court within one year, from the rendition of the judgment, and as a condition precedent, all costs and damages recovered by the judgment must be paid, to authorize the court to grant a new trial under its provisions. This record contains no evidence that the costs were paid, or that the application was intended to be made under the statute; but on the contrary, the reasons assigned on the motion were upon common law grounds. This section does not take away the right of the court, to grant a new trial as at common law, when there are grounds for it, and this application was evidently intended as such when it was made and determined, and as we have seen, they were not sufficient to require the court to grant the new trial.

The judgment of the court below is affirmed.

Judgment affirmed.

The Galena and Chicago Union Railroad Company, Appellant, *v.* John C. Dill, Appellee.

APPEAL FROM COOK.

An unauthorized proposition to the president of a railroad corporation, that a person injured by a train of the company, should be sent to a hospital, is improper to go to a jury as evidence, in an action by the injured party against the company.

An act which exempts a railroad company from ringing a bell or sounding a whistle, at a road crossing, is not unconstitutional.

An omission to give a signal, by sounding a bell or whistle, is not of itself evidence of negligence.

A railroad company, and a traveler on the highway, have correlative rights, and each must use proper caution where there is danger of a conflict. Neither has a superior right, except as it results from the difficulties and necessities of the case.

THIS was an action on the case brought by Dill, against the appellant, in the Kane Circuit Court, but by change of venue the cause was tried in the Cook Circuit Court.

The declaration alleges that in June, 1854, the appellant being a body corporate, was the owner of a railway, which it operated, and across which there was a common highway, leading from the town of Geneva to Elgin, in the county of Kane, and used as such; that Dill, accompanied by a lady, was driving a pair of horses and buggy along said highway, and in the act of crossing said railway with all reasonable care, diligence and speed, when a locomotive, with a train of passenger cars attached, directed and managed by the servants of appellant, approached said highway without the knowledge of Dill; that it was the duty of the appellant to ring a bell, or blow a whistle attached to the locomotive, at least eighty rods before the locomotive and train of cars should reach said crossing of the highway, and that it also became the duty of the appellant to slacken the speed of the locomotive and train, and approach said highway slowly and cautiously; and that appellant so carelessly conducted the said locomotive and train, on its approach to and crossing of said highway, by not slackening speed, and by giving warning as aforesaid, nor otherwise, of the approach of said train of cars, to said Dill, while he was driving across said highway, that the buggy was struck and destroyed, and "that then and there, with all the power and violence of a locomotive and train thereto attached, forced and threw Dill fifty feet in height from the buggy, from which height he fell upon the cars attached, upon which he was carried forty rods, etc.," whereby he was greatly injured, and had his mental faculties impaired; that he has been sick and languishing from thence hitherto, etc. That Dill has been forced to pay five hundred dollars to the owners of the buggy, from whom he hired the same. That he has paid three hundred dollars for his board, nursing, etc., until the commencement of the suit, and five hundred dollars for services of physicians, nurses, etc.

Damages laid at twenty thousand dollars.

Plea of not guilty and joinder.

There was a trial by jury, MANIERRE, judge, presiding, and a verdict for $15,500. The judge of the Circuit Court ordered

a remittitur of three thousand dollars, which the plaintiff below consented to, and thereupon the motion for a new trial, which had been entered, was denied by the court. The defendant in the court below, brings the case to this court by appeal.

On the trial of this cause, the plaintiff below gave in evidence the following:

Testimony of *Elijah Wilcox*: Resides at Elgin; was about the twenty-third of December, eighteen hundred and fifty-four, on the train from Elgin to Chicago; the train ran over a carriage, with a gentleman and lady, two miles east of Clinton, near Mr. Wheeler's house, this side of Elgin. The man in the carriage was a stranger to me, they called his name Dill. The train was going west, the carriage very nearly north. We stayed at this point on account of the accident about half an hour. The first I saw, was the horses cleared from the carriage, running towards Mr. Wheeler's; I went forward and saw the man, and got him into the cars or train.

The plaintiff was insensible, almost lifeless, apparently so.

I did not suppose he would live to get to Elgin. He was injured about the head and shoulders, and his leg was cut; no bones broken or fractured. I thought the head was the worst injured. Had never seen him before.

Was in the cars when the accident happened. Did not leave my seat until car was about stopping. We were running at pretty good speed. Don't know whether train was behind time or not; had not heard any agent of the company say that the train was behind time.

The road upon which Dill traveled, has been a public highway since 1839.

The road has been repaired and kept open. The road went from St. Charles to Elgin.

The train was running pretty fast; it was a down grade. Did not hear any signal before they approached the crossing. Heard a whistle or bell at the time of crossing, or soon after. Can't say whether it was a bell or whistle; it was one or the other. The collision was just about the time I heard the sounds.

There was something startled us all. I was informed very soon after the collision of what had taken place. The crossing could be seen quite a distance; I should think two miles, perhaps more. There was no obstruction between the railroad track and crossing. The plaintiff was in a top buggy.

On the highway there may be a few scattering trees. The wagon road is a little higher than the railroad; no cut in the railroad before it approaches the crossing. Dill was carried from fifteen to twenty rods from the crossing. The buggy was com-

pletely demolished, broken all to pieces. The train passed beyond the wagon road, and then backed up to the crossing.

Plaintiff also introduced as a witness, *C. B. Dodson*, who testified he knew Dill, and said: I saw Mr. Turner, the president of the railroad company, and related the circumstances as I had heard them talked about. I suggested to him that Dill was destitute and had no friends, and that I desired the company to send him to the hospital. Captain Turner said he could do nothing for him. Mr. Dodson, the witness, said that he did not go to Mr. Turner at the instance of the plaintiff, or any one in particular, and that Dill did not know of his going. To the admission of which testimony the defendant's counsel objected, but the court overruled the objection; to which ruling of the court in permitting said testimony to be given to the jury, the defendant excepted.

The following errors are assigned:

The court permitted improper evidence to be given on the part of the plaintiff in the court below.

The Circuit Court gave improper instructions on the part of the plaintiff.

The Circuit Court improperly overruled the motion for a new trial.

The Circuit Court should have set aside the verdict, because the verdict was contrary to law and evidence, and because the damages were excessive.

E. Peck, for Appellant.

B. F. Fridley, and R. S. Blackwell, for Appellee.

Walker, J. It is assigned as error, that the court below admitted improper evidence on the part of appellee. And in their brief, appellants insist that Dodson's conversation with the president of the road, in reference to sending appellee to a hospital was irrelevant and impertinent to the issue, and should have been rejected. We are at a loss to see for what purpose it was admissible. Dodson says he was unauthorized by any person, to propose that appellee should be sent to the hospital, and it was unknown to him. By what means the parties are to become liable by propositions made without any authority, by a stranger to the whole transaction, we are unable to perceive. And even if Dodson had been authorized to make such a proposition, if it was not designed as an offer of a compromise, or as a satisfaction of damages either in whole or in part, the road could have acquired no right by acceding to it, not even the right to set off expenses incurred in procuring his admission to

a hospital, or any that might have been paid for keeping him while there. It is not imposed as any part of the duty of this railroad company, that their agents or officers shall procure admission to a hospital, for persons injured by operating their road. This conversation does not appear from the evidence, to have been a part of the *res gesta*. And if the appeal was made to the president on the grounds of philanthropy, he was only under the same obligation as any other citizen, and was free to act or not as his feelings might dictate. If it was offered for the purpose of showing malice, we find no other evidence tending to show any bad feeling between the president and appellee, or immediately connecting the president with the collision, and the mere fact that a proposition was made by a stranger to both parties, that appellee should be sent to a hospital, and the reply that the road could do nothing in that matter, does not establish malice on the part of the officers of the road. But in no point of view do we see that this evidence was legitimate for any purpose on the trial. It may not have misled the jury, but even if it did not, it was not pertinent to the issue, and therefore should have been rejected.

The appellee asked, and the court gave to the jury, this instruction: "That if the jury believe, from the evidence, that the plaintiff was free from negligence on his part, in approaching and attempting to cross the track, and that the defendant by reason of any negligence, either in running over the crossing in question, at a greater speed than is usual, and was proper, or in not ringing the bell, or sounding the whistle of the locomotive, within a reasonable distance from the crossing of the highway, upon which the plaintiff was traveling,—if the jury find such facts from the evidence, this is sufficient to charge the defendant, and the jury will find a verdict for the plaintiff and assess his damages." This instruction asserts as a legal proposition that it was a duty imposed by law upon the railroad company, to ring the bell or sound the whistle of the locomotive, and for a failure to do so, it was liable for the injury sustained by appellee, if he was free from fault on his part.

The act of the legislature of the 25th of February, 1854, (Sess. Laws, 165,) amendatory of its charter, contains this provision: "It is hereby declared and enacted, that the thirty-eighth section of an act, entitled 'An act to provide for a general system of railroad incorporations,' approved November 5, 1849, does not and shall not extend to, or control the charter or franchises of the act hereby amended." The thirty-eighth section referred to in this provision, is this: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance

of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State, and also to be liable for all damages which shall be sustained by any person by reason of such neglect." That it was the intention of the legislature by the act of 1854, to release this incorporation from an observance of the provisions of this section, is too plain to admit of any doubt. The language employed is too unequivocal to admit of construction. It is a familiar rule of construction, that the use of negative words in a statute, renders its requirements imperative, and those employed in this statute, are of that character, and it would be a perversion of the rules of interpretation, and of language, to give to it any other meaning, than that appellant should not be required to comply with its provisions, and to release them from all liability for its non-observance.

But it is urged, that this act of 25th February, 1854, is unconstitutional, inasmuch as it exempts appellants, from a compliance with a portion of the duties imposed upon all other similar incorporations in the State. That the protection of the traveling public from injury, and in the enjoyment of their right of transit, by private or public conveyance, is such a police power as is incident to, and may be exercised by the legislature, will be readily conceded. And whether such regulation apply to travel on public highways, by railway or by water navigation, can make no difference in its exercise. The object being to insure the safety of individuals from injury and loss, it may be exercised in such manner as the legislature may deem most expedient. Whether its regulations shall embrace all of these modes of travel, or only a portion of them, all of the carriers of travelers by each mode, or only a portion, is a question for the legislature alone to determine, in the exercise of its power. They may apply proper police regulations to one highway or railway and exempt all others from its operation, or they may apply it to all highways or railways, and exempt one or more from its operation, if they choose. The power of adopting police regulations for the protection of its citizens, is inherent to government and it may do so in any manner, not prohibited by the fundamental law of its creation. And there is no such prohibition upon our legislature, as will render this enactment void. If all acts should be held to be void, which apply only to one, or to a limited number of individuals, many of the most important rights claimed by a portion of our citizens, would prove unfounded. Incorporations could only

have uniform privileges, if they could at all exist under special enactment. The legislature would have no power to grant special privileges or exemptions to individuals, and would be compelled to prescribe uniform rules for every individual in the State.

These enactments then, leave the rights of the parties, in this case, as regulated by the principles of the common law. Its principles, according to the maxim "*Sic utere tuo ut alienam non loedas*," or "enjoy your own in such a manner as not to injure another person," apply to this case. When the public highway became established, every person became possessed of the right to travel over it at all times, when interest, convenience or pleasure might dictate. This right is not superior to, but is only co-extensive with the rights of others. No person, or portion of community have the legal right to appropriate it, or any portion of it, to their exclusive use. Nor can one person have a superior right to its enjoyment, over another person. But from necessity, when passing over it, no two persons can occupy the same portion of it, at the same time.

When appellants procured their charter, acquired the right of way, and constructed their road, they became invested with the exclusive right to use and enjoy it, except such portions as passed over the public highway, and to that portion in the course of their business, they acquired the right to use it in the same manner, to the same extent and under the same liabilities, as the balance of community. They had the same but no better right, to cross a public highway with their trains at the point of intersection with their road, that individuals have to cross their road at the same place. This right is mutual, co-extensive, and in all respects reciprocal. And in the exercise of these rights, all parties must be held to a due regard for the safety of others. In the exercise of these rights, they must be mutually held to every reasonable effort, to avoid inflicting or causing injury or loss to others. It will be presumed that the servants of a railway company are cognizant of the various road crossings on the line of their road, and that persons are liable at all times to be in the act of passing the point of intersection, and they should be on the look-out, so as to avoid injury to others, who may be passing the road, as well as those in their charge, so far as may be done by the use of all reasonable effort. Their locomotives and trains being heavy and less under their control than that of vehicles employed on common highways, they cannot be held to have them as completely in their power to prevent injury, as persons may have theirs who travel on highways. But this should not excuse efforts to foresee and prevent collisions, at the crossings of public highways. When danger is seen or

might be seen by the exercise of ordinary prudence, they should be held to all reasonable effort to avoid it. The safety of those of whom they have the charge, as well as those traveling on the highway, requires it. On the other hand, persons using the highway must be held to the use of all reasonable efforts on their part, in like manner to foresee and avoid danger. A want of proper circumspection on their part is liable to produce disastrous consequences to railroad travelers, as well as to themselves. When the company have erected the proper signs and notices at the point of intersection, the highway traveler should under ordinary circumstances heed its warning, and use the proper precaution to avoid a collision, and failing to do so, negligence more gross on the part of the company only will render them liable for injuries received.

The question of negligence is one of fact, which must be left to the determination of the jury. It depends to so great an extent upon the surrounding circumstances of each case, that unless it is gross, no rule can be adopted. The jury must necessarily determine from the situation of the parties, and all of the surrounding circumstances, whether there has been negligence on either part, or whether the occurrence was purely accidental, and without the fault of either party. The court has no authority to determine the fact of negligence, unless it be in the non-observance of a positive requirement of law. Whether the failure to ring a bell or sound the whistle is negligence, is a question of fact for the jury, and could not be so regarded, unless its omission occasioned the collision, producing the injury. Where such acts are not required by legislative enactment, their omission does not raise a legal inference that the injury resulted from a want of their performance.

By this instruction the jury are told that if the appellants, by reason of any negligence in not ringing the bell, or sounding the whistle of the locomotive, within a reasonable distance from the crossing of the highway, and the plaintiff was free from fault, that they should find for the appellee. This instruction assumes that it was a legal duty imposed upon the appellants to ring the bell, or sound the whistle, and that its omission rendered them liable. The law has made no such provision. This could not be negligence unless its omission produced the injury complained of, and the law not having imposed the liability, the court could not give to its omission such an effect. It may be, that the result would have been the same, if the bell had been rung, or the whistle sounded, and if so, it was not negligence to omit it. The instruction should have left it to the jury to say, whether the omission to ring the bell or sound the

whistle was negligence, which produced the injury, and failing to do so, it was error to give it.

There is no other error perceived in the record, either in the admission or rejection of evidence, or the giving or refusing the various instructions asked.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOEL H. DIX *et al.*, to the use of JAMES E. SOUTHWORTH *et al.*, Plaintiffs in Error, *v.* THE MERCANTILE INSURANCE COMPANY, Defendant in Error, and

The SAME, Plaintiffs in Error, *v.* THE CHICAGO CITY INSURANCE COMPANY, Defendant in Error.

ERROR TO COOK.

An action on a contract must be in the name of the party in whom the legal interest is vested.

A party suing, who shows he has not any interest in the cause of action, cannot recover.

Where one of the three partners who had effected an insurance, afterwards and before a loss, assigns his interest to the other two, without any notice to, or consent by the insurers; the two cannot recover on the policy, especially where they so declare in their declaration, and the policy forbids such an assignment.

THESE two cases came before the court, upon the same state of pleadings.

Joel H. Dix, Horatio G. Sinclair and George J. Harris, plaintiffs in this suit, (who sue for the use of James E. Southworth, Albert Slauson, Valorus Southworth and Harvey Farrington, Jr., carrying on business under the name and style of Southworth, Slauson & Co.,) by Cyrus Bentley, their attorney, complain of the Mercantile Insurance Company, a corporation established and existing under the laws of the State of Illinois, defendants in this suit, who have been summoned, etc., of a plea of trespass on the case upon promises: For that whereas, heretofore, to wit, on the twenty-seventh day of September, A. D. 1856, at Chicago, to wit, at the county of Cook, aforesaid, by a certain instrument or policy of insurance then and there made under the hands of Cyrenius Beers, the president, and Thomas Richmond, the secretary of the said corporation, and countersigned by Justin Parsons, the agent of said company, at Chicago, aforesaid, the said Cyrenius Beers, Thomas Rich-

mond and Justin Parsons, acting and being duly authorized for and on behalf of the said corporation, the said Mercantile Insurance Company, in consideration of twenty-seven dollars to them paid, the receipt whereof was thereby acknowledged, did thereby agree to insure the said plaintiffs by their then name or style of Dix, Sinclair & Harris, against loss or damage by fire, to the amount of two thousand dollars, on their stock of groceries, (meaning their stock of groceries,) contained in brick building situated in and known as No. 43 South Water street, city of Chicago, Illinois; and the said corporation thereby promised and agreed to make good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property above specified, from the twenty-seventh day of September, one thousand eight hundred and fifty-six, (at noon,) unto the twenty-seventh day of September, one thousand eight hundred and fifty-seven, (at noon,) the said loss and damage to be estimated according to the true and actual cash value of the property at the time the same should happen, and to be paid within sixty days after notice and proof thereof, made by the assured and received at their office, in conformity to the conditions annexed to said policy; provided always, and it was thereby declared, that the said corporation should not be liable to make good any loss by theft or any damage by fire which might happen or take place by means of invasion, etc.

And it was moreover declared, that the said policy was made and accepted in reference to the conditions thereto annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for, as by the said instrument or policy of insurance, reference being thereunto had, will more fully appear; and the said plaintiffs in fact say that the said conditions annexed to said policy are (amongst others) as follows, to wit:

"7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or any interest in it, the liability of the company in virtue of such policy shall thenceforth cease; and in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease."

Of which said instrument or policy of assurance, and the conditions thereto annexed, the said defendant afterwards, to wit, on the day and year first aforesaid, at the county aforesaid, had notice.

And thereupon afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendants, had then and there paid to the said defendants the said sum of twenty-seven dollars as a premium for the insurance of two thousand dollars upon the stock of groceries mentioned in the said instrument or policy of insurance, and had then and there undertaken and faithfully promised the said defendants to perform and fulfil all things in the said policy and the conditions thereunto annexed contained, on the part and behalf of the said assured to be performed and fulfilled, they the said defendants undertook and then and there faithfully promised the said plaintiffs that they (the said defendants) would assure the said plaintiffs against loss or damage by fire to the amount of two thousand dollars upon the said stock of groceries, and would perform and fulfill all things in the said instrument or policy contained on their part and behalf to be performed and fulfilled.

And the said plaintiffs in fact further say, that they the said plaintiffs, at the time of making the said policy of insurance, and from thence until the 12th day of February, A. D. 1857, were interested jointly as copartners in the said insured stock of groceries, to the amount or value of all the moneys by them ever insured or caused to be insured thereon; that on the said last mentioned day, the interest of the said Sinclair therein was sold and transferred to the said Dix & Harris, and that from the said last mentioned day until the loss and damage hereinafter mentioned, the said plaintiffs, Dix & Harris, were jointly interested therein to the amount or value aforesaid, to wit, at the county aforesaid, and that the said stock of groceries in the said policy mentioned, afterwards, to wit, on the second day of March, A. D. 1857, to wit, at the county aforesaid, was burnt, consumed and destroyed by fire, and that no part thereof was lost by theft, etc.

And the said plaintiffs further say, that although they the said plaintiffs have in all things conformed themselves to and observed all and singular the said articles and stipulations, conditions, matters and things, which on their part were to be observed and performed, according to the form and effect of the said policy, and of the said conditions thereunto annexed, and although the stock and fund of the said company, always from the time of making the said policy, hitherto have been and yet are sufficient to pay to the said plaintiffs the said damage and loss sustained by the said fire; and although sixty days after notice and proof thereof made by said plaintiffs and received by said defendants, at their office, in conformity to the condi-

tions annexed to said policy, had long elapsed before the commencement of this suit, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice and were then and there requested by the said plaintiffs to pay them the said sum of two thousand dollars so by them insured as aforesaid; yet the said defendants, not regarding their said promises and undertakings so by them made as aforesaid, did not, nor would when they were so requested as aforesaid, or at any time before or since, pay the said sum of two thousand dollars, or any part thereof, but have hitherto wholly neglected and refused so to do and still neglect and refuse so to do, to wit, at the county aforesaid.

The second count is like the first, except as to the amount of the policy, which is $3,000 instead of $2,000—this suit being brought upon two policies, one for $2,000 and one for $3,000, making a total of $5,000.

The common counts were added, to which a *nolle prosequi* was subsequently filed.

To this declaration defendants filed a demurrer, assigning as special causes,

1st. That it appears by said count, that, at the time of the fire, the plaintiffs did not own the goods covered by said policy;

2nd. That during the continuance of said policy, and before the fire, the said plaintiff, Sinclair, in violation of said policy and without the written consent of the said defendants, sold his interest in the goods insured to the said Joel H. Dix and said George J. Harris, and that the same was so owned at the time of the fire;

3rd. That said count of said declaration is otherwise insufficient, uncertain and informal, etc.

There was a like demurrer to the second count of the declaration.

The court, MANIERRE, Judge, presiding, sustained the demurrer to this declaration.

To correct this judgment, the plaintiffs sued out this writ of error.

C. BENTLEY, for Plaintiffs in Error.

SHUMWAY, WAITE AND TOWNE, for Defendants in Error.

BREESE, J. We do not well see, how this action can be maintained and at the same time preserve an important principle which lies at the very foundation of suits at law. That principle is, that an action on a contract must be brought in the name

of the party in whom the legal interest in the contract is vested. 1 Ch. Pl. 3. A party suing, who, by his own showing, by the averments in his declaration, has no interest whatever in the cause of action, never can be permitted to recover in an action at law.

We think a case cannot be found decided in a court of law, where a person having no legal interest in the subject matter of the action, has been allowed to maintain an action at law alone or with others. It is impossible that he can, since, by his own showing he has nothing for which to sue. All the interest of one of the parties had passed out of him. 16 Peters, 501.

But it is insisted, that by another rule of law equally fundamental, a suit on a contract must be brought in the names of the parties contracting, and therefore this action is properly brought, the contract of insurance having been made with the plaintiffs.

This is all very well, very true, and would be decisive, did not the declaration disclose the fact of want of interest. Had the declaration been silent on the fact of assignment, and it might well have been—it would be good without such an allegation, there can be no question of a proper case being stated, against which the defendant by plea should defend. But the declaration itself showing the nakedness of the case—being in fact a *felo de se*, the defendant could do nothing but demur, for by so doing—by admitting the facts as the plaintiffs have stated them, the case for the defendants could not be better made out. Why disclose in the declaration, the fact of the assignment by one of the plaintiffs to the others? What was expected by the pleader to be gained by it? Would it not have been better, to let that matter of assignment, and the question growing out of it, come from defendant by plea? Could not the rights of the two partners be fully protected, in the usual mode of declaring in the name of those with whom the contract was made but for the use of the parties really entitled? or why say anything about it in the declaration? As it is stated, the case made by the declaration destroys itself. It is *felo de se*.

The declaration showing that one of the plaintiffs had parted with his interest in the property insured, before the loss accrued, puts an end to the case, on another principle well established and universally recognized, and that is, upon a policy against loss by fire, no recovery can be had unless the insured has an interest in the property insured at the time of the loss.

Now without insisting upon the first objection, this must be fatal and must dispose of the case. Who were the parties insured? The policy shows they were Sinclair, Dix and Harris. Who had the interest at the time of the loss? Dix and Harris. Sinclair then, had no ground of recovery when suit was brought

—having no interest in the property he could not be damaged by its loss.

But independent of all this, this condition was annexed to the policy: "And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." Here was a transfer by one of the insured to the others, of his undivided interest in the property insured. There is a change of title to an undivided interest in the property. At the date of the policy it belonged to Sinclair, at the time of the loss it was the property of Dix and Harris, so that there was a complete transfer and change of title to this undivided interest.

It is however, replied to this, that the reason on which this condition is based, is to prevent parties insured from transferring the property to strangers and thus introducing into its care and management, parties not known to the insurers. Much argument, in support of this position, has been advanced, and cases cited, supposed to sustain it, which are by no means satisfactory.

A contract, as well of insurance, as in regard to any other matter, must be interpreted according to the intention of the parties making it, and that to be gathered from the language and terms employed, and the objects contemplated by it.

The intention of the company was manifestly, as urged, that no strangers should come into the management and care of this property without their consent. Knowing the parties with whom they were contracting, relying upon the fidelity and circumspection of each and every one of them, they were willing to take the risk at the premium stipulated. It was an object of the first importance with them, to secure for the property, the guardianship and care of faithful and trust-worthy men, and for this they were willing, for the premium, to entrust the property to the care of Sinclair, Dix and Harris, but not to the care and watchfulness of Dix and Harris alone. Is it not plain that the assurers may be as greatly prejudiced by removing one, to whom with others, they had entrusted the guardianship of valuable property, as by the introduction of a stranger? The one removing from the concern may have been the very one, on whose vigilance, fidelity and care the greatest share of confidence was reposed, and by so removing, the hazard is increased to the assurer without any corresponding increase of premium. This is neither just nor equitable. The plaintiffs therefore, have no right to say, that it was against "the coming in of strangers," this condition was aimed. The assurers have bargained and paid, for the care and watchfulness of each and every person whose property they have insured, and they have an undoubted

right to hold them to a strict observance of the contract, and we have no right to say, when it is agreed between them and the assured, that a transfer or change of title to the property or to an undivided part of it shall make the policy void, that they were stipulating against a transfer to strangers only. The terms used are too broad for that, and the object of the condition would be defeated by so restricting them, as we have endeavored to show.

There is a vast difference between the sale by one partner of his entire interest in a partnership concern, and a change simply in the relative shares in the concern, for in the latter case, the watchfulness and care of the partner which was bargained for, still continues, whilst in the former it is forever gone.

We have no doubt upon any of the positions we have here assumed, and consider any reference to adjudged cases on the point, or comments on them, wholly unnecessary. *Howard* v. *The Albany Insurance Co.*, 3 Denio, 301, and *Murdock* v. *The Chenango County Mutual Insurance Co.*, 2 Comstock, are to the point.

1. The plaintiffs have by their own showing defeated their case.

2. One of the plaintiffs by the showing of the declaration, had no insurable interest at the time of the loss.

3. The transfer and change of title by one partner to the others, avoided the policy.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

John Davis, Plaintiff in Error, *v.* The Michigan Southern and Northern Indiana Railroad Company, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

The delivery of a baggage check by a railroad company, is *prima facie* evidence that the company has the baggage.

If on a change of passage from one railroad to another, the agent of the road does not find the baggage which is checked, he should give immediate notice to the owner, or the company owning the road on which the passenger embarks, will be held liable.

The owner of lost baggage should not be permitted to prove the value of the articles in which it is packed. So of other articles, the value of which may be established from description.

A revolver is included in personal baggage.

A party should not be allowed to recover for an unreasonable amount of money lost with his baggage. If he has money beyond what is necessary for his personal expenses in his baggage, the company should be notified.

A trunk is not a proper place for a passenger on a railroad, to carry money for his traveling expenses.

The testimony of a party, who from time to time, increases his demands for the value of the lost baggage, should be received with caution.

THIS was a suit against defendant as common carrier of passengers and baggage, the suit being for baggage of plaintiff, lost by defendant. Plea, general issue; joinder, and jury waived, and trial had by court.

The plaintiff introduced the railroad checks of defendant, Nos. 2 and 991, and proved that they were the evidence of baggage deposited with the defendant for transportation, and plaintiff was then sworn as witness in the case, and proved contents of trunk and carpet bag—being baggage lost—and the value thereof, amounting in the aggregate to $915.25.

Which testimony was objected to by counsel for defendant.

On cross-examination, plaintiff as witness, swears, that the contents of said trunk and carpet bag, or the value of the articles, was not made known to defendant or its agents; that he never saw his baggage after leaving Dunkirk; that about twelve miles beyond Toledo, on the Ohio, Grafton and Toledo road, the two checks above mentioned, were given him in exchange for checks received at Dunkirk; the two packages, trunk and carpet bag, were found missing at Chicago; saw agent of defendant at Chicago, and made application for my baggage, and said to the agent (Mr. Gray), that if he would give me my diplomas, (medical), that I would let the rest go; mentioned the money to Mr. Gray, when he took a memorandum of the contents of the lost baggage. Three trunks were alike in general appearance, one being smaller than the others; the contents of the trunks not lost, were of the value of fifteen hundred dollars.

The defendant introduced *George M. Gray* as a witness, who testified that he was the general passenger agent of defendant, and has so acted for five years past; that we employ agents to go on board cars of Cleveland and Toledo Railroad, who exchange our checks for the checks of that company, with those passengers who come this side of Toledo. This check, No. 2, (check produced by witness) is the duplicate of the one held by the plaintiff; we have also the check for which it was given, belonging to the Cleveland and Toledo Railroad Company, also the strap check, No. 991, corresponding with the other check of the plaintiff; these checks were found at Toledo; Dr. Davis called on me and produced his checks; said he had lost a trunk in which were some diplomas, and family relics; said nothing

about gold or valuable articles in the three first interviews, afterwards he claimed that there was gold and valuable clothing; never said he had gold or money of any kind in the trunk at the first interview. We sent to Toledo for the baggage, and used all diligence to find it.

E. D. Robinson, witness for defense, testified to being ticket agent, and that the tickets of defendant for three years past have had printed on the backs of each ticket the words, "This ticket entitles the holder to not over eighty pounds of baggage, but not at any rate exceeding in value $100, unless notice is given, and an extra amount paid at double first-class rates," as upon this ticket now shown the court.

Plaintiff, by his attorney, objected to the introduction of this ticket and the testimony in relation thereto. Overruled by the court, and exception taken.

Witness testified further, that similar language and to the same import was on the tickets sold over the New York and Erie Railroad to Chicago; this has been the practice for more than two years.

To all of which testimony on part of defendant, objections were made by plaintiff, which were overruled by the court, J. M. Wilson, judge, who tried the case.

And afterwards, to wit: At the February term of said Court of Common Pleas for the year 1857, the judge of said court then and there rendered judgment in favor of plaintiff, for one hundred dollars and costs of suit, a jury having been waived.

Whereupon plaintiff, by his attorney, enters motion for new trial, on ground of improper testimony being admitted, and that judgment was against evidence, which motion was overruled. The plaintiff below brought the case to this court.

Shumway, Waite & Towne, and J. W. Chickering, for Plaintiff in Error.

B. C. Cook, for Defendant in Error.

Breese, J. The delivery of a check to a passenger is intended to relieve him from all care and superintendence of his baggage while on its journey, and devolves such care upon the agents of the several roads over which it passes, and must be considered as *prima facie* evidence of the delivery of the baggage. On the exchange of checks, before reaching Toledo, if the baggage master could not find the trunk and carpet bag, which it seems were connected together and marked with one check, on the Cleveland cars, he should have given immediate notice to the owner from whom he received the check; not having done so,

the company must be held to have received the trunk and bag, and to be liable for the loss, and for the value of such of their contents, as can be properly denominated baggage. Was it not for this exchange of checks, the defendant would not be liable; the remedy would be against the Cleveland and Toledo Railroad Company.

On the trial of this cause, the plaintiff was sworn as a witness to prove the contents of the lost trunk and carpet bag, and he stated their value at nine hundred and fifteen dollars and twenty-five cents, and presented an inventory of the different articles contained in each. The plaintiff was also permitted to prove the value of the trunk and carpet bag, which under the decision of this court in the case of *Parmelee* v. *McNulty*, 19 Ill. R. 558, he was not authorized to do, nor the value of any other article which could be established by other than his own evidence. The court say in that case, "The law permits a party to be a witness in his own cause for the purpose of proving the contents of lost baggage, and even its value when he cannot adduce other evidence of those facts. This is an exception to the general rule of law, and should not be extended beyond the necessity which gave rise to it."

Besides the trunk and carpet bag, the value of many of the other articles said to have been contained in them, could have been well proved by other evidence, such as the coats, vests, pants, shirts, etc.,—by a description of them, any dealer in those articles could have established their value.

But were the articles contained in the inventory, sworn to by the plaintiff, baggage? The wearing apparel is unquestionably baggage, and so must the revolver be regarded, under the authority of the case of *Woods* v. *Devin*, 13 Ill. R. 751.

Regarding the revolver as baggage, and of the value of twenty-five dollars, that, and all the necessary other baggage amounts in value, as sworn to by the plaintiff himself, to ninety-three dollars and fifty cents only, whereas he has recovered a judgment for one hundred dollars, and should not complain. The money sworn to, whether bank notes, gold or silver, does not appear, and amounting to four hundred and thirty-nine dollars, cannot be considered in any proper sense, as baggage. Unless it was in gold and silver, a trunk is no place to carry it, in railroad traveling, even if wanted for traveling expenses, for it cannot be readily got at, for use. Besides the sum is unreasonable for such purpose. When a through ticket for Chicago is bought and paid for in New York, the passenger does not require but a small sum to carry him through, and if he travels with much more, and leaves it in his trunk, in the baggage car, giving no notice of its contents to the company, he ought not to

recover for its loss. If it be gold and silver coin, or bank notes, then he should inform the company of the contents, and pay extra for its transportation and care over it, if demanded.

The money not being fairly included in the term baggage, the conduct of the plaintiff was a virtual concealment of the sum—his representation of the trunk and its contents as baggage, in the customary sense of that term, was unfair and calculated to impose on the company, and that of itself would exonerate them, on the authority of the case of *The Chicago and Aurora Railroad Company* v. *Thompson*, 19 Ill. R. 578.

But we are not without our suspicions, and we think well grounded, that the great value now placed upon the contents of the trunk, is wholly an after-thought.

George M. Gray, the general passenger agent of the defendants, testifies, that the plaintiff called on him, and produced his checks, and said he had lost a trunk in which were some diplomas and family relics, saying nothing about gold or valuable articles in the first three interviews. Afterwards he claimed that there was gold and valuable clothing. At the first interview, he did not say he had gold or money of any kind in the trunk. On one occasion, Gray testifies, but on what occasion is not shown, and is therefore not evidence, that the plaintiff said he had but one ticket and paid extra for baggage. The plaintiff in his testimony swears, that the contents of the trunk and carpet bag, or the value of the articles were not made known to the defendants or their agents, and that he never saw his baggage after leaving Dunkirk. He says he saw the agent of the defendants at Chicago, and made application for his baggage, and said to the agent, Mr. Gray, that if he would give him his medical diplomas he would let the rest go. He says he mentioned the money to Mr. Gray when he took a memorandum of the contents of the lost baggage.

Now, it is incomprehensible that any man of ordinary sagacity and intelligence, on losing property so valuable as the contents of this trunk are now stated to be, and so large a sum of money, more than four hundred dollars, should not at once have stated the fact to the agent of the company to be made responsible, if for no other purpose than to prompt immediate and efficient action by the company, to trace out the loss. When told by the plaintiff, or given by him to understand, that the medical diplomas were of the most value to him, and that, for them, he would give up all else, they had no great incentive to exercise any unusual vigilance to recover the property.

In three interviews the plaintiff had with the agent of the company, he never hinted of gold, money or valuable articles being in the trunk. It was not until he had thought the matter

over, and probably been advised that he could swear to the contents of the trunk and their value, that he came to the conclusion that the chances of success were worth the risk of converting, by his own oath, some medical diplomas, and old family relics, into valuable jewelry and money.

In all such cases, where the opportunity for detection is slight, the strongest possible inducements are presented to those not over scrupulous, for making large statements of such losses, and magnifying the value of every article. Courts and juries therefore, should be very cautious in receiving such testimony, and if there be a shade upon it to discard it.

The fact that the plaintiff made no such claim as he now makes, in the first interviews with the agent, satisfies us that the claim for more than the court allowed him is fabricated.

The judgment of the court below is affirmed.

Judgment affirmed.

Jacob Russell *et al.*, Appellants, *v.* The City of Chicago, Appellee.

APPEAL FROM COOK.

The Common Council of the city of Chicago had authority to appoint special collectors, under the charter of 1851, and whether they had this power or not, the collector elected was not justified in withholding monies, upon the ground that the fees received by such collectors belonged to him.

In an action of debt, a plaintiff cannot recover more than he claims by his declaration, nor can the damages on a penal bond be greater than the *ad damnum*.

Summons in debt, $50,000; damages, $1,000.

The declaration in first count, avers that defendant owes $50,000, etc., and alleges that defendants executed their writing obligatory, binding themselves to pay the City of Chicago the sum of $50,000, conditioned that, whereas, defendant Russell was, on the 6th day of March, 1855, elected city collector of said city for one year, and until his successor should be duly elected and qualified, if said Russell should faithfully execute the duties of his said office, and account for and pay over all monies received by him as such collector, in accordance with the orders theretofore passed, or which might be passed by the Common Council of said city, and deliver all books, papers, and all other property belonging to the said city, to his successor in office, then said obligation to be void, otherwise to remain in full force.

Assigns as breach, that section six of article two (of the collection of taxes) of chapter fifty-eight, in page 418, of G. W. and Jno. A. Thompson's Compilation of Charter and Ordinances of City of Chicago, provides that the city collector shall pay into the city treasury, all moneys collected by him as fast as collected, and at least as often as every Monday the like funds collected by him, which said section and article were in force whilst said Russell was collector.

That said Common Council duly levied and assessed the taxes for the year 1855, and the clerk of said city duly delivered to said Russell on the 18th day of October, 1855, a warrant for the collection of the same, commanding him as city collector to collect the same. That said Russell, by virtue of said warrant, as such collector, received and collected the sum of $250,000, and failed to pay over into the city treasury, of such sum so collected, the sum of $3,188.13, whereby said writing obligatory has become forfeited, and an action hath accrued to the plaintiff to have of and from the said defendants the sum of $50,000 above demanded.

Second count, substantially as the first.

Third count, common count alleging indebtedness against all defendants of $50,000, on account stated, and for money had and received.

Breach, neglect of defendants to pay aforementioned sums.

Ad damnum to declaration, $1,000.

The sixth plea—to first and second counts—was as follows: That defendant Russell, as city collector, was wholly and solely authorized by law to collect, as well the special assessments for improvements and other municipal purposes levied and assessed by said city for the year 1855, as the regularly assessed taxes for said year, and was by law and of right, as such collector, wholly and solely entitled to all fees and commissions for the collection of such special assessments. That said Russell was, at all times during his term of office, ready and willing as such collector, to collect all monies due and owing to said city of Chicago, for special assessments, as well as the regular taxes assessed for said year 1855, and did notify the said city thereof, immediately after his said election as such collector. That the said city unlawfully refused to allow him to collect said special assessments, and unlawfully appointed and empowered certain others, not having legal authority so to do, to collect said special assessments.

That the sum of $3,188.13 was and is the just amount of fees and commissions for and upon the whole amount of said special assessments levied and assessed by said city for said year 1855, and collected, and no more, and that said Russell being such

collector as aforesaid as he well and lawfully might, kept and retained the said sum of $3,188.13, the amount of said fees and commissions for and upon said special assessments, so levied and collected as aforesaid.

Cause tried upon the issues, November 26th, 1858, by the court, by agreement of counsel, without a jury.

Judgment by the court, of debt against defendants, $50,000, and the court assessed damages at $3,611.09.

The errors assigned are as follows:

1st. The court erred in sustaining the demurrer of the plaintiff below (appellee), to the 6th plea of the defendants below.

2nd. The court erred in rendering judgment for the plaintiff below for $50,000 debt, and in assessing its damages at $3,611.09.

3rd. The court erred in allowing interest from July 15th, 1856, to November 26th, 1858, and in including said interest in the damages assessed.

4th. The court erred in rendering said judgment in its amount and form.

5th. The court erred in overruling the motion for a new trial, and in arrest of judgment, and in rendering the said judgment against the said defendants below, impleaded, etc.

Clarkson & Tree, for Appellants.

E. Anthony, for Appellee.

Walker, J. The first assignment of error, questions the decision of the Circuit Court in sustaining a demurrer to appellant's sixth plea. It was filed as a defense to the first and second counts of the declaration, and avers that appellant Russell, was, as city collector, wholly and solely authorized by law to collect as well the special assessments for improvements and other municipal purposes, levied and assessed by said city for the year 1855, as the regular assessed taxes for that year; and was by law entitled to the fees and commissions for the collection of such special assessments. That he was at all times ready and willing to collect all special assessments, as well as the taxes for that year, and gave the city notice thereof, but the city refused to permit him to collect such special assessments, and unlawfully appointed and empowered other persons, not having legal power so to do, to collect such special assessments. And that $3,188.13, was the amount of fees and commissions upon the amount of the special assessments, so collected by other persons for the year 1855. And that appellant, Russell, kept and retained of moneys collected by him, the sum of $3,188.13,

the amount of the fees and commissions upon the special assessments, so levied and collected.

The first question raised by this plea, is whether the Common Council by their charter had legal authority to appoint collectors of special assessments. By the first section of chapter two of the amended city charter of 14th February, 1851, it is enacted that the officers of the city shall be, "A clerk; an attorney; a treasurer; a school agent; a marshal; a board of school inspectors; a board of health; one chief, and a first and second assistant engineers of the fire department; one or more collectors; etc." It is also enacted by the third section, that "At the annual election, there shall be elected by the qualified voters of said city, a mayor; marshal; treasurer; collector; surveyor; attorney; and chief and assistant engineers. * * At the same time the electors in their respective wards shall vote for one alderman, and one police constable, etc." The 5th section provides, that "The officers elected by the people under this act, (except aldermen), shall respectively hold their offices for one year, and until the election and qualification of their successors respectively. All other officers mentioned in this act, (except aldermen and firemen,) and not otherwise specially provided for, shall be appointed by the Common Council by ballot, on the second Tuesday of March in each year, or as soon thereafter as may be, and respectively continue in office one year, and until the appointment and qualification of their successors." The third section only provides, as it will be perceived, for the election of one collector, while the first authorizes "one or more collectors." Under this enactment, the city was required to have at least one collector, and he was required to be elected by the people, but they were authorized to have more, and the further number was not limited. And by the fifth section, the Common Council was empowered to appoint by ballot that further number. This authority was given when power was conferred upon them to appoint all officers not required to be elected by the people. There being but one collector required to be elected, it necessarily follows that when the city determined to have more, they were authorized to appoint such additional number. And when appointed, they succeeded to all the rights, privileges and duties, in collecting the dues of the city, so far as authorized by the city, as appertained to the collector elected by the people. No objection is perceived to limiting them, when thus appointed to a specified division of the city, or to the collection of a specified branch of the city revenue. We are therefore of the opinion, that the Common Council had the right to appoint collectors to collect the

special assessments, and that by so doing, they deprived appellant, Russell, of no legal right.

But if we are mistaken in this view of the question, we are at a loss to comprehend by what right the appellant, Russell, may retain these fees and commissions. If it were true that the Common Council had no authority to appoint such special collectors, it would not follow that the city had thereby become his debtor for these fees. It might be in case they had no authority, that a recovery could be had against those special collectors, for money had and received to his use, or an action maintained against the individuals composing the Common Council, if the appointment had been unauthorized by the charter, but the city surely could not have incurred any obligation to pay anything to him. It might as well be contended that the State or county incurs a liability for the payment of fees and commissions to persons deprived of office by an intruder, yet it is believed that such a doctrine has never been advanced, and would hardly be seriously contended for by any one. In all such cases the law holds the intruder liable to the person legally entitled to the office, for fees and emoluments received, by the person thus intruding into it. The collector, is claiming fees for services which he has not rendered for the city, and they have no authority under their charter to pay him, even if they were so disposed and were to attempt it. But in either point of view, the plea presented no defense, and the court committed no error in sustaining the demurrer.

It is also urged, that the court below erred, in finding the damages at $3,611.09, when the declaration only claimed one thousand. It has been repeatedly and uniformly held by this court, that in actions of debt on penal bonds, assigning breaches under the statute, that it is error, if the jury fail to find both the debt and damages. And that it is not form but substance, and the omission cannot be supplied by the court. And no rule of practice is better established, than that in an action of debt, the plaintiff cannot recover damages beyond the amount claimed in his declaration. And this rule has been applied by this court to recoveries on penal bonds for the performance of covenants or conditions; *Fornier* v. *Faggott*, 3 Scam. R. 347; *Stephens* v. *Sweeney*, 2 Gilm. R. 375. In these cases upon penal bonds, the judgments were reversed, because the damages found on the trial exceeded the *ad damnum* laid in the declaration, and they are in point and decisive of this case. Whatever our opinion might have been, were the question an open one, we regard the practice too long and too well settled by our adjudications to be now disturbed. To do so, would lead to more inconvenience than benefit. It is only a question of pleading and practice,

and if we were to reverse the former decisions of this court because they do not conform to the English decisions, it is believed that it would lead to more inconvenience than benefit. These decisions have long been recognized and acted upon by our courts and the profession, and in a matter so easy to be complied with, we can perceive no urgent necessity for overruling decisions repeatedly and deliberately made, simply to make them conform to those of another country.

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

Judgment reversed.

Myron H. Fish and Milo Lee, Appellants, *v.* Elijah M. Roseberry, Appellee.

APPEAL FROM MERCER.

In actions *ex delicto*, it is seldom that courts will interfere with the finding of juries; but in actions *ex contractu*, where a measure of damages is usually furnished, and the proof and instructions are not properly considered, verdicts will be set aside.

When wheat is sold in the stack, there is an implied warranty, that it is merchantable.

This was an action of assumpsit, to recover the price of one thousand bushels of wheat, brought by appellee against appellants in the Rock Island Circuit Court, and taken to Mercer by a change of venue.

The declaration alleges that the defendants were indebted to plaintiff in the sum of $900, the price of eight hundred bushels of wheat sold, etc.; declaration also contained the common counts.

Plea, general issue.

The plaintiff to maintain the issue on his part, called as a witness, *Horatio Roseberry*, who testified, That he was the son of plaintiff; my father contracted to deliver to Fish and Lee, the defendants, eight hundred bushels of spring wheat, by the first of November, 1855, if possible, or as soon thereafter as it could be threshed and delivered; under this contract: "Rock Island county, October 18th, 1855. I have this day agreed to deliver to Fish and Lee, at the warehouse of Samuel Kenworthy, in Andalusia, eight hundred bushels of spring wheat, within one month if possible, for which I am to receive one dollar and twelve and one-half cents per bushel. E. W. Roseberry." And the same having been presented to and examined by the witness,

he said: "I don't know whether this is the paper," referring to the written contract between the parties.

To which objection plaintiff's counsel stated that said contract was obtained by defendants from plaintiff by fraud, and proposed to prove such fraud by witnesses, showing that defendant, Lee, misread the said contract to plaintiff, he being at the time of the execution thereof, unable to read the same, whereupon witness was further allowed by the court to testify in relation to said contract, as follows, to wit:

"I did not read the paper; that is father's signature; Mr. Lee, one of the defendants, was present; don't know who proposed to reduce the contract to writing. When I came into the house, they were writing; the defendant, Mr. Lee, sat down to write; after writing, he handed the contract to father to sign; he (father) said he could not read it, and looked for his spectacles; could not find them, and would trust to Mr. Lee's honor to read it; Lee then read it over: father refused to sign it; it specified a particular time for delivery, to which father objected, and Lee wrote another contract and read it to father; by its terms, as Mr. Lee read it, father was to deliver eight hundred bushels of wheat at Andalusia, by the first of November if possible, or as soon after as it could be threshed and delivered. In November this contract was made, think it was November—middle of October I should have said, in 1855. Mr. Lee put the paper in his pocket at that time; Mr. Lee came to buy father's wheat; they (Mr. Lee and father) went out to the stacks; I did not go with them to the stacks; Mr. Lee had wheat heads in his hand; they then went to the house, I went also; when I went in they had bargained for the wheat; Mr. Lee was to pay one dollar twelve and one-half cents per bushel, for eight hundred bushels of wheat. The wheat was to be delivered at Kenworthy's warehouse situated on the Mississippi river, about nine miles from my father's house; there was no specified time for the delivery, but to be delivered as soon as possible. I did not hear Mr. Lee say anything about whether satisfied with the wheat or not; he said that he wanted to purchase the wheat that was in the stacks; they were about an hour at the stacks; I went immediately to procure a threshing machine; could get none within three or four weeks; one Powers came on the last day of December to thrash the wheat; commenced New Year's day, 1856; they had many break downs which consumed a good deal of time; they were obliged to stop on account of cold weather, as the hands refused to work on that account; don't know how long this stop was; it was some days I think; the cold weather commenced about the second week in January; they continued threshing off and on during February; they kept

us in suspense on account of the machine breaking. Finished threshing all the wheat the last of February or first of March; we did not haul any wheat in till about the first of April; hauled with two wagons with cattle; got stuck in the mud, then quit till the roads improved; as soon as the roads would permit, commenced again and hauled until seeding time, then quit; in about two weeks commenced again and finished hauling about the first of June; delivered eight hundred and one bushels and some pounds; the wheat did not suffer any from the time we commenced threshing till delivered; the wheat was an average quality of that threshed from the stacks and it was as good when delivered as when threshed; father received no notice to my knowledge, not to deliver the wheat.

First agreement written was to deliver eight hundred bushels of wheat by the first of November, 1855, at Kenworthy's warehouse; the second contract as Lee read it, was to deliver by the first day of November, 1855, if possible, if not, as soon as it could be threshed and delivered; there was no difference in the two contracts, except as to the time of delivery; the written contract was the contract between the parties, but was misread by Lee, as to time of delivery only. I paid particular attention at the time Lee read it that way; father cannot read writing without spectacles; I could have read it; don't remember that my father told Lee that the wheat was good; it was hard getting machines that year; don't know of any machine that could have been had within a month from the date of the contract; could have got a machine from Holliday for a larger price, one cent per bushel; he offered to come in December, if we would give him his price, six cents; he threshed for some of our neighbors; I was out looking for a machine just after Lee was there; did not go to see Holliday at all; we stopped for cold weather, this was the second week in January; the machine was ready then, but we had some trouble about the hands, sometimes the machine was ready when father was not; we stopped three or four days on account of the cold weather; don't know how long we threshed then; cold weather did not stop us after the third week in January; the horse-power breaking, was another cause of stoppage; it took about three weeks to repair it. The crop was about sixteen hundred bushels; I guess we had about half of it threshed by the last week in January.

James Roseberry testified: I am son of the plaintiff; reside with him; Lee came to the house about the middle of October; said he would like to purchase wheat; said they were giving one dollar and ten cents per bushel at Rock Island; father wanted one dollar and fifteen cents per bushel; Lee said he would go down to the stacks and look at it; went down and

agreed to give $1.12½ for it; said he thought it was very good wheat, and that he would be able to give that for it; he wrote an agreement and read it over to father; father was not willing to sign it because he did not like the time for delivery; Lee took paper and wrote another, read it, and father signed it. He was to deliver the wheat by the first of November if possible, or as soon after as he could thresh and deliver it; contract was written on blue paper like this, (referring to contract offered in evidence,) and was about the same size. I heard Lee read it; father tried to find his glasses but could not; he could not see to read it without them; 'twas the wheat in the stack that Lee wished to purchase; this was the wheat delivered. Delivery completed about the first of May; completed threshing all our wheat about the first of March; the roads were bad; did not clean the wheat till after we finished threshing. I did not go expressly for a machine; the one we got did not separate very well; it broke down frequently and sometimes would require a week, and sometimes three or four days to repair it.

After they came back to the house, Lee offered one dollar twelve and one-half; father agreed to take it; the first agreement stipulated that delivery should be by a fixed time. I knew while Lee was writing the last contract, that it would give us more time; Lee read it, that father should deliver the wheat at Andalusia by the first of November if possible, or as soon thereafter as he could get it threshed and delivered, the only difference between the contract offered in evidence, and the way it was read by Lee, was in the time of delivery; Lee said that he wanted to purchase the wheat that was in the stacks; he bought eight hundred bushels of it. There was sixteen hundred bushels in all, one-half of it was threshed by the latter part of January.

Samuel Kenworthy testified: Fish and Lee, the defendants, engaged room in my warehouse in September, 1855, for storing wheat. Roseberry delivered a little over eight hundred bushels of wheat for Fish and Lee; about three loads were delivered in April, and the balance in May. In January, I think, Mr. Lee told me that he expected Roseberry to deliver some wheat. I offered one dollar and thirty cents in October for wheat and could not buy it; it may have been after the twentieth; in April and May it was worth eighty cents.

The wheat delivered by Roseberry was damp and musty; it was not merchantable; don't think millers would have paid over sixty or sixty-five cents for it; I supposed I received the wheat as warehousemen would have received it—just as I did, if Lee had never spoken to me about it. The oldest son, Horatio Roseberry, said the wheat was his; I gave him receipts in

his own name for the whole of it, and entered it upon my book as his. I wrote to Fish and Lee and informed them of the condition of the wheat; they answered that they would not have it. I think I did not receive the letter until after all the wheat was delivered, and some fourteen days after I wrote. Wheat raised some twenty or thirty cents per bushel in the space of a week or two in the month of October, 1855, I think after the twentieth; this wheat was not in a condition to keep without extraordinary care and attention; I specified this in the receipts. Roseberry, the plaintiff, afterwards told me to dispose of it the best way I could; the fore part of February the roads were good, the latter part they were rather soft, from Andalusia to Roseberry's; there might have been three days that it would have been bad hauling wheat. In March the roads were not so good. We received more wheat in April than any other month; I think the last of this wheat came in on the 6th of May; Roseberry, the plaintiff, said Mr. Lee would not take the wheat; I told him it would not keep without much trouble; he told me to do the best I could with it; Horatio Roseberry claimed all the wheat; the receipts were given in his name; old Roseberry drew none of it.

Horatio Roseberry re-called: The wheat I delivered did not belong to me, it was my father's; I lived with him and worked on his farm. I might have said to Kenworthy that it was my wheat; if I haul a load to town, I call it mine; I think I said it was father's wheat, but I am not certain.

Defendant then called *E. R. Powers:* I threshed for plaintiff in '56; threshed through the month of January, and but little in February; threshed three hundred bushels the first week; about the 20th of January we had 1,176½ bushels threshed; we were hindered by plaintiff many days; we had to run half-handed; machine hands had to fill the place of Roseberry; we had three small breaks that required about three hours each to repair; were not hindered any for two weeks up to the 20th; if plaintiff had furnished the hands he ought to have furnished, we could have threshed at the rate of one hundred and fifty bushels per day; I should not consider the roads very bad the latter part of January; my teams were on the roads then for about four weeks, and there was nothing to prevent hauling; when we quit threshing the roads were sloppy, but the ground was frozen underneath; the first obstruction to hauling was after the 14th of March; I told Roseberry that if he did not get away his wheat, that probably Fish and Lee would not take it; said he was not particular whether they did or not; thought that he could get better price, that there was no danger of the Russian war ceasing, and that wheat would come up

before harvest, and he had no doubt would be worth one dollar and fifty cents. He had some very good wheat and some very poor wheat; it had been wet and badly frozen; out of 1,600 bushels, I should think there might have been fourteen hundred that was damaged; as we threshed the wheat, wagons hauled it away, the good to one place and the bad to another.

Robert Whittaker testified: We commenced threshing the first day of January; the stacks of wheat had taken considerable wet and were frozen on the outside; there were several threshing machines in that neighborhood; this job was our first that winter; we could have threshed the wheat in November or December, if notified long enough beforehand. I lived about four miles from Roseberry's. Holliday had a threshing machine; he lived about a mile and a half from plaintiff's.

David E. Morse testified: I assisted in threshing plaintiff's wheat; some was in good condition, some badly frozen; I was there two days; think teams were hauling wheat from that neighborhood to Andalusia in February and March; think I delivered some in February; there were a number of machines around there; I saw this wheat at Andalusia; it was musty and unmerchantable; was at Roseberry's house about the first of May; Horatio Roseberry and Robert Harrington were there; I examined the wheat and said it was damp; they answered, yes; I asked if they had mixed the wheat, they said they had run the poor wheat through the wind mill, and taken out what ice they could, then mixed it with the good wheat; the bad would spoil the good.

Joseph T. Cooper testified: I assisted in threshing this wheat; about one-fourth of it was in bad condition; about one thousand bushels was threshed by the twentieth of January; we were hindered by Roseberry; could have threshed from one hundred and fifty to two hundred bushels per day with full hands; there was no difficulty in getting machines in the fall of 1855. Roseberry's sons refused to work, on account of the cold; don't know of any one else who did.

L. A. Chabat testified: It was May, 1856, that I first saw this wheat; it was musty, damp and unmerchantable.

Nelson Sherwood testified: I have known Lee and Roseberry for four years; about the 12th of May, 1856, plaintiff said he had eight hundred bushels of wheat in Kenworthy's warehouse to sell, that he had once sold it to Fish and Lee, but did not deliver it when he contracted to, and they would not have it, and that he wanted to sell to some one else; he said that Lee had scratched out part of the contract and added a part so as to alter it.

The court gave the following instructions for the plaintiff:

1. If from the evidence in this case, the jury believe that, on or about the 18th day of October, A. D. 1855, the plaintiff in this suit contracted to sell to the defendants, 800 bushels of wheat, out of wheat then in the stack upon plaintiff's premises and unthreshed, and that by the terms of such contract, said plaintiff was to deliver such wheat at Andalusia, at the warehouse of Samuel Kenworthy, by the first day of November, then next and following, if possible, or as soon thereafter as said plaintiff could thresh and deliver said wheat, and that the plaintiff, after such 18th day of October, made reasonable and proper effort to deliver such wheat at Andalusia as aforesaid, and did within a reasonable time thereafter, deliver said 800 bushels at the place provided for in the contract, then the defendants are liable to pay said plaintiff the price agreed upon by said parties as the price of said wheat, provided the plaintiff used proper care in preserving said wheat from harm before delivery, and delivered said defendants an average quality of wheat threshed from plaintiff's stacks, mentioned at the time said contract was made.

2. If from the evidence in this case, the jury believe that the plaintiff contracted to sell, and the defendants agreed to buy, 800 bushels of wheat, which wheat was to be threshed from and out of stacks of wheat that plaintiff then had on hand, then the law would imply that such wheat was to be of an average quality, as compared with the entire quantity in such stacks, and it would make no difference whether such wheat was merchantable or not, as the defendants, under such circumstances, would receive the precise article they contracted for, and would have no right to complain, unless the plaintiff did or permitted some act or thing, by which the average quality of said wheat was impaired.

3. If from the evidence, the jury believe that the plaintiff was induced by the defendants or either of them, to sign the written contract offered in evidence, by the fraud and circumvention of either of said defendants, then the plaintiff in this case is permitted to prove the true contract between the parties by parol, and if under such circumstances the jury believe, from the evidence, that the plaintiff has *reasonably* performed such parol contract, if found to exist in respect to the sale and delivery of said 800 bushels of wheat at Andalusia, then the plaintiff is entitled to recover in this suit, provided that in other respects the plaintiff has performed his part of said parol contract.

4. If from the evidence, the jury believe that the parties to this suit extended the time for the delivery of said wheat, they

might lawfully do so, whether such contract was in parol or in writing, and the evidence of such extension may be inferred from circumstances proven to exist. Thus, if from the evidence, the jury believe that Lee, one of the defendants, in January, 1856, expressed a willingness to receive said wheat from the plaintiff, or directed his warehouseman to do so, it is proof tending to show that the time of the delivery was extended beyond the time mentioned in the written contract.

5. If from the evidence in this case, the jury believe that the defendants, or either of them, on or about the 18th day of October, 1855, by fraud and circumvention, induced the plaintiff to sign a written contract for the sale and delivery to them of 800 bushels of wheat, then the jury are bound by the law of the land to disregard such written contract, utterly and entirely, when offered in evidence as proof of such contract; and if, in this case, the jury, from the evidence, believe that the defendants or either of them, when reading to the plaintiff (being unable to read) the written contract offered in evidence, misread the same in any material part, and thus induced the plaintiff to sign said contract, then such contract is not binding upon the plaintiff, and is wholly void as to him.

6. If from the evidence in this case, the jury believe that Lee, one of the defendants, in reading to the plaintiff the contract offered in evidence, (he, the plaintiff, being then unable to read the same,) materially misread such written contract, as to the time of the delivery of the wheat spoken of in said contract, and thus induced the plaintiff to sign the same, such an act on the part of Lee would vitiate and render void such contract as to the plaintiff in this suit.

To the giving of all which instructions the defendants excepted, which exception the court overruled and gave said instructions.

The defendants then requested the court to instruct the jury as follows:

1. The court will instruct the jury that they are the sole judges of the credibility due the testimony of all witnesses testifying before them, and are not bound to believe that of any witness whom they believe unworthy of credit, notwithstanding the character of such witness for truth and veracity, has not been formally impeached by the testimony of any other witness.

2. A witness who makes knowingly contradictory statements in regard to any material fact in issue before them, is unworthy the credit of a jury.

3. The court will instruct the jury, that if they believe from the evidence, that plaintiff admitted that he had sold the wheat to defendants, but that he had not delivered it when he

agreed to, that defendants were not bound to receive it, they will find for the defendants.

4. The court will instruct the jury that the admissions of the plaintiff are evidence against him.

The court will instruct the jury, that in no event were the defendants bound to receive unmerchantable wheat of the plaintiff.

The court will instruct the jury, that if they believe from the evidence, by the admissions of plaintiff, that he had not delivered the wheat in the time required by the contract, they will find for the defendants.

5. If the jury believe, from the evidence, that the plaintiff contracted to deliver 800 bushels of wheat within one month from the 18th day of October, 1855, at Kenworthy's warehouse in Andalusia, if possible, and that it was reasonably possible to do so, and that plaintiff did not deliver said wheat within that time, then the jury must find a verdict for the defendants, unless they find that defendants afterwards accepted the said wheat under same contract.

6. If the jury believe, from the evidence, that plaintiff contracted to deliver 800 bushels of spring wheat at Andalusia, at Kenworthy's warehouse, by the first day of November, A. D. 1855, if possible, if not, as soon after as it could be threshed and delivered, and that it was not possible to deliver said wheat by the said first of November, then the jury must believe that the plaintiff used all diligence and exertion in getting the same threshed and delivered as soon after said first day of November, A. D. 1855, as possible, or the plaintiff cannot recover.

7. The law is, that the wheat to be delivered on a contract to deliver a certain number of bushels of wheat, is to be of a fair, merchantable quality, and therefore if the plaintiff, under the contract, only delivered wheat which was not of a fair, merchantable quality, he cannot recover upon said contract.

8. Wheat of a fair, merchantable quality, means good fair wheat in market, without reference to whether the season has generally damaged wheat or not.

9. A contract for the purchase of 800 bushels of wheat to be threshed and delivered by the seller, is not a purchase of the unthreshed wheat, and such wheat would remain the property of the seller until the same was delivered under and according to the contract.

10. If the jury believe, from the evidence, that there was an extension of the time for the delivery of said wheat, by the said defendants, then the jury must further believe, from the evidence, that the wheat was delivered in strict compliance with

the terms of said extension, otherwise the jury must find for defendants.

And further; the mere statement of defendant to Kenworthy, that he expected Roseberry would deliver some wheat, is not of itself evidence of such extension.

And the court then gave all said instructions as asked by the defendant, except the 3rd, 4th and 6th, and then and there refused to give the said 3rd, 4th and 6th instructions as above asked, but modified the same. (Which instructions as modified are in the words and figures following):

3. The court will instruct the jury, that if they believe, from the evidence, that plaintiff admitted that he had sold the wheat to defendants, but that he had not delivered it when he agreed to, that defendants were not bound to receive it, and that defendants did not receive it, and if from the evidence they believe such to be the fact, they will find for the defendants.

4. The court will instruct the jury that the admissions of the plaintiff are evidence against him; but that all the admissions of a party made at the same time and in the same conversation, both for and against himself, must be considered and weighed by the jury.

4. The court will instruct the jury, that in no event were the defendants bound to receive unmerchantable wheat of the plaintiff, unless they believe, from the evidence, that the defendants purchased certain wheat of plaintiff of a different quality after a fair examination of its quality, or purchased certain wheat then in stacks, with a fair opportunity of examining its quality. The court will instruct the jury, that if they believe, from the evidence, by the admissions of plaintiff or otherwise, that he had not delivered the wheat in the time required by the contract, they will find for the defendants.

6. If the jury believe, from the evidence, that plaintiff contracted to deliver 800 bushels of spring wheat at Andalusia, at Kenworthy's warehouse, by the first day of November, A. D. 1855, if possible, if not, as soon after as it could be threshed and delivered, and that it was not possible to deliver said wheat by the said first day of November, then the jury must believe that the plaintiff used all reasonable diligence and exertion in getting the same threshed and delivered as soon after said first day of November, A. D. 1855, as was reasonably possible, or the plaintiff cannot recover.

To the modification of said instructions, the defendant excepted, which exceptions the court overruled, and gave the said instructions, as modified.

After which the jury returned a verdict for the plaintiff, and

assessed his damages at nine hundred dollars. The defendants entered their motion for a new trial, for the following reasons:

1st. That the court gave to the jury in the case, on behalf of and for the plaintiff, erroneous instructions.

2nd. That the verdict of the jury was against the instructions of the court in the cause.

3rd. That the verdict of the jury was contrary to the evidence in the case.

4th. That William I. Nevins, one of the jurymen who tried the cause, was, when said case was tried, over sixty years of age.

Which motion the court overruled, and rendered judgment on the verdict. The defendants excepted, and prayed an appeal.

The errors assigned are:

1. The court erred in giving each of the instructions asked for by defendant.
2. The court erred in modifying defendants' instructions.
3. The court erred in overruling motion for a new trial.
4. The court erred in rendering the judgment.

B. C. Cook, for Appellants.

Beardsley & Smith, for Appellee.

Breese, J. We are satisfied on an examination of the facts of this case and the instructions of the court, that a new trial should be awarded. It is true, as a general rule, courts will not interfere to set aside verdicts, where it is believed the jury has decided against the weight of evidence, and against the instructions of the court, provided it appears from the whole record, that substantial justice has been done. This is pre-eminently the rule in actions *ex delicto*, where juries have no well assigned limits within which to bound their judgments. It is somewhat different in cases *ex contractu*. Such cases furnish of themselves the rule, and whenever juries transgress it, their verdicts should be unhesitatingly set aside.

The meaning of the contract in this case, taken in its most favorable aspect for the appellee, is, that he should make all reasonable efforts to deliver the wheat if not by the first of November, as soon after that day, as by the exercise of reasonable diligence he would have been enabled to do. The proof is, we think, conclusive, by such exercise, he could have delivered the whole quantity contracted for by the first, or middle of December. A man really desirous of performing such a contract, could have delivered the wheat, and without extraordinary exertion, by the first day of December. This the whole testimony fully shows. *Eldridge* v. *Rowe*, 2 Gilm. R. 96; *Taylor*

v. *Beck*, 13 Ill. R. 386. Speculating upon the chances of the war with Russia being prolonged which would raise the price of wheat to one dollar and fifty cents per bushel, may account, perhaps, for his long neglect in the delivery. He has shown no diligence or desire to perform the contract.

The proof shows also, that as late as May 12th, appellee did not consider that he had performed the contract, as at that time he offered to sell the wheat then in the warehouse, stating that he had once sold it to appellants, but had not delivered it according to contract,—that they would not have it, and wanted a purchaser. *Bannister* v. *Read*, 1 Gilm. R. 92–100.

Besides, it is proved, the wheat when delivered, was damp and unmerchantable, not such wheat as the appellants had contracted to purchase. Exposed the whole winter and part of spring to the weather, it had ceased to be such an article as they had contracted for in the preceding October. When in the stack, there was an implied warranty, that the wheat was merchantable. *Misner* v. *Granger*, 4 Gilm. R. 69.

There is proof also, and well worthy the attention of the jury, that the wheat was actually the property of Horatio Roseberry, the principal witness in the cause. The warehouseman receipted to him for it, he claiming it as his own, at the time of delivery, and it was so entered on the books.

Under the contract as proved, the greatest degree of diligence was required of the appellee, to deliver the wheat at the earliest possible day. The first instruction, seems to be based upon a less degree of diligence as requisite on his part, and if it deteriorated, before its delivery, the loss must fall on the appellants. A more unjust proposition could not be stated. The jury are in effect told, that the appellee may idle away his time, his sons refuse to work when they might work,—no great effort be made to obtain machinery for threshing, and no care taken to protect it from the weather, and if thereby, there is a loss by injury to the wheat, the appellants must bear the loss. This is neither law, justice or good sense.

The appellee has made out no case whatever against the appellants. He has neither performed his contract, nor endeavored to perform it. The appellants have never received the wheat, nor are they shown to have been in fault; and no verdict, under the proof in the record should be rendered against them. Parties should be held to a reasonably strict performance of their contracts, as well for the delivery of wheat as any other article, and cannot be permitted unusual delay, waiting for a rise in the price, and failing in that, deliver the article when the price is down. The instructions given on behalf of appellants were substantially correct, as well those modified, as those originally

asked, but the jury seem to have disregarded them. The justice of the case being wholly with the appellants, the judgment, for the reasons given, is reversed and the cause remanded.

Judgment reversed.

John Denman, Appellant, *v.* Augustus J. Bayless, Appellee.

APPEAL FROM McLEAN.

Unless the submission requires it, it is not necessary that an award should be published, or that notice of it should be given to the parties. Nor need it be in writing.

The terms and directions of the submission, should control the arbitrators.

It is not error to refuse to let one of the arbitrators testify, that he did not intend to surrender the award, after it had been agreed upon and signed, unless the losing party should consent.

This was an action of debt, commenced by Bayless against Denman in the McLean Circuit Court, on an award.

The declaration contains a special count on the award, and the common counts.

To which declaration the defendant pleaded the general issue; and gave notice as follows: The plaintiff will take notice that under the above plea that the defendant will offer evidence and insist that the award sued on and set up in plaintiff's declaration, was made up and had by collusion and fraud of the plaintiff and Dolman, and a majority of the arbitrators, or with some of them, and for that reason, that the same is not binding upon defendant. That defendant had no notice of the time or place of meeting of the arbitrators, and no hearing of the matters in difference before them, between the plaintiff and defendant; that the award sued on was never published as the award of the arbitrators.

The cause was submitted to a jury, who returned a verdict for plaintiff; whereupon the defendant moved for a new trial, which motion the court overruled, and entered judgment for the plaintiff below, for the sum of two hundred and forty dollars, debt, and one cent, damages.

The defendant below prayed an appeal to the Supreme Court.

Bayless, the plaintiff below, proved, on the trial of said cause, the signature of Augustus J. Bayless, John Denman, John W. Hanson, Samuel Watson, and John A. Dolman, to the submission, appointment of umpire, and award; and then the

plaintiff gave in evidence the submission, written appointment of umpire, and award, and then proved by *Samuel Watson*, one of the arbitrators, that John A. Dolman was the umpire, and that he and the other arbitrators all signed the award.

Watson, on cross-examination, testified that Bayless and Denman both appeared before the two arbitrators, named in the submission, and then made statements that the two named in the award could not agree: that then Dolman was brought in by Bayless; that they selected him as umpire; that Dolman was the most active in making out the award; that Denman was not present after Dolman was selected as umpire, nor was he present when award was made; that no evidence was given before Dolman; that the matter was talked over alone; that they all three signed the award, and that he took it for the benefit of the parties, and locked it up in his safe. He further testified, on cross-examination, that he did not know how the award was taken from his safe; that he never delivered it either to Bayless or Denman, or anybody for them. The defendant then offered to prove by Watson, that he never intended to deliver the award as the award of the arbitrators, unless Denman was willing and assented to the award, and that he never delivered the award, and never should have done it until he had seen Denman and inquired of him about it, which he never did do; to the offering of which testimony the plaintiff then and there objected, which objection was sustained by the court. To which decision the defendant then and there excepted.

There was nothing in the submission, requiring the award to be in writing, or requiring a notice to be given to the parties.

The errors assigned are:

1st. That the court erred in not granting a new trial.

2nd. That the court erred in rejecting the testimony offered by the appellant, the defendant below.

J. M. Scott, for Appellant.

W. B. Scates, and R. E. Williams, for Appellee.

Breese, J. The appellant insists that to make the award binding on him, it should have been published, and reference is made to 1 Greenleaf Ev., sec. 75; 9 Mass. R. 198, and 15 Johns. R. 197.

It is said by Greenleaf, in his Treatise on Evidence, that it is essential to allege and prove that the award was published, and an award is published whenever the arbitrators give notice that it may be had on payment of the charges. (Greenleaf Ev., sec. 75.)

For this doctrine, reference is made to the case of *Kingsley* v. *Bell*, 9 Mass. R. 198. In that case it was held, that a declaration containing no allegation that the award was published, or made known to the defendant, except by bringing the action, was fatally defective. This is so, doubtless, when publication is provided for by the submission, not otherwise. It was said in *Hodsden* v. *Harridge*, 2 Saund. R. 62, note (4), That an averment that the defendant had notice of the award was not necessary, unless it be expressly stipulated in the submission that the award should be notified to the parties, for it is a general rule that when a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requisite. We would therefore understand, that in the case of *Kingsley* v. *Bell*, it was provided in the submission that the parties should be notified of the award.

In *Sellick and Sellick* v. *Adams*, 15 Johns. R. 197, the parties expressly stipulated in the submission, that "the award of the said arbitrators or any two of them, be made and set down in writing under their, or any two of their hands and seals, ready to be delivered to the said parties in difference on or before the 18th of July next ensuing."

In this case, the submission does not require the award shall be in writing, or any notice, whatever, given of it.

The publication of an award by giving parties notice of it, are matters of agreement between the parties to the submission, and unless it is so provided, it is neither necessary to publish it or give notice to the parties.

Neither is it necessary to make the award in writing, unless required by the submission, and therefore a parol award on a submission in writing, would be good. Watson on Arbitrations and Awards, 89.

All that is requisite for arbitrators to do, is to regard the terms and directions of the submission, and follow them, so that when the submission provides that the award shall be in writing, under the hand of the arbitrator, the award to be valid must be under the arbitrator's hand as well as in writing. When it is to be in writing under the hand and seal of the arbitrator, an award in writing only is insufficient. Therefore unless prescribed by the submission, the award need not necessarily be in writing, for a verbal award is perfectly valid. Russell on the Power and Duty of an Arbitrator, 206–7.

Upon the point made by appellant, that certain testimony offered by him was excluded, we have only to say, it was of such a character as to justify the court in so ruling. He proposed to prove that one of the arbitrators, who both agreed to and signed the award, and who took charge of it for the benefit of the

parties, never designed to deliver the award without the consent of the appellant.

The very idea is monstrous—that an award duly made and signed, and delivered by the arbitrators to one of their body, or to any other person for the benefit of the parties, shall be defeated if the unsuccessful party shall not agree to it! And what is to be thought of an arbitrator who shall swear that although he agreed to the award and signed it, yet he never intended that the party in whose favor it was made, should have the benefit of it, without the other party consented to it. It is strange indeed that it should be supposed the unsuccessful party has any consent to give or withhold. He is bound by the award, and an arbitrator cannot consider the wishes of either party, in regard to the award, after it is agreed upon and signed. Like a juror when he has made up and rendered his verdict in the case, his power is gone, and his verdict must stand. The court properly rejected all such testimony—it had nothing to do with the case, and in no way affected the right of the plaintiff to recover.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Stephen Merritt *et al.*, Appellants, *v.* John G. Farris *et al.*, Appellees.

APPEAL FROM MARSHALL.

Where a notice of an election for a school district specifies several purposes, in such a way as that no doubt is left as to its meaning, it will be sufficient, although there may be an omission in it of a copulative conjunction.

The directors of a school district may levy and collect a tax to erect a school house, the cost of which is not to exceed one thousand dollars, without a vote of the inhabitants; and may also levy and collect a tax to keep a school six months in each year, in addition to the amount provided by the State and township fund.

There is not any limitation upon the rate of taxation for school purposes.

Where it appears that a site for a school house has been chosen, it will not be invalidated because the clerk has made irregularities or omissions, in describing the site selected.

The omission to tax some property in the district, will not vitiate the tax.

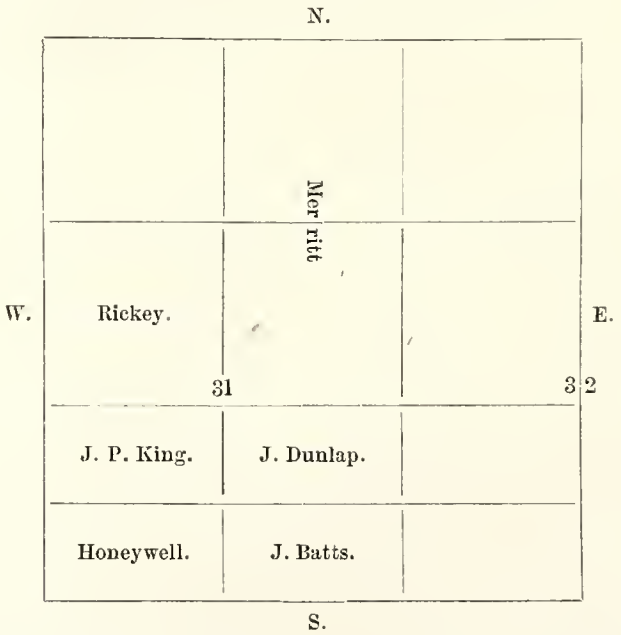
Equity will not restrain the collection levied by officers *de jure* or *de facto*, because of irregularities in their levy or collection.

This was a bill in chancery, filed by Stephen Merritt, James P. King, Samuel Rickey, John Dunlap, Jr., William S. Honeywell, William Murray, John Batts, M. Shackleford, and H.

Beaumont, complainants, in the Marshall Circuit Court, at the January term, A. D. 1859, to enjoin the collection of a school tax levied by the directors of school district No. 10, in Township 13 N., Range 9 East, in that county. The injunction was granted, and at the same term the respondents filed their answer and affidavits in its support, and moved the court to dissolve the injunction, which was done, and the bill dismissed. The plaintiffs in error, who were the complainants below, appealed to this court.

The bill alleges that the complainants are residents and tax payers of Marshall county, Ill., and that they are all, except Stephen Merritt and Samuel Rickey, residents of school district No. 10, in Township 13 North, Range 9 East, in said county; and that said Rickey is the owner of real estate in said district, and Merritt is the owner of both real and personal estate in said district, all of which is subject to legal taxation.

The district is composed of section 31, the south half of section 30, the west half of section 32, and the south-west quarter of section 29, according to a plat filed as follows:



That John G. Farris, Harmon Andrews, and Warner Combs pretended to act as school directors of said district, up to October last, and that Harmon Andrews, Warner Combs and Daniel Diel now pretend to act as directors of said district, as successors of the first named directors.

That Farris, Andrews, and Combs, while pretending to act as school directors of said district, and assuming so to act, attempted to authorize and cause to be levied an enormous and burthensome tax on the property of said district, and by such

attempt have wrongfully induced Washington E. Cook, the county clerk of said county, to assess and compute said taxes upon the valued property of said district, which is very grevious to the property holders of the district and particularly to complainants.

That the first named directors made and signed a certificate on the 8th June, 1858, and returned it to the clerk of the county, by which they authorized and required, and certified that they had estimated to be levied a tax of *one per cent.* for extending schools beyond six months, and *six* per cent. for ordinary school purposes, making *seven* per cent. upon the property of the district.

The certificate is attached, and is as follows:

"We, the undersigned, directors of district No. 10, Township No. 13, Range No. 9, in the county of Marshall, and State of Illinois, do hereby certify that said board have estimated and required to be levied, for the year 1858, the rate of six for general school purposes, and the rate of one for paying teachers and extending term of schools on each one hundred dollars valuation of taxable property in said district."

That the clerk, in compliance with said certificate, assessed and levied seven per cent. school tax (on the $100) on the property of complainants, as follows:

	Valuation.	*Tax.*
Stephen Merritt, ne 31 and se 30	$2,240	$156.80
Sam'l. Rickey, nw 31	1,280	89.60
W. S. Honeywell, sh sw 31	600	42.00
Jas. P. King, nh sw 31	600	42.00
John Dunlap, jr., nh se 31	455	31.85
John Batts, sh se 31	585	30.90
Personal Property:		
S. Merritt	494	34.58
M. Shackleford	357	24.99
Jas. P. King	241	16.87
W. S. Honeywell	194	13.50
Wm. Murray	162	11.34
John Batts	209	14.53
John Dunlap, jr.	189	12.23
H. Beaumont	75	6.25

Which tax was wrongfully made by said clerk, and is now in the hands of William Reeves, the tax collector of the township, with a warrant attached thereto for collection, and the collector is demanding payment and threatening to collect the tax by a levy and sale of the property of complainants.

That there are several persons, residents of the district, who

own and have owned for a year past a large amount of personal property, upon which no tax is levied for school purposes.

That Mary Grief has property valued at	-				$250
Levi Tonquary,	"	"	"	" -	- 100
David Gill,	"	"	"	"	- 900
Geo. Cook,	"	"	"	" -	- 300
					$1,550

Upon which the tax at above rates would amount to $108.50.

That said taxes as levied amounted to $981.82, and if the personal property omitted had been taxed, would have amounted to $1,090.32.

That no election has ever been held in the district to fix upon a site for a school house, or for building or buying a school house, and no election for any purpose had been had, except for directors; nor has any notice of any election for any purpose (except for electing directors) been posted up or given; no school house site has been purchased or obtained.

That the number of scholars in the district is very small, and it would not cost over $200 to procure good teachers for six months, and pay all expenses, and that a suitable school house, large enough to accommodate all the scholars of the district, could be built for $400 at furthest.

That the law does not permit a tax of over three per cent. to be levied.

That the house in which the school is kept is not central; that it was not located or erected by the people; that it is claimed by one John G. Farris, and is not the property of the district. That Farris never had a good title to the land on which it is built; that he has deeded it in trust to D. G. Warner, and the land is now liable to be sold.

That said directors had no power, right or authority to levy the tax, or authorize it to be levied, and that in doing so they exceeded their powers, both in the amount levied and in the right to levy the same, and that the clerk had no power to assess said tax, nor has the collector authority to collect it.

The oath of defendants is waived, and an injunction prayed against the collector and all the defendants, to restrain the collection of the tax.

The answer of the defendants admits that complainants are all residents and tax payers of Marshal county, and are all residents of the school district except Merritt and Rickey, who own real estate in the district, but Merritt has no personal property in the district, to the knowledge of respondents.

That said school district is properly described in the bill.

Admits that the persons named in the bill acted as directors, as set forth, and insists they were and are directors in fact. Admits that Farris, Andrews and Combs, as directors, did cause the tax to be levied, as set forth in the bill, except the tax was not levied to extend the school beyond six months in the year, and excepting further that the directors returned with the certificate a list of the resident tax payers of the district. That in pursuance of the certificate, the directors assessed and levied the tax as set forth.

They admit that Rowe is collector of taxes for the township, and that he has in his hands a collector's warrant from the clerk, to collect the tax except as hereinafter set forth.

Admit that Mary Grief, Tonquary, Gill and Cook, are not assessed as charged in the bill, but aver that Grief and Tonquary were returned in the said list of resident tax payers of said district to the clerk, and were not taxed, because they were not assessed or returned as tax payers by the assessor of the town for the previous year, and that said Gill never was taxed because he could not be found by the assessor, and has never lived in the district.

Allege there was a vote of the people of the district, on the 6th of April, 1857, to decide upon a site for a school house, and for building a school house, and it was voted that the directors should proceed to build a school house upon said site, of brick, twenty-one by thirty feet.

They assert that due notice of the meeting was given by posting up a notice in the district, on the 23rd of March, 1857, calling for an election of directors, and for selecting a school house site.

That at the meeting John G. Farris offered to give one-half acre of ground for a school house site, which was accepted; and that he had since deeded the land, by a good warrantee deed, to the district.

Allege that the district contains forty-seven children under twenty-one years of age.

Admit that $200 would employ competent teachers for all the schools in the district for six months, and pay all expenses.

Deny that a suitable school house could be built for $400, and allege that they have built a school house on the site selected by the voters, of dimensions required, which cost $761.60. That the directors, Farris, Andrews and Combs, built the school house in the cheapest and most economical manner.

Admit the tax is over three per cent., but assert they had a right to levy a greater tax.

Allege the school house is in as central a situation as it can be placed, unless it is put in the centre of a section where there

are no roads. That the school house is not over three-fourths of a mile from any house in the district.

Allege that the school house is the property of the district, and is not claimed by Farris. Admit that Farris did make a deed of trust for the land, and allege that said trustee has released all claim to the half acre upon which the house is situated.

Allege that the school house was built in pursuance of the vote; that it cost over $700, and was completed and ready for school about the first of November, 1857, and the directors have caused a suitable school to be kept therein six months in each year ever since.

That said Andrews, Combs and Farris, as directors, in the spring and summer of 1857, in good faith, caused a tax to be levied on the property of the district, of $500, which tax they supposed would be sufficient to make the first payment to the builder of the house for 1857.

That the tax so levied would have made the payment intended. That the collector of the town, for 1857, proceeded under a proper warrant to collect said tax, and did collect $317.00 thereof, when certain of the tax payers of the district, among whom were Merritt, Rickey and King, obtained from the Circuit Court an injunction restraining the collection of said tax, which injunction was made perpetual by the court.

That after they were so enjoined, and in 1858, they proceeded to levy another tax upon the taxable property of the district to pay for building said school house, and keeping up the school six months in the year, (which is the tax complained of in this case.)

The tax was six per cent. for building the school house, and one per cent. for schools. That the persons who paid the tax assessed in 1857, were to be repaid out of the tax assessed in 1858. That the collector, Wm. Rowe, was authorized by the directors to receive in payment of the taxes of 1858, the receipts or certificates given for the taxes of 1857, of the persons who had paid the taxes of 1857. Which receipts amounted to $317.28, which, if deducted from the tax of 1858, of $981.82, would leave a balance of $664.54 only.

That neither Merritt, Rickey or King ever paid anything on the subscription for supporting the school in 1857; that Merritt sent one of his children to the school; that Rickey had a tenant who sent two children, and paid no tax or subscription; and that King had no children.

That in the school now kept there are children of the tenants of Merritt and Rickey, and the children of Murray and Honeywell are going to the school, and Batts is sending one scholar.

That at the time of the meeting of the voters to build a school house, Honeywell did not live in the district; that at said meeting Merritt was a voter and one of the judges of election, and a candidate for school director; that King and Murray were not at the election, and Dunlap and Murray did not then live in the district.

That Murray owns no real estate in the district, and is not a permanent resident, and expects to leave on the first of March.

The election notice is set forth. It is dated March 23, 1857, and says the election is for the purpose "of electing three directors for selecting a school house site, and for a school house site for said district," and is signed, "Timothy Atwood, T. T."

The election was held April 6th, 1857. It was voted to accept half an acre of ground for a school house site, and that the directors be instructed to build a house, thirty by twenty-one feet, of brick. Warner Combs, Harmon Andrews, and John G. Farris were elected school directors.

Proof was taken to show that the notices were posted up as set forth in the answer.

The court dissolved the injunction and dismissed the bill; whereupon the complainants appealed to the Supreme Court.

Complainants now allege, that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, manifest error hath intervened to their prejudice in this:

1st. The court erred in dissolving the injunction and dismissing the bill.

2nd. The Court erred in not making said injunction perpetual.

For which errors the said complainants pray that said judgment may be reversed, annulled, set aside, and for nought held.

G. L. Fort, and H. M. Weed, for Appellants.

W. H. L. Wallace, for Appellees.

Walker, J. The complainants by their bill, seek to enjoin the collection of a district school tax, because of alleged irregularities in its levy. The first objection urged is, that the notice calling the election, is not sufficiently specific, as to the purposes of the election. It specifies the objects to be, for the purpose "of electing three directors, for selecting a school house site, for a school house for said district." The notice clearly specifies the first object to be the election of three directors, and another object clearly indicated by the last clause, was for the selection of a site by the voters, upon which to erect a school house. It is true that the person drafting the notice, omitted the copulative conjunction "and," after the word "directors"

and before the words " for selecting," but we cannot see that there is any doubt in its meaning, and it would have been no plainer if the omission had not occurred.

It is also insisted, that directors have no power to levy a tax for the erection of a school house, when the cost shall not exceed one thousand dollars, but the tax for such purpose must be voted by the district, without reference to its cost. The construction given by this court, in the case of *Munson* v. *Minor*, to the school law, was that the directors have the power to levy and collect a tax for the erection of a district school house, when its cost does not exceed one thousand dollars, without the sanction of the voters of the district, and that they have a like power and that it is imposed as a duty, that they should estimate the amount required over and above the State and township fund, to keep in successful operation the schools of their districts, for six months in each year, and to levy and have collected, a tax sufficient to raise such amount. In this case, the tax was levied to build a district school house which cost less than eight hundred dollars, and to continue the schools of the district after the State and township fund was exhausted, for the period of not more than six months in the year, and they were warranted in this by the law. The certificate returned to the clerk specifies these purposes, and is in strict compliance with the statute and even in the form, given by the 44th section of the act. While the per cent. levied is large, we are, after a careful examination of the law, unable to find any limitation upon the rate of taxation for school purposes. In cases where the power is given to the directors to make the levy, there is no limit but the amount required for the purpose for which it is levied, and the same is true where the power is conferred upon the voters of the district.

It was likewise insisted, that the site for the school house, was not selected by the voters of the district. The answer and evidence shows that a site was chosen by a majority of the voters, but the clerk of the election did not describe it by metes and bounds, but only by general reference. The answer and affidavits also show, that the site thus selected has been conveyed to the district, by the person who owned it at the time it was selected. This being the case, no objection is perceived to the levy of the tax for the reason urged. It is not believed that it is material to the validity of the selection, that the clerk of the election should describe the place chosen with precision, in entering upon his records the fact that the voters made choice of a site. His record in no way alters or controls the fact of the site having been selected. It is a fact, that he has no power to alter or control. And when the selection has been made and the district has obtained the title to the property chosen, the

object of the law has been attained, and trifling and unimportant matters of form, should not be permitted to defeat the purposes of the law.

It was also insisted that a portion of the persons in the district liable to taxation, as well as a portion of the taxable property situated in the district, were not assessed, and that the tax was thereby rendered void, as being in violation of the 5th section of the 9th art. of the State constitution. That provision 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." It is first urged, that this levy is not warranted by the constitution, because it is not uniform as to persons and property, within the jurisdiction of the corporate body imposing the tax. The constitution, in its application to the various departments of the government and to individual rights, must receive such a construction as to give it a practical operation. It must be so applied as to promote and effect the objects of its adoption, and not to defeat the end for which it was established. Equality is provided for, both as to persons and property, in the levy and collection of all taxes by the constitution, whether for State or other purposes. And to hold that the omission to assess an individual, or to assess property, liable to taxation under the revenue laws, will render the whole tax levied under that assessment, to the extent of the revenue of which it forms a part, to be void, instead of accomplishing the object of the constitution, would only render its provisions authorizing the collection of revenue inoperative. If the omission to assess an individual, or to assess property liable to assessment, would render the whole district school tax void, it would for the same reason, render the whole township, county, and State levies equally so, when made by the same officer assessing for each of them. These taxes are all levied on the assessment made by the township or county assessors. And if his omission to assess property, destroys the equality of the entire tax of the district, it has the same effect upon the State, county and township tax, as the omitted property is liable to be assessed for all of these purposes, and its omission increases the burthen of other tax payers, to the extent of the amount it would have yielded. The framers of the constitution could not have designed, that such an omission should avoid the tax levied upon the property, which is regularly assessed. They intended to require, and did require, that the law should provide for a uniform mode of assessment and collection, which would not sanction exemptions from the burthens of taxation,

and they imposed the duty upon the officers acting under the revenue laws, of executing them fairly and impartially, but it never could have been intended that their omissions, should render the whole tax void, and to suspend the collection of the revenue. If an officer willfully and corruptly, or from gross negligence, were to make such omissions, he would doubtless be liable to make compensation in damages, to those suffering injury.

It was also urged, that this tax was not levied and collected by the school district, as contemplated by this provision of the constitution, as the assessment was made by the township assessor, and collected by the township collector, but it could only be assessed and collected by officers of the district. The law authorizes the directors to adopt the general assessment for the purposes of taxation, and upon it, to make their levy, and when made it is collected for and paid over to them. The various officers, concerned in the collection of the district school tax, are for the purposes of that tax, under the law, as fully district officers as if they were elected for the purpose by the voters of the district. And the mode adopted for the assessment and collection of this tax, leaves it entirely under the control of the district, and when it is done, the assessment and collection of the tax, is virtually made by the district.

This court, in the case of *Munson* v. *Minor*, *post*, and in the case of *Chicago, Burlington and Quincy Railroad Company* v. *Frary*, *ante*, p. 34, held that equity will not restrain a tax levied by officers either *de jure* or *de facto*, where the power to levy a tax is an incident to their office, and that mere irregularities and informalities in its levy or collection will not be inquired into by a court of equity, but that the parties supposing themselves aggrieved will be left to seek their remedy at law. In this case we find these defendants acting as directors, and the law having conferred upon them the power to levy this tax, even if the objections had as a matter of fact, been well founded, we could not hold that a court of equity has the power to grant relief.

The decree of the Circuit Court must be affirmed.

Decree affirmed.

John L. Marsh, Appellant, *v.* James O. Bennett, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

Pleas which profess to answer the declaration, but only answer a part of it, are obnoxious to a demurrer.

In an action on a note, a plea which sets up, that the maker and payee of the note were owners of land, and that the payee took a conveyance of the land, in order to sell it on joint account, and gave the note as security for the prompt payment of the purchase money when the land should be sold, that it remains unsold, etc., the payee being anxious to sell, etc., is good, as showing a want of consideration.

This suit was brought in the Peoria County Court, for the June term, 1858. The plaintiff below filed a declaration upon a promissory note, containing two special counts and also the common counts. The defendant below demurred to the declaration, which was sustained as to the first special count, and overruled as to the others. Plaintiff below then filed an amended declaration.

To this amended declaration the plea stated in the opinion was filed.

The cause was tried at the January term, 1859, before the Judge of the Peoria County Court, and a jury.

The jury retired and brought in a verdict for the plaintiff for $1,927.36, and defendant moved for a new trial.

The court overruled the motion for a new trial, and rendered judgment on the verdict. Defendant excepted, and prayed an appeal.

H. M. Wead, for Appellant.

Bryan & Stone, for Appellee.

Caton, C. J. The third and fifth pleas are bad. They profess to answer the whole declaration, when they only answer a part of it, and the demurrer was properly sustained to them.

The fourth plea alleges that the consideration of note sued on was, that the plaintiff and defendant were, on the 24th day of February, 1857, owners in fee simple of the lands in the second plea described; and that the legal title thereof was vested in defendant for the purpose of sale and conveyance whenever said lands could be sold; that plaintiff was the equitable owner of one undivided half of said lands; that the legal title being vested in the defendant, and the equitable title of half of said lands being in the plaintiff, the defendant executed the note sued on, which was to be held by plaintiff as security for the prompt

payment to plaintiff of one-half of the purchase money for which said lands should thereafter be sold by defendant, after deducting all moneys advanced by defendant and costs and charges of sale. Avers that defendant has always been willing and anxious to sell said lands, that no part thereof has been sold, that he has received no money thereon, that said lands remain unsold, and that the legal title thereof is still vested in defendant for the purposes aforesaid; and that the equitable title to said undivided half of said lands is still vested in plaintiff. Concludes with a verification. To this plea there was also a demurrer, and demurrer sustained, and defendant abided by his plea.

This plea we think presents a good defense to the note. Our statute treats a promissory note as one part of an agreement, that is, the agreement to pay the money, and allows the other part of the agreement, that is, the consideration, on which the agreement to pay the money was made, to be shown by parol, thus forming an exception to the general rule, that an agreement cannot rest partly in writing and partly in parol. If a note was given without consideration, or if the consideration has totally or partially failed, this may be pleaded, and proved by parol. This plea shows a total failure of consideration, or rather a want of consideration. If the statements of this plea are true, there was no consideration for the promise to pay the money, till the maker should receive money for the use of the payee, upon a sale of the land. Till then, he could sustain no damage, and the promise to pay was without consideration. He might have held it till a consideration had arisen. This he did not choose to do, but brought his action, when in fact no consideration for the promise existed. The judgment must be reversed and the cause remanded.

Judgment reversed.

Andrew J. Johnson, Cornelius F. Backus, and Edgar L. Morse, Plaintiffs in Error, *v.* The People, Defendants in Error.

ERROR TO RECORDER'S COURT OF THE CITY OF CHICAGO.

A conspiracy to obtain goods by false pretenses, is an indictable offense.

If a person indicted for a misdemeanor is put on trial, the right to a final judgment on the demurrer, is supposed to have been waived.

On an indictment for a misdemeanor, the plea of not guilty must be entered by counsel or the accused without an arraignment. Without an issue there is nothing to be tried, and if this is not shown, it is error to sentence.

If the record shows a trial by consent, the defect may be held to be cured; or the omission to enter the plea may be obviated by an order of court.

The awarding of a separate trial in criminal cases, is a matter of discretion, not assignable for error.

THIS indictment in the Recorder's Court of Chicago, contains but one count for conspiracy, the substance of which is: "That defendants, on the 3rd day of May, 1858, at Chicago, wickedly and unjustly devising and intending one Joshua B. Casey to defraud and cheat of his goods and property, did then and there falsely and fraudulently conspire, combine, confederate and agree together among themselves, to get and obtain knowingly and designedly, by false pretenses, of the said Joshua B. Casey, one horse, of the value of six hundred dollars, the property of him, the said Joshua B. Casey, with the intent then and there to cheat and defraud the said Joshua B. Casey of the said horse."

To this indictment, plaintiffs in error demurred in proper persons.

Plaintiffs in error applied for continuance immediately, and filed three affidavits.

Cornelius F. Backus, one of defendants, filed three affidavits for continuance of cause and separate trial, showing that on the same day in which indictment was found, he is required to go to trial; that he has a good defense, and that one Charley S. Brodber was a material witness, then absent; that he expected to procure his attendance, and could not safely proceed to trial; and discloses what he expects to prove, that he, Backus, had nothing to do with the trade, no way interested, and that the horse was sold to Johnson, etc.

Backus made an application for a separate trial, stating that he was included in the indictment, so that he could not be a witness; that he cannot have fair trial with the others, and states the reasons and facts.

A jury was called, who were impanneled to try the cause, and they found all the defendants guilty.

The motions for a new trial, and in arrest, were overruled.

The points of error as made:

Court erred in overruling the demurrer.

Court erred in overruling the application for continuance.

Court erred in refusing separate trial to Backus.

Court erred in trying the cause, defendants not having been arraigned.

Court erred in not giving a new trial.

Court erred in not arresting the judgment.

A. Garrison, for Plaintiffs in Error.

W. Bushnell, District Attorney, for the People.

Walker, J. This was an indictment presented against the plaintiffs in error, which charged that "wickedly and unjustly devising and intending one Joshua B. Casey to defraud and cheat of his goods and property, they did then and there falsely and fraudulently conspire, combine, confederate and agree together among themselves to get and obtain, knowingly and designedly, by false pretenses, of the said Joshua B. Casey, one horse, of the value of six hundred dollars," with the intent to defraud and cheat him of the same. To this indictment the defendants filed a demurrer which was overruled by the court. Defendant Backus then entered a motion upon an affidavit filed for a continuance, and also filed an affidavit and entered a motion for a separate trial. The record fails to disclose any disposition of either of these motions. The defendants were then put upon trial, which resulted in their conviction. The record fails to disclose any arraignment or any plea by the defendants. Whether this is an omission of the clerk in making the transcript of the record, which may be probable, from the manner in which it seems to have been prepared, or was omitted by the court, we are unable to determine.

The first question presented is whether the court erred in overruling the demurrer to the indictment. Our statute has declared it to be an offense to obtain goods by false pretenses. And "undoubtedly, as obtaining goods by false pretenses, is a statutory misdemeanor, conspiracies to effect them are indictable." Whart. Crim. Law, 674. This is the common law rule, and brings this indictment clearly within the provisions of the 169th sec., chap. 30, R. S. 182, which provides that all offenses not enumerated in that chapter, shall be punished by fine and imprisonment, in the discretion of the court, limiting the fine to not more than one hundred dollars, and the imprisonment to not exceeding six months.

It is likewise insisted that the offense is not sufficiently charged. That the means intended to be employed for the purpose of obtaining the property, are not specified in the indictment, and do not show an indictable offense. No judge ever doubted that a conspiracy to cheat is an offense, as much as a conspiracy to commit larceny, robbery or other crime. The means agreed to be employed by defendants in such cases, may never have been disclosed, and could not therefore be stated, and yet the offense would be complete, and may be proven by overt acts, and other circumstances. The very nature of the offense

would as a general thing, render it impossible for the prosecutor to ascertain and prove the means, agreed to be employed. We think the charge contained in this indictment, clearly describes an offense at the common law, and that the demurrer was properly overruled. The doctrine seems to be settled in England, that if a defendant demur to an indictment for a misdemeanor, and the demurrer be overruled, judgment of conviction is rendered, but in felonies the rule is different. 1 Chit. Crim. Law, 442; Whart. Crim. Law, 187. But in this case the defendants were put upon trial, and the right to final judgment on the demurrer, was waived.

The 181st section of the Criminal Code (Scates' Comp. 407), provides that upon the arraignment of a prisoner, it shall be sufficient without any other form, for him or her to declare orally, by himself or herself, or his or her counsel, that he or she is not guilty; which plea the clerk is required to immediately enter on the minutes of the court, and the mention of the arraignment and such plea, shall constitute the issue between the People and the prisoner, and if the clerk should neglect to insert in the minutes of the court, the arraignment and plea, it provides that it shall be done under the order of the court, and then the error or defect shall be cured. The arraignment and plea has always by the practice in cases of felonies, been regarded as essential to the formation of the issue, to be tried by the jury, but in cases of misdemeanor the practice allows the plea of not guilty to be entered without arraignment and may be entered by counsel. But it is believed that the practice is uniform, both in England and this country, in requiring the formation of an issue to sustain a verdict. Without it there is nothing to be tried by the jury. If the record had shown that the trial was by consent, in the case of a misdemeanor, it might be held to cure the defect, but when the trial does not appear to have been so had, no such intendments can be indulged. Or in case there had been a plea entered, and the clerk by an omission of his duty, had failed to enter it upon the record, the prosecuting attorney might have cured the defect by procuring such an entry under the order of the court. But the statute has provided for no other mode of obviating the objection, and unless waived by the defendant, it must be held to be error. In this case the error has not been cured by either of these modes, and the judgment should have been arrested for the want of such plea.

The plaintiff in error, Backus, urges a reversal because the court refused to award to him a separate trial, on his motion for the reasons stated in his affidavit. We are aware of no reported case of any court, which has ever held that it is error to refuse a severance in the trial of a criminal case. The right is dis-

cretionary with the court, to be exercised as all other matters of discretion. *United States* v. *Merchant*, 12 Wheaton, 480. Being a matter of sound discretion in the court below, we have no right to revise its decision in refusing a separate trial to this plaintiff in error.

No objection is perceived to either the giving or refusing the various instructions asked, nor in the modification to the defendant's ninth instruction. The prosecution was for a conspiracy to obtain goods by false pretenses and not for having so obtained them. And the instructions fairly present the law as applicable to the evidence on the charge for which the defendants were tried.

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

Judgment reversed.

William C. Boilvin *et al.*, Appellants, *v.* Henry Moore *et al.*, Appellees.

APPEAL FROM PEORIA.

Where goods are erroneously shipped to a fictitious person, and after remaining unclaimed, are sold by the warehousemen, the surplus proceeds, after paying charges, belong to the shipper.

This was an action of assumpsit. Declaration contained common counts. Plea, general issue. Cause tried before Powell, Judge, without jury, and judgment for appellees, of $291.83.

Edward B. Norton testified, that he was clerk for plaintiffs, who were manufacturers of nails at Wheeling, Virginia, and that on the 29th March, 1855, plaintiffs shipped a lot of nails to John W. King, Peoria, by steamboat; the invoice was enclosed in a letter and sent by mail; with the invoice was a bill of lading and draft upon King for his acceptance at six months. John W. King nor any one else ever offered to pay for the nails. Plaintiffs again wrote King, demanding payment October 11th, 1855. They received no reply, and wrote to King again December 8th, 1855, all directed to John W. King, Peoria, Ill. No reply was ever received to any of these letters.

Edward M. Norton testified, that as agent of plaintiffs he personally sold the nails specified in order in Peoria, Illinois, to a man as I supposed, from the manner in which his name was

written, by the name of John W. King. I had no personal acquaintance with him. I took orders from all sorts of persons without personal acquaintance, confining myself to inquiries as to their ability to pay, and looking to the orders I receive for the name of the party and place of shipment. I presented the order to plaintiffs, who filled it and shipped to Peoria. The order was given February 1, 1855, delivered to plaintiffs February 14, 1855, and the nails were shipped March 29, 1855. The signature at bottom of order is in the handwriting of the party who gave the order; whether it is Hing, or Sting, or some other name, I cannot say. I know the party was a dealer in Peoria, and I took the order from himself personally at his own store. No payment for the nails was ever made.

The following facts were admitted: That plaintiffs sent an order upon defendants to M. McReynolds, for the nails, in spring of 1856, which order was not accepted. That no such person as John W. King has been known to *reside* in Peoria, either at date of the order or since. That the nails were never received by King, but were received by defendants, who were warehousemen in Peoria, from the steamboat Tiber, in April, 1855, in store for the consignee, and charges paid by defendants at time of receiving them. That the nails remained in store until spring of 1856, when they were sold to pay charges—sold for $425, and charges on them, $133.17. That defendants had no authority from, or ever saw or knew, John W. King, but the nails were left with them by steamboat Tiber, together with bill of lading. That no persons except plaintiffs have ever demanded the nails or the proceeds thereof.

Manning & Merriman, for Appellants.

Bryan & Stone, for Appellees.

Breese, J. This is a very plain case, one in which the doctrine of stoppage in transitu, or of conditional sales, has nothing to do. All the facts show, that the nails were shipped to Peoria to a fictitious person—one having no existence there, and remained in the appellant's warehouse until they sold them, uncalled for by the party in whose name they were shipped or any other person by his authority. The agent mistook the signature to the order for the nails, and hence being sent to a fictitious address, the title never passed out of the vendors—the plaintiffs below. They had a perfect right to recover the balance of the proceeds of the sale after deducting the charges upon them. It would be iniquitous that the appellants should

have the proceeds, their claim for warehousing and other expenses being fully satisfied. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Lucius B. Boomer, impleaded with the Kankakee Bridge Company, Plaintiff in Error, *v.* Robert J. Cunningham *et al.*, Defendants in Error.

ERROR TO WILL.

A bill cannot be sustained to enforce an agreement by a debtor, to pay one creditor in preference to others, where such creditor has no greater right than others, to such funds.

Robert J. Cunningham, John McIntosh, and Henry Wilson, administrators of Richard L. Wilson, deceased, filed their bill in chancery in the Circuit Court of Will county, against the Kankakee Bridge Company, Lucius B. Boomer, A. B. Stone and George A. Gray, John S. Smiley, Samuel Carr, John Leich, the collectors of the towns of Wilmington, Essex, Reed and Norton, Charles H. Weeks and David Perry, county treasurers of the counties of Will and Kankakee, setting forth that on or about the 13th day of June, 1856, Robert J. Cunningham, John McIntosh and Richard L. Wilson, then living, entered into and signed a contract in writing, with the Kankakee Bridge Company, then composed of H. Kerney, supervisor of the town of Essex, Richard Warner, supervisor of the town of Reed, and John J. Camp, supervisor of the town of Wilmington; which corporation was created by an act of the legislature of the State of Illinois, approved February 15, 1855, for the purpose of building a bridge across the Kankakee river at Wilmington. That by said contract, Cunningham, McIntosh and Richard L. Wilson undertook to clear the bed of the river, furnish the materials, and erect two piers and two abutments for a highway bridge across the Kankakee river, describing particularly the manner in which said abutments and piers were to be constructed.

The bridge was to be completed before November 1, 1856. The company reserved to itself the right to alter or change the specifications in regard to the size of the abutments and piers, etc. The company were to pay for mason work and materials delivered and laid up in said piers and abutments, upon monthly estimates, reserving therefrom twenty per cent. until the work should be completed.

The bill alleges, that the company employed one Mathewson as an engineer to locate the bridge, make plans of the same, and to make monthly estimates of the work as it progressed. That as soon as the piers and abutments were located, and the plans of the same were drawn and placed in the orators' hands, to wit, on or about the 20th day of July, 1856, Cunningham and McIntosh commenced the work, and proceeded with it as rapidly as possible until Dec. 1, 1856, when the same was completed, with some trifling exceptions; and that they obtained an estimate from Mathewson showing that the amount of work done was 1,246 $\frac{42}{100}$ yards, which, at $7.50 per yard, amounted to $9,348.67.

That the money to pay for the construction of said bridge was to be raised by a special tax upon the property in the towns of Wilmington, Reed and Essex, as provided by the act of February 15, 1855, being the only towns which voted in favor of said act. That two of said assessments had been collected, amounting to about $14,000 or $15,000. That the company had paid the orators about $5,000, leaving about $4,500 which was due and unpaid.

That before the completion of said piers and abutments, the company contracted with A. B. Stone and L. B. Boomer for furnishing the materials and putting up the superstructure of said bridge, which they had nearly, if not quite, completed; and that the funds used in paying said Stone & Boomer were a part of the assessments made upon the towns of Wilmington, Reed and Essex, and which the orators contended should have been applied first to the payment of the balance due them.

That the assessments upon the said towns of Wilmington, Reed and Essex for the year 1857, amounting to $7,600, had not been collected, but would be collected during the ensuing winter, and when collected would be subject to the order and direction of the company, of which Richard Warner was treasurer; and that the orators were informed and believed, and so charged the fact to be, that said company and the supervisors of said towns intended to apply the money to be collected in said towns to the payment of Stone & Boomer, and in the erection of a bridge connecting the east bank of the Kankakee river with the bridge then being erected by Stone & Boomer, upon the piers and abutments built by the orators. That said company had already commenced to build said bridge across the east branch of said river, and had expended a large amount of money on the same, being all the balance of the money collected for the years 1855 and 1856, and which the orators charged should have been applied in payment of the balance due them.

The bill charged, that it was provided in the contract, that Cunningham, McIntosh and Richard L. Wilson should be paid for the said work out of the taxes of the aforesaid towns first to be raised, and prior to all other claims.

That the whole amount of taxes to be raised in said towns for the three years provided for in said act of February, 1855, would not be sufficient to pay all the costs and expenses of building said bridges, into some $4,000 or $5,000, and that said company had no other means or authority or ability to procure the necessary means for that purpose.

The bill charges, that the company had drawn orders in favor of Stone & Boomer, and other persons to the orators unknown, upon the collectors of said several towns, for the whole, or a portion, of the tax for the year 1857, with the fraudulent intent of preventing the orators from instituting legal proceedings to recover the amount due them.

That the money to be collected on the assessment of the year 1857 should be first applied to the payment of the orators' claim; and that the amount that might be due Stone & Boomer, and the amount which might be due for building the bridge across the east branch of the Kankakee river, and every other claim upon the company, should be held secondary to the claim of the orators.

That said company had been, and were still, giving orders for the appropriation of the money so to be collected in said towns, as fast as the same was collected, in paying Stone & Boomer, and the expense of building the bridge across the east branch of said river, to the utter exclusion of the claim of the orators; and that the amount of said assessment, when collected, would not be sufficient to pay the orators the balance due them, and the amount that would be due Stone & Boomer, and the expense of the bridge across the east branch of the Kankakee river; and should the plan of paying the last mentioned claims first be carried out, the orators would be entirely remediless.

And praying for a writ of injunction restraining the said bridge company, its officers and agents, from paying out any money in their hands or under their control, of the proceeds of the tax theretofore or thereafter to be collected in said towns, for the building said bridge; and from issuing or giving any order to any person whatever, upon any collector of said towns, or upon the county treasurers of said counties, or upon any person charged with the collecting or keeping of any money belonging to said bridge company; restraining the several collectors of said towns from paying over any of said tax collected by them, to any person whatever, except the treasurers of said counties, and from accepting any orders drawn on account thereof; and

restraining the treasurers of said counties from paying out any moneys which they then had or which might thereafter come into their hands, as the proceeds of said tax, until the further order of the court; and that the orators might have a decree for the payment of the sum due them out of the moneys derived from said tax, and for further relief.

An injunction was issued, agreeably to the prayer of the bill.

A summons was issued, which was served upon all the defendants *except A. B. Stone and L. B. Boomer.*

The following decree was entered:

And now come the said complainants, by McRoberts and Goodspeed, their solicitors, and the said bridge company, by Royal S. Noble, one of said corporation, and on motion of said complainants and by and with the consent of said bridge company, it is ordered that a decree be entered herein in favor of said complainants, against the said defendants, for the sum of $2,165.22; and that the said defendants pay to the said complainants the said sum of $2,165.22 out of any money in their hands, or in the hands of the treasurers of Will and Kankakee counties, or in the hands of the collectors of the towns of Wilmington, Reed, Essex and Norton, now collected, or to be collected hereafter, for the purpose of erecting a bridge across the Kankakee river at Wilmington, as provided in the act of the legislature, approved the 15th day of February, 1855. It is further ordered, that the said sum of $2,165.22 be paid to the complainants by the said defendants, as soon as that amount of money shall come to their hands, and shall be paid before any other claim or demand against said bridge company. It is further ordered, that Royal S. Nobles, the treasurer of said bridge company, be authorized to draw an order or orders in favor of said Cunningham and McIntosh, or their attorneys, upon the treasurers of Will and Kankakee counties, and the collectors of the said towns of Wilmington, Reed, Essex and Norton, for the said sum of money, which shall be sufficient authority to said treasurers and collectors upon whom the same shall be drawn, to pay the amount of such order or orders. It is further ordered, that Alexander Anderson and Adam Comstock be allowed the sum of $10 each, for services rendered as arbitrators in this cause; and that the said injunction in this cause be dissolved as to all the defendants except as to said supervisors and said bridge company, and that said bridge company pay all the costs of this proceeding.

Lucius B. Boomer brings the case to this court by writ of error, and assigns the following errors:

1st. The court should have decreed that Stone and Boomer

were entitled to be paid the amount of their contract before any other payments were allowed from the fund in question.

2nd. That the decree is, that the defendants generally should pay, and that the bill sets up no claim against Stone and Boomer.

3rd. That the decree is, that the defendants generally shall pay, and upon its face sets forth that it is rendered upon the consent of the Kankakee Bridge Company, who were not, and do not claim to have been, authorized to speak for Stone and Boomer.

4th. That judgment should have been for the defendants instead of the complainants.

5th. The rendition of the decree, when it appeared upon the face of the bill that Henry Wilson was improperly joined as a complainant, and that the proper parties were not made defendants thereto.

6th. The rendition of the decree against Stone and Boomer and affecting their rights, when the court had no jurisdiction over them by service of process or by voluntary appearance.

7th. The making the order of reference when Stone and Boomer were not in default, and the cause not at issue; and because the order was without authority, and did not direct an account of the amount due Stone and Boomer.

8th. The rendition of the decree because it declares that complainants had a first lien upon the fund mentioned in the bill, and said claim first to be paid thereout, when it appeared by the bill that Stone and Boomer were entitled equally with complainants, and the decree should have directed complainants and Stone and Boomer to be paid *pro rata.*

Beckwith, Merrick & Cassin, for Plaintiffs in Error.

McRoberts & Goodspeed, for Defendants in Error.

Caton, C. J. In this case, the decree must be reversed and the bill dismissed. The bill is for the specific performance of an agreement, to pay a certain fund to one creditor, instead of another, where the party claiming the fund has no inherent right to it above other creditors, except the promise of the debtor to pay him, in preference to the others. We know of no precedent for enforcing the specific performance of such an agreement. The party must seek his remedy, for a breach of the agreement, by an action at law. The act of the legislature, made the bridge company a body corporate and politic, capable of suing and being sued, of making contracts, and holding real and personal estate. There is no pretense, that there was not a perfect remedy at law,

for the violated contract. If they could be sued, a judgment might be obtained and satisfaction sought, by a sale of their property, the same as any other corporate body, so that the inadequacy of the fund raised and to be raised by the tax, to pay all the debts, did not necessarily show, that by other means the debts could not be paid. But if it were so, there was as much intrinsic merit in the claims of the other creditors, as of the complainants. They were made favorites, by the agreement of the company, and not by reason of any superior equity in their demand. If this were a trust fund, by operation of the law creating it, it was for the benefit of all the creditors equally, and it may be, that equity would interfere, to prevent them from diverting it from its legitimate object, if they threatened to do that, but it would only interfere for the benefit of all the *cestui que trust*, without showing any partiality to either. And in such a proceeding, all of the creditors should be made parties, unless they were so numerous or so situated, as to make an exception to the general rule.

The principles on which this case is decided, are so simple and so familiar, that we have preferred to determine it upon its merits at once, without regard to the question of service, and other subordinate questions, which were raised on the argument.

The decree is reversed and the bill dismissed.

Decree reversed.

Gideon H. Rupert *et al.*, Appellants, *v.* Stephen Roney, Appellee.

APPEAL FROM TAZEWELL.

A party who makes a special deposit of uncurrent bills with a banker, and afterwards takes them away, cannot recover, upon the assumption that the bankers had issued similar bills to the plaintiff in the course of business.

This was an action of assumpsit, brought by Roney against Rupert and Haines, at the Tazewell Circuit Court, to recover a sum of money for an amount of the bills of the "Rhode Island Central Bank," which Rupert and Haines as bankers had paid out in the course of their business, to Roney, and afterwards, when the bills of said bank had ceased to be current, refused to receive back on deposit.

The declaration contains the common counts. Plea, general issue.

There was a trial by jury, and a verdict for the plaintiff for $427. And defendants below then moved the court for a new trial, which motion the court overruled, and entered judgment for plaintiff. Defendants below appealed.

B. S. PRETTYMAN, for Appellants.

A. L. DAVIDSON, and J. ROBERTS, for Appellee.

BREESE, J. All the argument, reasoning and inferences from facts proved in this case, might possibly avail the appellee, was it not for the existence of one fact which has not been, and cannot be explained by him, and which must determine this case against him.

The record shows, after this Rhode Island money was expressed back in October, by Roney, from St. Louis, to Rupert & Co., bankers at Pekin, after taking out of the package eighteen dollars of current funds and placing the same to the credit of Roney on the bankers' books, the Rhode Island bills were placed in the vault, and the clerk was told not to enter them as a credit to Roney, as those notes at that time were discredited, not being received on deposit or paid out. On the 6th of October, and just after Roney got back from St. Louis, he came into appellants' banking house, and asked that these bills, expressed by him from St. Louis, should be passed to his credit as current funds. The acting banker, Haines, refused to do so, and they were then specially deposited, $465 Rhode Island bank bills, for the plaintiff Roney.

There were several conversations between Haines and Roney before the special deposit was made. This most clearly intimates that Roney, by making this special deposit of them, had made them his own. But this is not all; the conclusive fact is that Roney sometime afterwards came into the banking house, got these bills thus specially deposited by him, took them off, and never afterwards returned them to the defendants. Surely, if any one act can bar a recovery in such case, this act does it effectually. After he withdrew this money, he may have used it as par funds in some one of his transactions, and picked up on the very day of trial, the notes he brought into court and offered to surrender. He does not show that was the money he got from the appellants, and the inference is not strained that he procured it for the occasion. The identical notes he received from the appellants would alone suffice to charge them.

On the whole proof we think it very questionable if there was any guaranty of these notes, but whether or not, the acts of Roney himself, have deprived him of all right to recover. The judgment is reversed.

Judgment reversed.

Franklin Safford *et al.*, Plaintiffs in Error, *v.* Micah Vail, Defendant in Error.

ERROR TO McHENRY.

Parties or privies to an usurious transaction, have the right to avail themselves of the defense.

A party to a note as surety, afterwards becoming principal to another note, covering the same with other indebtedness, with a different party, may set up the defense of usury, to the first note.

A party may take a judgment by *nil dicit*, to that portion of his demand not answered by a plea, even though a demurrer may have been filed, at any time during the term at which the plea is filed, if before final judgment, on payment of costs of the motion.

The judgments and orders of court and pleadings, should be embraced in the record; and if they are copied into the bill of exceptions, it will be at the expense of the party who has it done.

The declaration contains, first, a count on promissory note, for $720, made by defendants payable to the order of plaintiff, and by him ordered to be paid to himself. Note dated 5th February, 1857: One year after date at ten per cent. after due. Also the common counts.

Pleas filed:

1st. General issue by both defendants to whole declaration.

2nd. As to $220 of said promissory note. That the $720 note was given for $500, borrowed two years before, and twenty per cent. per annum, interest amounting to $220, and for no other consideration.

Defendants, by leave of the court, withdrew the general issue.

Plaintiff demurred to special plea, and defendants joined in demurrer. Defendants then moved for judgment for a discontinuance.

Plaintiff entered cross-motion for judgment against defendants by default.

The court allowed the cross motion for judgment by default, but gave judgment for defendants for the *costs* of the cross-motion. The court also sustained the demurrer to the special plea, and

adjudges against defendants, the costs on demurrer. Also that plaintiff recover his damages.

The proofs were then submitted to the court, and the court assessed the plaintiff's damages at $738, and gave judgment for that amount and costs.

The errors assigned are:

1st. The court erred in sustaining the motion of the plaintiff below for default, after the defendants had applied for a discontinuance.

2nd. The court erred in giving judgment for part of the costs of said motions and not for the whole of said costs.

3rd. The court erred in sustaining the demurrer to defendants' special plea.

4th. The court erred in the assessment of damages without the intervention of a jury or the clerk.

5th. The court erred in assessing the damages in gross.

6th. The court erred in proceeding in the case without disposing of defendants' motion for a discontinuance.

7th. The court erred in not giving judgment for defendants below.

8th. The court erred in giving judgment in favor of plaintiff below.

Coon & Rogers, and T. L. Dickey, for Plaintiffs in Error.

Church & Kerr, for Defendant in Error.

Walker, J. The sustaining of the demurrer to appellant's special plea, is assigned as error. It was a plea of usury interposed as a defense to two hundred and forty dollars of the note sued on, in this cause. And it alleges that on the fifth day of February, 1856, appellee agreed with one Henry Stephens to loan to him five hundred dollars, and that Stephens should give his note for six hundred dollars; that in pursuance of such corrupt and usurious agreement, he executed his note due one year after date, with appellant, Franklin Safford, his security thereon, for that sum, in consideration of the loan of the said sum of five hundred dollars, the loan of which was the only consideration for such note. And that at the maturity of that note, it was agreed by and between Stephens and appellee, that further day of payment should be given to Stephens, of the six hundred dollars due by the terms of the note, for one year from that date, if the appellants would execute their note for the sum of seven hundred and twenty dollars, due in one year; that in pursuance of that agreement to forbear and give further day of payment, on the said sum of six hundred dollars, appellants executed

the note sued on, and that it was executed on that consideration and no other. The question presented by this plea is, whether the agreement set up, is in violation of our usury laws. The person borrowing the money and making the contract, as alleged by the plea, is not a party to the record. He was the principal in the first note, with Franklin Safford his surety, and the surety on that note, with Norman J. Safford, are the makers of the note sued on, and who interpose this defense.

It has been held, and the doctrine is believed to be correct, that the surety in a joint note may set up the defense of usury, and if necessary, file a bill to establish the defense, although the principal maker should refuse to join in the defense or become a party to the bill. *Morse* v. *Hovey*, 9 Paige, 197. Such a contract can only be avoided by the party who made it, or by some one standing in legal privity with him, and not by a mere stranger to the transaction. *Jackson* v. *Tuttle*, 9 Cow. 233. In the case of *Thompson* v. *Thompson*, 8 Mass. 135, where the facts were, that one Mitchell was justly indebted to Bennett in the sum of $190.73, and at the same time defendant was indebted to Mitchell in that or a greater sum. By arrangement, the defendant gave his note with an indorser, due in one year, to Bennett, for the amount of Mitchell's note with interest, and also paid Bennett, on the delivery of the note, a sum equal to three per centum upon the amount of the debt, when Bennett discharged Mitchell. The court held the transaction to be usurious. The court in delivering the opinion say, "In the case at bar, besides the legal interest of six per cent. per annum, reserved in the note, there was paid another sum, equal to three per cent. of the principal. There was, then, more than legal interest reserved by the note, and it thus became usurious and void by the statute."

This plea alleges that there was reserved as interest on the loan of five hundred dollars for one year, one hundred dollars, equal to twenty per cent. per annum. And on the renewal, an interest of twenty per cent. per annum was reserved on both the principal and former interest, amounting to one hundred and twenty dollars. Our statute only authorizes the taking or reserving an interest of ten per cent. per annum, and all over that amount in this case was usurious. And if the appellants were parties or privies to the transaction, they have the right to avail themselves of the defense. Franklin Safford was a surety to the first note, and is a party to this, and he has the right as such surety to set up the defense. And the appellants are both parties and privies to the usurious transaction for which the note sued on was given. They, as such, have the right to insist upon the statute as a defense to the interest reserved, and the pleas substantially present

a bar to that extent. The appellee has reserved twenty per cent. per annum, interest, when the statute has only authorized ten. And the fact that the appellants substituted this note for the one first given, does not purify the transaction of its usurious taint. The statute has forbidden the appellee from receiving more than ten per cent., and he cannot avoid its effect by indirection.

It is objected that the Circuit Court erred in permitting appellee to take judgment *nil dicit* for that portion of the cause of action not answered by this plea, after the demurrer was filed. In the case of *Warren* v. *Nixon*, 3 Scam. R. 38, this court held that where a plea professes to answer, and does only answer, a part of the cause of action, and the remaining portion is unanswered, and the plaintiff demurs or replies to the plea, it works a discontinuance. But that the plaintiff shall be permitted, at any time during the term at which the plea was filed, and before final judgment is rendered, to correct his mistake by taking judgment *nil dicit*, for the portion unanswered, on the payment of costs. This case is decisive of that question.

It is likewise insisted that the court erred in permitting appellee to take judgment *nil dicit* on the payment of the costs only of the motion. This we think was correct.

It is not correct practice, to set out the pleadings in the case, in the bill of exceptions. Nor should the judgment and orders of the court be embraced in it, nor exceptions to judgments on demurrer. They tend to burthen the record and increase the expense of the transcript, without any benefit. When the pleas and orders appear in the record, that is sufficient without their again appearing in the bill of exceptions.

The judgment is reversed and the cause is remanded, and the plaintiff in error will pay the costs of embodying the judgment, orders and pleadings in the cause unnecessarily copied into the bill of exceptions, and defendant in error the balance.

Judgment reversed.

Michael Diversy, Appellant, *v.* Daniel Moor, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The acceptor of an accommodation or other bill of exchange, is the principal debtor; giving time to the acceptor does not discharge the maker.

The acceptor of a bill and the drawer of a note are the principals, the indorsers are sureties.

Neglect to bring suit against the drawer of an accommodation bill, on request by the acceptor to do so, does not discharge the acceptor.

THIS action was assumpsit, brought to the Cook County Court of Common Pleas.

The plaintiff, Daniel Moor, declared upon a bill of exchange, bearing date at Chicago, July 9, 1857, drawn by Thomas W. Egan, upon the defendant, Michael Diversy, for two thousand dollars, at ninety days, payable to the order of the drawer. The declaration also contained the common money counts.

The defendant pleaded the general issue to the whole declaration, and to the special count upon said bill, the following special plea:

And for a further plea in this behalf as to the said first count in the aforesaid declaration, the said defendant says *actio non*, because he says, that in the drawing, accepting and delivering of the said bill of exchange in said count mentioned, the said Thomas W. Egan, the drawer thereof, was the principal debtor, and this defendant accepted the same without consideration, as the mere surety of the said Thomas W. Egan, and for his accommodation, which was, to wit, at the time of the making of the same, to wit: at Chicago aforesaid, well known to the said plaintiff; and the defendant further says, that after the said bill became due, by the terms thereof, he the said defendant, on, to wit, the 15th day of October, 1857, to wit, at Chicago aforesaid, apprehending that the said Thomas W. Egan, the principal debtor as aforesaid, was likely to become insolvent, without previously discharging said bill, so that it would be impossible or extremely difficult for this defendant, after being compelled to pay said bill, to recover the same back of said Egan, did then and there, by letter in writing sent to and received by the said plaintiff, then holding said bill, thereby notify and require him, the said plaintiff, forthwith to put the said bill in suit. And the said defendant further says that the said plaintiff neglected and refused to put the said bill in suit, as required by the said letter, and failed to use due diligence to collect the same, and that before the commencement of this suit, to wit, on the first day of November, 1857, to wit, at Chicago aforesaid, the said Thomas W. Egan, the principal debtor as aforesaid, became and was wholly insolvent, whereby, by virtue of the statute in such case made and provided, the said defendant is discharged from said bill, and this he is ready to verify, etc.

To this plea the plaintiff demurred, specially assigning for cause, that the allegation of notice by letter, in writing, etc., was insufficient, and assigning no other cause.

The defendant joined in demurrer.

The court sustained the demurrer, and defendant elected to stand by his plea.

The court rendered judgment in favor of the plaintiff, against the defendant, for two thousand one hundred and thirty-six dollars.

The defendant appealed.

The sustaining said demurrer to said second plea and giving the judgment aforesaid, is assigned for error.

Scates, McAllister & Jewett, for Appellant.

Williams, Woodbridge & Grant, for Appellee.

Breese, J. This case, in its main feature, differs not at all from the case of *Cronise* v. *Kellogg*, 20 Ill. R. 11, and must be determined in the same way. The courts in England and in this country have uniformly held, that the acceptor of a bill of exchange becomes, by his acceptance, the principal debtor, even though his acceptance was for the accommodation of the drawer, he having no funds of the drawer in his hands, and not expecting any.

Debt will lie against him by the payee or endorser, where the bill expresses on its face to be for value received. *Raborg et al.* v. *Peyton*, 2 Wheaton, 385. And if the holder of such a bill takes a *cognovit* from the drawer for payment by installments, he does not thereby discharge the acceptor. *Fentum* v. *Pocock et al.*, 1 Eng. C. L. R. 105. And this, whether the holder, at the time of taking the bill knew it was an accommodation bill or not. Ibid. To the same effect is the case of *Nichols et al.* v. *Norris*, 23 ib. 28.

So giving time, as in the case of *Cronise* v. *Kellogg*, *supra*, to the acceptor, does not discharge the maker. *Bank of Montgomery* v. *Walker*, 9 S. & R. 229. So if the holder of a note, who at the time it was discounted, knew that it was drawn for the accommodation of the borrower, give time to the indorser without consulting the drawer, the latter is not discharged thereby. The principle in all such cases is, that the drawer of a note and the acceptor of a bill of exchange stand in the same situation. The acceptor of the bill and the drawer of the note stand as principals, the indorsers as securities only.

To the same effect is the case of *Chends* v. *Barlow*, 9 Pick. 547, and so is the case of *Lambert* v. *Sandford*, 2 Blackford, 137. *Grant* v. *Cary*, 7 Wend. 227, and *Murray and Murray* v. *Judah*, 6 Cowen, 484.

So if the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had no funds of the drawer in

his hands and took the bill on the promise of the drawee to accept it, he expecting to receive funds from the drawer, the promise of the drawee to accept constitutes a valid contract between the parties, notwithstanding the drawer fails to place funds in his hands, and his acceptance binds him though it is known to the holder he has no funds of the drawer in his hands —it is sufficient, if the holder trusts to such acceptance. *Townsley* v. *Sumrall*, 2 Peters, 170. The acceptor of a bill of exchange stands in the same relation to the drawer as the maker of a note does to the payee, and the acceptor is the principal debtor in the case of a bill precisely like the maker of a note. *Wallace* v. *McConnell*, 13 Peters, 136. And Chitty on Bills lays down the same doctrine. Ch. on Bills, 304.

Nor is it allowed that such an acceptor shall say, he is only a surety—to him the equitable doctrines respecting sureties do not apply. *Anderson* v. *Anderson*, 4 Dana, 352.

One who lends his name to serve his friend in order that he may obtain money on it, ought not to complain, when the purpose is answered, if the law considers him precisely in the character he has assumed.

The judgment of the court below is affirmed.

Judgment affirmed.

The Chicago and Rock Island Railroad Company, Appellant, *v.* Mary Fell, Appellee.

APPEAL FROM PEORIA.

The common law writ of *certiorari* was for the purpose of bringing the record of an inferior court or jurisdiction after judgment before a higher court, to examine if jurisdiction existed in the lower court, and whether it proceedings were regular.

The question of liability of a corporation for committing a trespass, would depend upon a fact, as to the orders and directions of the company to commit or not the act complained of, and a *certiorari*, therefore, was not a proper remedy to authorize a review of the judgment of a justice of the peace, in a case of trespass.

The service of a process upon any agent, other than the law agent of a corporation, is sufficient, if properly made and returned.

On the 12th December, 1854, the appellants presented to the Circuit Court of LaSalle county their petition for a writ of *certiorari*, for the purpose of reviewing the records and proceedings in a certain suit in which Mary Fell was plaintiff and appellant was defendant, which suit was commenced before a

justice of the peace of LaSalle county on the 21st August, 1854, and judgment rendered against the defendant on the 28th August, 1854, for $64.16 debt, and $1.37½ costs. The cause of action as stated in the transcript, was "trespass on personal property."

The petition states, in substance, that the "Chicago and Rock Island Railroad Company" was duly organized under an act of 27th February, 1847, and an act of February 7th, 1851. That they, during the year 1854, were constructing and operating their said road.

That a suit was commenced agaist the said company as before stated. That summons was returned served as follows:

"Executed the within summons by leaving a true copy of the same with Rollin G. Parks, an agent of said company, this 22nd day of August, A. D. 1854, the president of said company not residing in my county."

That the plaintiff's claim was for a cow killed by the cars of said company, regularly running on said road, for the value of which, and also the value of the milk of said cow, from the time she was killed until the commencement of the suit.

That the defendants did not appear before the justice, and the plaintiff recovered a judgment as before stated.

That the summons was served on one Parks, who was freight agent at LaSalle, and who had nothing to do with the law business of the company.

That as soon as the summons was served, he enclosed a copy to John E. Henry, superintendent of the road, which was not received; so that the agent of the company whose business it was to attend to the law business of the company, nor the company, had any notice of the suit or judgment until more than twenty days after it was rendered.

That the justice had no jurisdiction of the subject matter of the suit.

That such action of trespass for killing a cow, and for the milk of such cow, could not be maintained against the said company.

That appellant had no opportunity to take an appeal in the ordinary way, and could not successfully prosecute a *certiorari* under the statute, and concludes with a prayer for a common law writ of *certiorari*.

The petition is verified by affidavit.

A bond in due form of law, conditioned for the due prosecution of the suit, was filed.

The writ was issued on the 27th December, 1854.

On the 4th June, 1856, the venue in the cause was changed to Peoria county.

At the December term, A. D. 1857, the defendant moved to quash the writ of *certiorari* and dismiss this suit for the following reasons:

1. No common law writ of *certiorari* lies in such case.
2. The facts appearing on the face of the petition in said cause do not authorize the issuing of any such writ.
3. The transcript and papers on file show that the justice decided correctly in said cause.
4. By return of said justice it does not appear that said justice has committed any error in law.
5. The justice had jurisdiction, and did not proceed illegally, so that no such writ lies.

The court sustained the said motion, and ordered a *procedendo* to the justice, and the appellant excepted.

The errors assigned are:

1. The court erred in sustaining the motion to dismiss the writ of *certiorari.*
2. The court erred in not reversing the judgment of the justice of the peace, and in not rendering judgment for the appellant.
3. The judgment of the justice ought to have been reversed, because the suit was for trespass to personal property, and the judgment was in debt.

N. H. Purple, for Appellant.

Manning & Merriman, for Appellee.

Walker, J. The return of the justice of the peace to the writ of *certiorari*, in the court below, shows that a suit was instituted by appellee against appellant, for a trespass to personal property. It also appears from the return, that a summons was issued and returned: "Executed the within summons by leaving a true copy of the same with Rollin G. Parks, agent of said company, this 22nd day of August, 1854, the president of said company not residing in my county." And that on the return day evidence was heard and judgment was rendered against the company for $64.16 debt, and costs of suit.

The common law writ of *certiorari* was used for the purpose of bringing the record of an inferior court or jurisdiction after judgment, before a superior court, to ascertain whether the inferior tribunal had acted without jurisdiction, or having jurisdiction, had proceeded illegally and contrary to the course of the common law. 1 Tidd's Prac. 330. And if upon the return of the record, it appeared that the inferior tribunal had jurisdiction and no substantial irregularity was apparent on the face

of the record, the writ was quashed and a *procedendo* was awarded; but if on the contrary, it was apparent from the record, that the inferior court had acted without jurisdiction, or had exceeded its jurisdiction, or had acted contrary to law in any material matter, the practice was to quash the judgment and proceeding of the inferior court. In the case under consideration the summons was regular on its face, for an amount clearly within the justice's jurisdiction, and directed to the proper officer, returnable at a proper time, and formally accurate.

But it is urged, that the justice had no jurisdiction of the subject matter of the suit. The statute regulating the powers and duties of justices of the peace, confers jurisdiction by express terms in cases of trespass to personal property, when the amount claimed does not exceed one hundred dollars. It is the well established doctrine, that an individual may commit a trespass by his command, through an agent or servant. And an incorporated company, may in the same manner, become liable for a trespass either to the person or property of a person. While trespass would not lie against a railroad company, for the negligence of its servants in exercising their legal rights, it is unquestionably true, that if the servant committed an injury upon the person or property of another, under the direction of the company, trespass might be maintained against the company for the injury. In such a case, the well recognized rules which apply to private individuals, are applicable to incorporations. And in this case, it was a question of evidence, whether the company was liable in this form of action, and as it is no part of the office of the writ of *certiorari* to return the evidence upon which the justice rendered the judgment, it was not competent for the court below, nor can this court, say that the injury complained of was not done under the express directions of the appellants. It was only necessary that the court should see, that the law conferred jurisdiction upon the justice to take cognizance of the offense specified, and when it appears the court could have had jurisdiction, the presumption is that the evidence made out a proper cause for its exercise. If judgments of justices of the peace may be reviewed by this proceeding, and such presumptions should not be indulged in their favor, as the evidence is never preserved, upon which judgments are rendered, they would all be liable to be quashed, and endless confusion would result from such a practice.

It was also objected that the service of the summons, was not sufficient to give the justice jurisdiction of the appellant. This objection is not well taken. The legislature by act of February 8th, 1853, (Session Laws, p. 258,) provides, that when any suit shall be brought against any incorporated company, process shall

be served upon the president of such company, if he reside in the county in which suit shall be brought, and if he shall be absent from the county, or shall not reside in the county, then the summons shall be served by the proper officer, by leaving a copy thereof with the clerk, cashier, secretary, engineer, conductor or any agent of such company, found in the county, at least five days before the trial, if before a justice of the peace, and at least ten days, where the suit is brought in the Circuit Court. The language of this act is broad and comprehensive, and certainly embraces all agents of the company. There is no limitation restricting the service to the agent, whose duty requires him to attend to the law business of the company. The service upon any of its agents, is sufficient, and if such agent fails to notify the company of the service, it is a neglect of duty on the part of the agent, for which the plaintiff should in nowise be held responsible. It is a misfortune, occasioned by the neglect of their own employee, for which they must be accountable.

The other assignment of errors are not deemed to be well taken, and upon the whole record, no error is perceived for which the judgment of the court below, in quashing the writ of *certiorari* and awarding a *procedendo*, should be reversed, and the judgment is therefore affirmed.

Judgment affirmed.

The Chicago and Rock Island Railroad Company, Appellant, *v.* Warren W. Whipple, Appellee.

APPEAL FROM PEORIA.

A writ of *certiorari* to a justice of the peace, is distinct and seperate from an appeal; and if the writ of *certiorari* should be dismissed in the Circuit Court, an appeal or writ of error should be prosecuted to reform that judgment. On the hearing in the Supreme Court to revise the judgment of the justice on appeal, the judgment on the *certiorari* cannot be examined.

A justice of the peace has jurisdiction to render a judgment upon the judgment of another, where the amount is less than a hundred dollars.

A judgment in debt by a justice of the peace, for a gross amount of debt and damages, will not for that reason be reversed.

This suit was commenced before a justice of the peace in LaSalle county, on the 19th day of September, A. D. 1854. The summons was served by leaving a copy with George H. Buck, and designating him as agent of the defendant. The parties appeared.

The plaintiff claimed to recover the amount of a judgment, which had previously been rendered in favor of the plaintiff against the defendant, by N. Duncan, a justice of the peace of said county, on the 12th November, 1853.

The justice gave judgment for the plaintiff against the defendant for $71.20 and costs, on the 30th September, 1854.

Defendant appealed to the Circuit Court of La Salle county, from which a change of venue was taken to Peoria county.

Upon the trial of the appeal in the Circuit Court of Peoria county, the plaintiff, as shown by the bill of exceptions, gave in evidence the transcript of the judgment rendered by N. Duncan, J. P., on the 12th November, 1853.

He next offered in evidence the following petition for a *certiorari:*

STATE OF ILLINOIS, } Circuit Court thereof to November term, A. D. 1854.
LA SALLE COUNTY. }

To the Hon. Edwin S. Leland, Judge of the 9th Judicial Circuit.

Your petitioner, the Chicago and Rock Island Railroad Company, respectfully represents, etc.

The petition then states, in substance, that the company was duly incorporated under an act of the 27th February, 1857, and an act of February 7, 1851, and were constructing their road by contracts from Rock Island to Chicago, in 1853.

On the 4th November, 1853, Warren W. Whipple sued the defendant before N. Duncan, a justice of the peace of LaSalle county; the summons being dated on that day and returnable on the 12th November, 1853, which was served on the 7th of November, 1853, "by leaving a true copy of the same with George H. Buck, an agent of said company, the president of said company not residing in the county."

The claim before the justice was for cattle, which plaintiff there claimed had been killed by a locomotive running on said road. The justice gave judgment for plaintiff for $71.20 damages and costs.

Defendants did not appear before the justice. That there was no proof before the justice that defendants were running said road, and in fact they were not; but the same was then being run by Farnham & Sheffield, contractors for building said road, on their own account and for their own benefit.

That the justice erred in rendering judgment, and was wholly without jurisdiction of the subject matter.

That petitioners had no knowledge of said judgment until more than six months after the same was rendered.

That Buck was never at any time their agent, and service on him was no notice to them; and the first notice they had of said

judgment was by service of summons on them, in a suit brought on said judgment.

Petition alleges that justice's proceedings are illegal and erroneous, and prays for a common law writ of *certiorari*, etc.

Petition is verified by affidavit.

On the same day defendants filed their bond in the Circuit Court clerk's office, conditioned according to law, to prosecute their appeal, and to pay the judgment, etc., if the justice's judgment should be affirmed.

On the 27th December, 1854, writ of *certiorari* issued to the justice, returnable forthwith, who returned the transcript of the judgment and proceedings before him, as hereinbefore stated and set forth, rendered on the 12th November, 1853.

On the 6th day of March, A. D. 1857, in the Peoria county Circuit Court, (the venue in the case having been previously changed to said county,) the said Warren W. Whipple, by his counsel, entered a motion to dismiss the *certiorari* in said case for the following reasons:

1st. Because no common law writ of *certiorari* lies in such case.

2nd. Because the facts on the face of the petition do not authorize the issuing of any such writ.

3rd. Because the transcript and papers show that the justice decided correctly.

4th. The return does not show that the justice committed any error in law.

5th. The justice had jurisdiction, and did not proceed erroneously.

On the 7th December, 1857, this motion came on to be heard, and was argued by counsel for both parties. The court sustained the motion, dismissed the writ of *certiorari*, and ordered a writ of *procedendo* to the justice of the peace.

The court gave judgment for the plaintiff for $93.09, damages and costs of suit. The defendant insisting and setting up, that the judgment of the court dismissing the writ of *certiorari* and ordering a *procedendo* in said suit of the Rock Island Railroad Company against the plaintiff, constituted a bar to a recovery in this suit, brought to recover a judgment upon the judgment of 12th November, 1853, aforesaid.

From this judgment the defendant appealed to this court.

The errors assigned are:

1. In rendering judgment in favor of the plaintiff, the evidence showing that he was not entitled to recover.

2. In rendering judgment against the defendant in damages, the evidence and record showing that the judgment (if any)

should have been in debt for the amount of the judgment and costs sued for, and damages for interest only.

3. Judgment ought to have been rendered in favor of the defendants.

4. Because the defendants, in the original suit, or judgment rendered November 12th, 1853, were not legally served with process, and said justice had no jurisdiction in the case.

N. H. PURPLE, for Appellant.

D. L. HOUGH, for Appellee.

WALKER, J. This was an action originally brought before one Putnam, a justice of the peace of LaSalle county, on a judgment previously recovered before one Duncan, also a justice of the peace, of the same county. On the trial, the justice rendered judgment against appellants and they removed the cause to LaSalle Circuit Court by appeal; which was afterwards sent to the Peoria Circuit by a change of venue. While the appeal was pending in the LaSalle Circuit Court, a writ of *ceritorari* was awarded on the petition of appellants to Duncan, to send up a transcript of the proceedings and judgment before him, and upon which this suit had been instituted. The return was made to the writ, and the proceeding on the writ of *certiorari* likewise went by change of venue, to the Peoria Circuit Court, and was on the motion of appellee dismissed by that court. And afterwards this cause was tried by the court, by consent of the parties without the intervention of a jury, and resulted in a judgment in favor of the appellee, for $93.09; to reverse which, appellants bring the cause to this court.

The proceeding by writ of *certiorari*, was separate and distinct from the appeal, in this case. When the court dismissed it, the appellants, if disatisfied with that judgment, should have prosecuted an appeal or writ of error to this court, if they desired to have that judgment reviewed. On the trial of this cause, we have no power to determine, whether the judgment in that cause was erroneous or not. The record in that case is not now before us for trial, it is only properly before us as evidence in this case, and it is collateral to this proceeding.

The appellee on the trial of this cause in the court below, introduced in evidence, the transcript of the judgment recovered by appellee against appellant in the case before Duncan, and the petition, writ and transcript, returned by him in that proceeding. That transcript showed, that there had been a sufficient service of process upon the appellants, to give the justice jurisdiction over the person, and there can be no question, that the

justice of the peace had jurisdiction to try a cause and render judgment, on a recovery in another justice's court. Upon such a judgment debt may be maintained, and being less than one hundred dollars, he had jurisdiction of the amount. That transcript showed a recovery of a judgment which appeared to be in full force, and unless it appeared on its face to be void, for want of jurisdiction, either of the person or subject matter, the court could not disregard it, nor could it be attacked in such a collateral proceeding, to show that it was erroneous. That could only be done by a direct proceeding. The evidence we think justified the finding of the court below.

It is also urged that the Circuit Court erred in rendering judgment for a gross sum, it being an action of debt. While it is clearly necessary in all actions of debt originating in the Circuit Court, that the debt and damages should be separately found, and that the judgment should specify each separately, and while it is error to render a judgment in such a cause for the gross amount of debt and damages, still in actions originating before justices of the peace, and tried in the Circuit Court on appeal, the same strictness is not required. And a judgment in such a case, for the gross amount of debt and damages, will not for that reason, be reversed. *Horton* v. *Critchfield*, 18 Ill. R. 135; *Pendegrast* v. *City of Peru*, 20 Ill. R. 52. We perceive no error in this record requiring its reversal, and it must be affirmed.

Judgment affirmed.

Horatio G. Howlett, Plaintiff in Error, *v.* Luther L. Mills *et al.*, Defendants in Error.

ERROR TO COOK.

The mere assent of a creditor that his debtor may make an assignment for the benefit of his creditors, does not have the effect to release the debt.

The filing of a duplicate plea does not render an answer to it necessary. It may be struck from the files, or disregarded.

This was an action of assumpsit brought by Mills *et al.* against A. B. Sears and the plaintiff in error, (H. G. Howlett,) as partners under the firm of A. B. Sears & Co.

The declaration was filed September, 1857, counting on three promissory notes described therein, and an account for merchandise.

Howlett, one of the defendants below, (plaintiff in error here,) filed a plea that the "said *defendants* did not promise," etc., as alleged; concluding to the country.

On the 26th of December, 1857, Howlett filed two additional pleas; one a special non-assumpsit "that *he* did not undertake and promise as alleged," etc., concluding to the country; and the other a special plea setting out transactions in detail between plaintiff and the assignee of defendant, by which Howlett claimed that plaintiff's demand was satisfied and discharged. This plea is stated in the opinion of the court.

The record recites that a demurrer to the second plea was sustained; and that the plaintiff joined issue on first plea, and to the second plea filed demurrer.

The record recites that parties appeared in court, and by their agreement, the "cause is submitted on the demurrer to special plea to the court for trial."

December 3, 1858, defendant, Howlett, filed another special plea, the same in substance with the foregoing special plea, but varying a little from it in form.

A jury was waived, and there was a trial of the issue joined by the court. Finding and judgment for plaintiff for $1,218.

The errors assigned are—

The second plea, special non-assumpsit, was good on general demurrer; the demurrer to it ought not to have been sustained.

At the time the cause was tried there were two special pleas on file, undisposed of and undecided.

T. Lyle Dickey, for Plaintiff in Error.

Smith, Dewey & Kellogg, for Defendants in Error.

Walker, J. This was an action of assumpsit, instituted by Mills and others against Howlett and A. B. Sears as partners, on three promissory notes. On the 19th of October, 1857, Howlett filed a plea of the general issue, and on the 26th of December following he filed a plea of non-assumpsit, and a special plea, which alleged, that he and Sears made and executed a deed of assignment of a large amount of real and personal property, by which they conveyed it to an assignee for the benefit of their creditors, and that defendants in error were included in the number, and that the same was of more than sufficient value to have paid all their debts and liabilities, including the notes sued upon in this action. That the defendants in error and others, their creditors, took the control of the property so assigned, out of the hands of the assignee, and directed him to surrender it to the possession of said Sears, to sell and dispose of, collect

and receive the proceeds of the same, for the use of defendants in error, and to pay their debt to defendants in error and their other creditors, and that the assignee, in pursuance of such order and direction, did surrender and deliver the property to said Sears, and that he took the control, possession and management of the same, and sold, collected, received and disposed of the property, without the knowledge or consent of plaintiff in error, whereby he sustained damage and became discharged from the payment of the notes sued upon in this case. To this plea, there was filed a demurrer, which was sustained by the court, and the plaintiff in error abided by the plea. It also appears from the record, that on the 3rd day of December, 1858, plaintiff filed a plea in every respect the same as that filed the 26th December, 1857, which remains unanswered. There was issue to the country, formed on the plea of non-assumpsit. The parties, by agreement, waived a jury, and a trial by consent was had by the court, which resulted in favor of the defendants in error, and the court rendered a judgment against Howlett, for the sum of $1,218.34, to reverse which, he prosecutes this writ, and assigns for error—

1. That the court below erred in sustaining the demurrer to defendant's special plea.

2. In rendering judgment while a plea remained in the record undisposed of, and not traversed.

3. In trying an issue in fact, before the issues at law were settled.

4. That the whole record does not show a cause, wherein a judgment could be properly rendered against plaintiff in error.

This special plea fails to aver that when the property was disposed of and converted into money, that it was sufficient to pay the indebtedness for which it was assigned; nor does it show that the defendants in error were, by the terms of the deed of assignment, entitled to receive any portion of the avails of this property, until all the creditors had received the full amount of their claims. For aught that appears, the deed may have preferred other creditors in the payment of their debts, and when this property was reduced to money, that it would have been exhausted in payment of such preferred creditors; and it fails to aver, that the defendants in error were by the terms of the deed entitled to any portion of this fund. The plea fails to aver, that defendants in error ever agreed to look to, or rely upon this property, to pay or discharge this debt. There is no averment, that they had, in consideration of the execution of the assignment, agreed to release their claim. It fails to aver, that they had received or were entitled to receive any portion of the fund from Sears, or in what manner the plaintiff in error had sustained damage. It does not aver that Sears had wasted,

sacrificed, or misapplied the fund, or had in any manner been wanting in care and prudence in its management. But it simply relies upon the fact, that by the advice of the creditors, of whom defendants were a part, the property was surrendered by the assignee into the hands of Sears, and that he had reduced it to money. The mere assent by a creditor, that his debtor may make an assignment for the benefit of his creditors, cannot have the effect to release and discharge the debt, and this is what is asserted by this plea. It, at most, could only be held to require him to look to the fund for his portion to be applied on his claim, and leave him to collect the remainder out of the debtor. This plea does not show such a state of facts, as could in any event discharge any portion of these notes. The damages alleged to have been sustained, were not offered to be set off against the notes, and these damages would not constitute such a defense. Not being liquidated, and not growing out of the contract or agreement sued on, they were not a proper subject of set-off, and the party's remedy, if he has any, is by action. The demurrer was properly sustained to this plea.

The plea filed on the third day of December, 1858, being almost a literal copy of that of December 26th, 1857, must be held to be the same plea. It presents the same defense, in precisely the same manner as the other. The defendant, under the statute, has no right to file as many copies of the same plea as he may choose, and if he does, all but one may be stricken from the files, or disregarded by the court. The statute only contemplates the filing as many several pleas, as may present a several defense to the whole or a part of the cause of action, or the same defense in a different form. The stipulation filed in this case, also shows that the latter was filed as a copy of the former plea, under the supposition that the former had been lost. It was not intended for, or relied on as a separate and an independent defense, and as a copy, it required no answer. There was no error in proceeding to trial and in rendering judgment, while this plea remained unanswered.

This disposes of the remaining assignments of errors and renders it unnecessary to discuss them separately.

The judgment of the court below is affirmed.

Judgment affirmed.

James W. Cochran, Appellant, *v.* Thomas A. Harrow, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

If a man stands by, and suffers another to purchase land, to which he has a mortgage, or title, without making the facts known to the purchaser, he will be estopped in equity from exercising his legal right.

The complainant, Harrow, filed his bill in chancery, setting forth:

That on or about the 23rd of February, 1854, he purchased of Samuel M. Hart, of Cincinnati, out lot, or block, number 13, in Canal Trustees' subdivision of section 7, township 39, R. 14 E., containing 10 acres, more or less, for $12,000, one-fourth cash, balance in three notes of $3,000 each, bearing six per cent. interest, payable in one, two and three years, respectively, and secured by mortgage on the premises, at the date of purchase.

That prior to said purchase, Hart employed land agents in Chicago, to sell said premises for him; and the first proposition to complainant was made by them, for Hart. Several interviews took place between them and complainant, and one or more between Hart and complainant, during the pendency of the negotiation; and as complainant was unacquainted with titles to land in Chicago, he reposed confidence in Hart, and in Sharp & Smith, and gave them directions on his part to look carefully into the same, and not to suffer him to be defrauded or to get a bad title; all of which Sharp & Smith, being his old acquaintances and friends, agreed to do for him. And complainant personally, and through Sharp & Smith, inquired particularly of Hart, before consummating the purchase, to know if his title was clear and unincumbered; and they both received in answer from Hart, his assurance that his title was entirely clear and unincumbered. It appeared of record at the time of the treaty for said purchase, that Hart derived his title from James W. Cochran, of Chicago, and as complainant had not time to get a full and regular abstract of title to said block, made, before the purchase, he caused an examination of the record to be personally made by Sharp & Smith, on the occasion of, and immediately prior to said purchase; who, on examining, found the deed of said Cochran to Hart, dated the 21st of February, 1854, acknowledged on same day, and filed for record on the 22nd of February, 1854, conveying to Hart the premises, in consideration of $9,000, acknowledged to be paid, and the receipt thereof fully acknowledged by the grantor, with the usual full covenants of title, and that the premises were clear

and unincumbered. They found no mortgage, trust deed, or other incumbrance, filed or recorded, from Hart to Cochran; all of which was duly reported by them to complainant; and for further precaution, complainant, prior to the purchase, caused application to be made by Sharp & Smith to Cochran, in person, who was informed by Sharp & Smith that complainant was in treaty with Hart for the purchase of the said premises which were then recently before sold by Cochran to Hart, and that Hart had represented that his title to the premises was clear and unincumbered; and for the safety of the purchaser, they wished for information, in behalf of complainant, from Cochran, whether in fact Hart was a reliable person, whose word and information might safely be taken and relied upon, in making said purchase. And thereupon, in answer to said inquiry, made on complainant's behalf, by his procurement, said Cochran answered and stated to Sharp & Smith, that Hart was a reliable person, whose information could be fully and safely taken and relied upon, in purchasing said premises. Cochran was also personally present when complainant, through Sharp and Smith, was transacting business in regard to said purchase, about the day of the date and execution of Hart's deed to complainant, and knew of said deed, purchase and sale, and was bound in good faith, if he had any incumbrance or lien on said premises, and against Hart for the purchase money, or any part thereof, or any claim whatever, to declare the same, or forever after be estopped from setting up the same against complainant's title thus acquired from Hart. Nevertheless, Cochran, on the occasion last specified, and also when particularly interrogated by Sharp & Smith, studiously and designedly kept out of view, concealed, and failed and neglected to make known the existence of any lien or incumbrance held by him against Hart and upon said premises.

That at the time of said purchase from Hart, and at the times and occasions last specified, Cochran held no incumbrance, trust deed or mortgage against Hart and on said premises, which could be discovered on the records, or from Cochran personally, by any efforts complainant could make or cause to be made.

Hart's deed to complainant bears date the 23rd of February, 1854, which is the true day of the purchase, and Cochran, on that day, had knowledge as above stated, and the notes and mortgage of complainant, for balance of purchase money, bear the same date and draw interest therefrom.

That on the 23rd of February, 1854, complainant paid Hart $1,500 of the purchase money, and left, by agreement, his three notes and mortgage, for $9,000, being the balance, with Sharp

& Smith, as the mutual agents of both parties—the $1,500, balance of the cash payment, to be remitted on return of complainant to Kentucky, which was actually done.

Immediately thereafter, complainant left for Kentucky, remitted the money, which, with the said notes and mortgage, were delivered by Sharp & Smith to Hart, who delivered his deed, with his wife's acknowledgment, to them, for complainant; and said deed was filed for record on the 3rd of March, 1854; which is referred to.

Charge of confederacy against Cochran, Hart, and J. Mason Parker, and others not named, and that Cochran, on the 24th of February, 1854, and immediately after complainant had completed said purchase and left for Kentucky, brought to light, unknown to complainant and Sharp & Smith, and filed for record, in fraud of complainant's rights, a trust deed, dated February 21st, 1854, on said premises, from Hart to Cochran, purporting to secure a debt due by Hart to Cochran, of $5,039, and evidenced by three several notes, payable in one, two and three years after date, and each dated May 7th, 1854, for the respective sums of $1,720, $1,680, and $1,590; in which deed said J. Mason Parker is trustee for Cochran, with full power to sell said premises in case of default in the payment of any part of said notes, on application of Cochran, or the holder thereof, after publication in a newspaper sixty days before the day of sale, with all right and equity of redemption, and to execute a deed to the purchaser, and pay said debt and costs.

That until the discovery of said trust deed, complainant was at all times expecting and intending to be ready to meet his said notes as they matured; that before such discovery he had, for said Hart's convenience, advanced him three several acceptances, amounting to $3,000, to anticipate the payment of the first of complainant's notes, which he did not take up, but left in Hart's hands. Afterwards he met Hart, who informed him it would be unnecessary to pay, and requested him not to pay, the first of said acceptances; and in consequence he did not pay it. Before the others matured, he discovered the fraud of the trust deed, and therefore neglected to pay them till his rights were adjudicated. Otherwise, he is yet ready promptly to meet and cancel his notes and mortgage aforesaid, as the payments fall due.

That he is informed that the notes and acceptances given by him to Hart have been negotiated to other parties and put in circulation.

At the time of making said purchase, he had no knowledge or information that Hart owed anything on his purchase money, or that there was any incumbrance on said premises for any sum

due to Cochran or others; and he believes Sharp and Smith were equally uninformed thereof. His first information of Cochran's trust deed was derived from seeing an advertisement of the sale of said premises in a newspaper, on the trust deed; and he believes Sharp and Smith had no knowledge of such incumbrance till after the said purchase of Hart; nor was said discovery made until after the complainant's notes to Hart had been negotiated.

Parker has advertised a sale of said premises under the trust deed, in default of payment of the first of Hart's three notes to Cochran; and said sale is to take place on 21st August, 1855.

Cochran, Hart and Parker made defendants, and required to answer, but oath waived.

Cochran, by his answer, admits sale of land by Hart to Harrow, on 23rd February, 1854, and on that day it appeared of record that Hart derived title of respondent, by deed, as set forth in the bill; that on said day the trust deed from Hart to respondent was not filed for record; and that Parker, trustee, had advertised a sale of the premises.

Knows nothing of Sharp and Smith's employment for Hart, but was aware that they acted for some of the parties, though he does not know by whom employed.

Knows nothing of any conversation between Sharp and Smith, or either of them and Hart, either when respondent was present, or at any other time, when Hart represented to them or to Harrow, that his title to the land was clear and unincumbered, and denies that any such representation was ever made by Hart to Harrow, or Sharp and Smith, or either of them, in the hearing of respondent; and if made at all, respondent never heard it.

Denies that he knew in any manner of the representation of Hart, if ever made, that said land was clear and unincumbered, previous to or at the time of sale, and never heard it charged upon him until a short time before the filing of complainant's bill, and then from said Smith.

Denies that Sharp or Smith, or Harrow, ever called on him in person, and informed him that Hart had represented to either of them "that his title to the premises was clear and unincumbered," and for the safety of the purchaser they wished for information "whether, in fact, said Hart was a reliable person, whose word and information might safely be taken in the premises, and relied upon in making the purchase;" and that thereupon, in answer to said inquiry, made in behalf of said complainant, this respondent "answered and stated to Sharp and Smith that Hart was a reliable person, whose information in the premises could be fully and safely taken and relied upon in taking and purchasing said land." This, your respondent

does not admit, but positively denies that any such conversation ever took place between himself and Sharp and Smith, and further denies that Sharp and Smith ever asked him any question in relation to the title of Hart, and whether there was any incumbrance on the property.

The court, on the evidence and pleadings, decreed that the equity of the case was with the complainant; that Cochran be estopped from claiming any right, title or interest in said property, under said deed of trust. Defendants Cochran and Parker were perpetually enjoined and restrained from setting up any right or interest in, or claim to said property, by means of said deed of trust. And costs and charges were adjudged against said Cochran.

An appeal was prayed by Cochran, and he assigns for error,

1. The court erred in decreeing that the defendant, Cochran, be estopped from claiming any right, title or interest in and to the property in controversy, under the deed of trust from Hart to Cochran.

2. The court erred in decreeing that the defendants, Cochran and Parker, be perpetually enjoined and restrained from setting up any right, or interest, or claim, in and to said property, under said trust deed.

3. The court erred in adjudging costs and charges against defendant, Cochran.

Waller & Caulfield, for Appellant.

R. S. Blackwell, for Appellee.

Breese, J. Do the facts in this case sufficiently show an equitable estoppel?

An equitable estoppel is said to be where one knowingly, though he does it passively, by looking on, suffers another to purchase land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.

The proof in this case is full to the point that the appellant, when spoken to by the agent of the appellee, about the title to the property in dispute, stated it was good in Hart, and when the trade was concluded at the Tremont House, on the evening of 23rd February, and fifteen hundred dollars of the purchase money paid by appellee in the presence of the appellant, and when, at the time, appellee declared he would buy no property with "a cut-throat mortgage" upon it, the appellant cannot now

be permitted to set up such mortgage to defeat the appellee. He concealed his interest when he should have disclosed it. Good faith required him, when called upon by appellee's agent about the title, and when consulted on the subject, to mention his unrecorded trust deed. His not doing so, was a fraud upon the appellee. As he chose to preserve silence when duty required him to speak, he shall not be heard, when justice requires him to be silent.

The decree is affirmed.

Decree affirmed.

John W. Waughop, Appellant, *v.* Benjamin Weeks *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

A subsequent agreement under seal, written upon and referring to a former agreement not under seal, which imposes a penalty in case the original contract should not be performed, does not convert such original contract into a deed.

Objections to the reading of papers to a jury, should be made in the Circuit Court.

Declarations of a witness before he is called, do not disqualify him. The interest of a witness in the event of the suit, should be established on his *voir dire*, or by other testimony.

This action was an action of assumpsit, brought in Cook County Court of Common Pleas, at the November term, A. D. 1858, and was tried before the court and a jury, J. M. Wilson, Judge, presiding.

The plaintiffs below declared in indebitatus assumpsit, on common count, for work and labor, and materials furnished.

The defendant below pleaded the general issue, with notice that work and labor and materials furnished to defendant by plaintiffs, were furnished under special contracts, in writing, between said plaintiffs and defendant, and that plaintiffs had not fulfilled their part of said contract; also notice and account of set-off (and sets out the contracts).

The plaintiffs introduced a witness who testified, among other things, that the work and labor and materials furnished, were furnished under a special contract.

The contracts were a special contract, and a supplemental contract under seal, and executed by the plaintiffs below in the name of B. & C. D. Weeks.

The plaintiffs below introduced in evidence the said contracts,

the parts of which, material to the questions involved in the assignments of error in this case, are as follows, to wit:

"DUTIES OF CONTRACTOR. He shall be strictly held to make such work and to use such materials as hereinafter subscribed, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions, without reference to what the drawing may measure on its scale. He will be further held to submit, as to the character of the materials used and the work done, to the judgment of the superintendents, and to procure from them all necessary interpretations of the design, and all necessary certificates regarding his payments."

"SUPERINTENDENTS AND THEIR DUTIES. Wm. W. Boyington or his assistant architects are declared to be the superintendents of the work for the owners; their duties will consist in giving, on demand, such interpretations, either in language, writing or drawing, as in their judgment the nature of the work may require, having particular care that any and all work done and material used for the work be such as hereinafter described, and in giving on demand any certificates that the contractor may be entitled to, and in settling all deductions of or additions to the contract price which may grow out of alterations of the design, after the same is declared to be contract, also determining the amount of damages which may occur from any cause, and to particularly decide upon the fitness of all materials 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."

"And it is hereby expressly provided that in case the contractor should feel aggrieved by the decision of the superintendents, 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 the superintendents, not only as regards extra work, but also to the sufficiency of the design."

"All payments made upon the work during its progress, are on account of the contract, and shall in no case be construed as an acceptance of the work executed; but the contractor shall be liable to all the conditions of the contract, until the work is accepted and finished and completed."

"TIME. Owner to give possession of the ground on or before the first day of April, A. D. 1856; contractor must agree to build the walls and chimneys ready for roof on or before the first day of September, 1856, and fully complete the plastering of the building within forty-five days after the same is declared by the superintendent ready for lathing, and must complete the whole job of masonry within days after the above mentioned time. Said work in no case shall be considered as finished, unless the same is so reported to the superintendent, and accepted by him."

"DAMAGES. And in order to secure the execution of the work in the manner and at the time specified, it is hereby distinctly declared that the damages arising from the non-fulfillment of the contract, as regards time, shall be a fair rent of the premises, for each and every day the work remains unfinished, and which sum of damages shall be deducted from the contract price."

"PAYMENTS. The said J. W. Waughop, or his executors, administrators or assigns, for and in consideration of the said B. & C. D. Weeks furnishing materials, and fully and faithfully executing the aforesaid work, so as fully to carry out the design for the same, as set forth by the specifications, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of W. W. Boyington, or his assistant superintendent, as aforesaid, and at the time mentioned in the foregoing specifications, doth hereby agree to pay to the said B. & C. D. Weeks the sum of ninety-eight hundred dollars ($9,800) in the following manner:

"As the work advances, the superintendent is to make out estimates of the work and materials furnished, and inwrought into the building, and upon a presentation of a certificate of eighty-five per cent. on said estimate, the said J. W. Waughop is to pay the amount, and the balance, fifteen per cent., will be paid in full on the completion of the contract; Provided the said superintendent shall certify in writing, that they are entitled thereto."

This agreement not under seal.

"SUPPLEMENTAL AGREEMENT.

"It is hereby agreed by and between the parties to the annexed contract, that the terms and conditions thereof be so varied that the said J. W. Waughop shall hold back and retain fifty per cent. of the whole contract price therein mentioned, instead of fifteen per cent., as provided therein, to secure the completion of the work, to be done according to specification, and to cover all damages for any failure in time, quality or workmanship, until the whole work is done, and completed, and in case the work shall be so delayed as to endanger the building, by being left open to the frosts of winter, the said B. & C. D. Weeks shall forfeit the full penalty

of fifty per cent. on the whole work, and in no other manner is this to be construed to alter in any respect the original contract, except as written above.

"Witness our hands and seals, this twenty-second day of September, A. D. 1856.

B. & C. D. WEEKS. [SEAL]
J. W. WAUGHOP." [SEAL]

The plaintiffs then offered and read in evidence the following certificate by W. W. Boyington, the architect and superintendent, dated October 25th, 1858, the signature to the same being admitted to be genuine.

"CHICAGO, October 25, 1858.

"To B. & C. D. WEEKS—*Gentlemen:*

"I hereby certify that you finished your contract with J. W. Waughop, Esq., for erecting and building two dwellings for said Waughop, located on the corner of Wabash Avenue and Washington street in the city of Chicago; but the said dwellings were not finished until six months after the time mentioned in said contract for finishing the same. Said contract provides that you shall pay a fair rent of the premises for all such delays, the amount of which is to be deducted from the contract price, after determining and deducting a fair rent of said dwellings for the six months delay, according to contract, and deducting what the said Waughop has paid you on said contract, and also deducting twenty-five dollars for not setting wash-boilers in basement (omitted), you will then be entitled to the balance, if any, due according to contract.

"Respectfully yours, WM. W. BOYINGTON,
Superintendent."

The plaintiffs then offered and read in evidence two certificates to J. W. Waughop, dated November 18, 1857, and Nov. 28, 1857, made by said Boyington, the architect and superintendent, the signatures to the same being admitted to be genuine, which said certificates are in the words following, to wit:

"CHICAGO, Nov. 18, 1857.

"MR. J. W. WAUGHOP—*Dear Sir:*

"Having looked over the contract between yourself and Messrs. B. & C. D. Weeks for building two dwellings on corner Washington street and Wabash Avenue, I hereby certify that Messrs. B. & C. D. Weeks have delayed the finishing of said dwellings at least six months beyond the time stipulated in said contract, and that you are entitled to a fair rent of the premises for the time of delay, as provided in the contract.

"My judgment is, that a fair rent of the corner house would be $1,500 per annum, and, at the rate of $1,000 per annum for the interior house, six months rent for both dwellings would be $1,250.

"You are further entitled to a deduction of $25.00 for not setting wash-boilers in basement, making $1,275.

"From the above deduction, Messrs. Boggs & Smith claim of you the sum of three hundred and fifty dollars for delays to them, as provided in their contract with you.

"Yours most respectfully, WM. W. BOYINGTON,
Superintendent."

"NOVEMBER 28, 1857.

"J. W. WAUGHOP, ESQ.—*Dear Sir:*

"In making up my estimate for delays, as stated above, I based my calculations upon what the dwellings would probably rent for at the present time. Had I made my calculation for the rates of rent for such class of dwellings at the time the contracts provided for finishing them, I should have rated the corner house at $1,800 per annum, and the interior house at $1,500, making $400 more that you would be entitled to for delay than by the first calculation.

"The reason I did not consider these rates in the first place, was, that I have been accustomed to calculate at the date of making my report; but upon reflection, I think you are entitled to the rates of rent you would get provided the buildings had been finished in time.

"In haste, yours, WM. W. BOYINGTON."

The plaintiffs, by their counsel, then offered to introduce as a witness on their part, Mr. H. B. Weeks, to whose examination the counsel for the defendant did then and there object, and offered to prove the interest of said witness in the result of this suit by *W. W. Boyington*, who being sworn, testified as follows:

I know Mr. Hiland B. Weeks. The old gentleman (meaning said H. B. Weeks) remarked when I asked him (Mr. Weeks) why he changed the mode of executing contracts, that it was in consequence of some unsettled matters of his own in New York, but that the work would be done as satisfactorily; that he should superintend the work, as though executed in his own name. Sometimes the young men took the certificates, sometimes himself; whenever I wanted anything done, I usually consulted with the old gentleman. He did not particularize what his difficulties were, but gave me to understand that they would come down on him for anything left unsettled in his hands.

Mr. Hiland B. Weeks being then called by the plaintiffs' counsel as a witness on their part, the defendant did then and there object to his examination and testimony as incompetent to go to the jury, whereupon the matter was referred to the court, who was of the opinion that the said evidence was not incompetent to go to the jury, and the jury could decide as to his credibility.

Hiland B. Weeks was then duly sworn, and testified.

The defendant, by his counsel, moved the court to exclude from the consideration of the jury, the certificates in evidence by W. W. Boyington, the architect and superintendent, on the ground that said certificates did not constitute a final certificate, as required by the contract. The court refused to exclude said certificates from the consideration of the jury, to which refusal, the defendant, by his counsel, excepted.

The jury found a verdict for the plaintiffs for $1,100.

The plaintiffs abated $84, interest, allowed by the jury.

The said defendant thereupon filed his motion for a new trial, which the court overruled, and the defendant excepted.

The court rendered judgment for plaintiffs, upon said verdict, and defendant prayed an appeal, which was allowed.

Plaintiff in error assigns for error the following:

1st. The court erred in giving the judgment aforesaid for the said plaintiffs below, against the said defendant below, whereas by law, the said judgment ought to have been given for the said defendant below, against the said plaintiffs below.

2nd. The court erred in holding the letters, or certificates, signed by Wm. W. Boyington, dated respectively, to constitute such a final certificate as the contract aforesaid required.

3rd. In admitting improper evidence to go to the jury on the part of the plaintiffs below.

4th. In excluding from the jury, evidence offered by the defendant below.

5th. In overruling the motion for a new trial, and the motion to exclude from the jury, the evidence of the plaintiffs below.

Arnold, Lay & Gregory, for Appellant.

King, Scott & Wilson, for Appellees.

Walker, J. The first question presented by this record, is whether the execution of the subsequent agreement under seal, converted the original, unsealed instrument, into a deed, and rendered it inadmissible in evidence. This subsequent memorandum although indorsed upon the paper containing the agreement of the parties, for the construction of the houses, and notwithstanding it referred to the former agreement, and the erection of the buildings, formed no part of the first agreement. It made no change in the terms, conditions or specifications contained in that agreement. It only imposed, or fixed a penalty, in case the original contract was not performed by appellees, and the building should be injured by the winter. But even if this were not so, there was no objection interposed to its being read as evidence to the jury, and the objection cannot be urged here, for the first time.

It is also urged that H. B. Weeks was shown by the evidence to have had an interest in the event of the suit, and was for that reason incompetent as a witness. Boyington, a witness, who was called to establish his interest, testified that H. B. Weeks had said to him, that the reason why he had changed the mode of executing contracts was on account of some unsettled matters in New York, and that the work would be as satisfactorily performed, as he would superintend it, as though

executed in his own name. That sometimes the young men received the certificates, and sometimes H. B. Weeks, and that whenever he wanted anything done, he usually consulted with the old gentleman. This evidence leaves it in doubt whether the witness, H. B. Weeks, was acting for himself in the name of his sons, or as their agent. But it is not inconsistent with an agency, and the interest of a witness to disqualify him from testifying, should be established by a preponderance of evidence, and that evidence should be legitimate. It has been held, and it is believed to be the rule, that the declarations of the proposed witness cannot be received to disqualify him from testifying. They are held to be no more than hear-say evidence, and therefore inadmissible to prove a disqualifying interest. *Jones et al.* v. *Gully*, 4 Litt. R. 25; *Price* v. *Chase*, 8 Mass. 487; *Commonwealth* v. *Wait*, 5 Mass. 261. The party may resort to the *voir dire*, or he may establish the disqualifying interest by other testimony, but it must be legal. If the declarations made by a witness out of court and not under the sanction of an oath were to be admitted to disqualify him, it would afford an easy and ready mode for an unwilling witness to avoid examination. He would only have to state out of court, in the presence of the friends of the party against whom he is called to testify, that he has an interest in the event of the suit, and they testify to his statements, and he would escape examination.

It was also objected that appellees were, under the contract, precluded from showing the amount and value of extra work. And that the superintendent should have determined these questions. Even if the proper construction of the contract authorized Boyington to determine the amount and value of the extra work, he did not make the estimate. The contract only authorized him to make additions to or deductions from the contract price, growing out of a change of plan and the damages thereby sustained. The architects testified that there might be extra work and extra material, without any change of the plan or design of the work. And if it required evidence to prove that fact, it was thus proved. And this evidence stands uncontradicted, and if it be true that this extra work was not occasioned by a change of plan or design, then the superintendent had no right to determine by his certificate its amount and value, and this must have been so regarded by the superintendent, for he does not attempt to fix it, when he estimated the damages sustained by appellant growing out of delay in the completion of the buildings. The appellees only proved the amount and value of the extra labor and materials furnished under the direction of the superintendent, and in this there was no error.

From the verdict in the case, it appears that the jury allowed appellant for all the payments he had made on the contract, and rent for the buildings for the period he was delayed in getting them, after the expiration of the time, when they should have been completed, by the terms of the contract. And we are not able to perceive that the jury allowed appellees anything more than the balance of the contract price, and for the extra labor and materials furnished, at the prices proved, and interest for delay in payment, which was remitted. After remitting the interest the evidence warranted the finding of the jury.

The judgment of the court below is affirmed.

Judgment affirmed.

George C. Smith, impleaded with Frank Swick and Richard N. Cowan, Appellant, *v.* Nathaniel L. Williams, Appellee.

APPEAL FROM COOK.

Where the evidence as to the persons who compose a copartnership is conflicting, the verdict will not be disturbed.

The court may send a jury back under instructions, as to how to correct a verdict.

A party cannot complain of an instruction, which favors himself.

This is an action of assumpsit, brought by the appellee against the appellant, impleaded, etc. Suit commenced by summons; service on George C. Smith, appellant only, others not found.

The declaration contains three special counts and the common counts.

The first count is on a note as follows:

Chicago, Ill., Sept. 30, 1857.

Received of N. L. Williams, sixty dollars, cash, which we promise to pay on demand, with interest, at the rate of 3½ per cent. per month.

$60. FRANK SWICK & CO.

The second count is on a note as follows:

Chicago, Ill., Oct. 1, 1857.

Received of N. L. Williams, one hundred and ninety dollars, which we promise to pay on demand, with interest, at the rate of 3½ per cent. per month.

$190. FRANK SWICK & CO.

The third count is on a note as follows:

CHICAGO, ILL., Oct. 13, 1857.

Received of N. L. Williams, seventy dollars, in cash, which we promise to pay on demand, with interest, at the rate of 3½ per cent. per month.

$70. FRANK SWICK & CO.

The defendant, George C. Smith, pleaded non-assumpsit, verified by affidavit.

Joinder by plaintiff.

The cause came on for trial before MANIERRE, Judge, and a jury, on the 30th day of June, A. D. 1858.

The cause was submitted to the jury, who, under the directions of the court, brought in a sealed verdict the following morning, which was as follows:

We, the jury, find verdict for the plaintiff.

Thereupon the court ordered the jury to retire again, and assess the damages, casting interest on the amount of notes at six per cent. per annum. To which said direction the said defendant, by his counsel, excepted.

Afterwards the jury returned a verdict as follows:

We, the jury, find verdict for plaintiff, and assess the damages at $334.22.

Thereupon said defendant, by his counsel, moved for a new trial and in arrest of judgment.

The court overruled said motions.

R. S. BLACKWELL, and E. G. ASAY, for Appellant.

D. P. WILDER, for Appellee.

CATON, C. J. This was an action of assumpsit on three several promissory notes, executed by Frank Swick & Co., a firm composed of Swick, Smith and Cowan, as is averred in the declaration. Smith alone was served with process. He appeared and pleaded non-assumpsit, which he verified by affidavit under our statute. The pleadings admitted the execution of the notes by Frank Swick & Co., and the only question made on the trial, was whether Smith was a member of that firm, when the notes were executed. Upon this point, the testimony was conflicting, some witnesses swearing that he was, and others, that he was not. There was evidence sufficient to support a verdict either way, and as the jury have settled this conflict in favor of the plaintiff below, we shall not disturb the verdict.

When the jury first came into court, they offered a verdict for the plaintiff simply, without assessing the damages. This the court refused to receive, but sent them again to their room, with instructions to assess the plaintiff's damages to the amount of the notes, calculating the interest at six per cent. per annum.

They afterwards returned a verdict in accordance with this instruction. Of this action of the court, Smith complains, but we think without the least cause. It has often been settled, that if a verdict is returned which is defective, or informal, it is the duty of the court to send the jury back, with directions how the verdict should be made up. If there was any error in this instruction, it was in favor of Smith, for the notes on their face drew interest at three and a half per cent. per month, and the court, when there was no plea of usury interposed, instructed the jury to allow but half per cent. per month. Whatever error there was in this instruction was in favor of Smith, and he cannot complain. The judgment is affirmed.

Judgment affirmed.

David Chalmers, Plaintiff in Error, *v.* Thomas C. Moore, Defendant in Error.

ERROR TO PEORIA COUNTY COURT.

Where it is designed to recover against the indorser of a note, action must be brought against the maker, at the first term of any court having jurisdiction, although there may not be ten days between the time the note falls due, and the commencement of the term.

As an evidence of diligence against the maker of a note, an execution should be levied on goods, and the right of property therein tried, if the goods are in the possession of the maker.

Diligence requires the issuance of an execution in the county where the judgment shall have been rendered.

Property in the possession of the maker of a note, should be sold subject to the claims of others, so that the rights of parties may be ascertained.

An execution should not be returned before its life is extinct, if diligence is to be shown under it.

The declaration was in assumpsit by Thomas C. Moore second indorsee, against David Chalmers, indorser; first count averring due diligence by suit, etc.; second count, insolvency when notes fell due, etc.; and the common counts.

There was a trial by jury; motion for a new trial; judgment for $213.69 and costs.

Execution to Knox county, dated July 17th, 1858. Received by sheriff, July 20th, 1858. Returned, no property found. Return not dated. Writ not marked filed. Alias execution to Peoria county, dated August 14th, 1858. Returned August 14th, 1858, no property found. Clerk testified that execution to

Knox county was returned to his office before the alias was issued.

Objections of defendant to reading said pleadings, record and proceedings, for that due diligence in the commencement and prosecution of suit had not been shown, and for that no writ of execution had remained in the hands of the proper sheriff for the time required by law to charge an indorser. Objections overruled, exception taken, and pleadings, record and proceedings read.

Deposition of *Miles Smith* shows, that the goods in the shop of makers of note had all been mortgaged. Knew of no property liable to execution. J. W. Moore owns house and lot, worth $450 or $500. Has lived there four or five years. Thinks suit would have been unavailing. Their stock of goods was worth $150 or $200.

Deposition of *Robert L. Hannaman* shows, that makers of note were much embarrassed on 23rd March, 1858. Don't think any part of note could have been made by suit. February 23rd, 1858, I filled up mortgage for $224.54 to J. B. Smith, on the stock of goods owned by the makers. Know of no other property liable to execution. I held claim for $40 against J. W. Moore since 1841, which I have been unable to collect by law. J. W. Moore had lot and house, worth $400 or $500, where he and his family live as their homestead. Don't know how much makers owe.

Testimony of *Elizabeth Chalmers* shows, that between spring and winter of 1857, makers of note bought about $800 worth of goods of indorser, Chalmers, and his predecessors, Quackenbush & Gillis. Paid about $400 or $500. Makers were considered good and prompt pay. Note sued on was given for part of such purchase. Judgment for $157 more rendered to-day.

Charles C. Bonney, for Plaintiff in Error.

Jonathan K. Cooper, for Defendant in Error.

Breese, J. The record in this case shows an action by the assignee against the indorser or assignor of a promissory note.

Ch. 73, section 7, (Scates' Comp. 291,) provides that every assignor of every promissory note, bond, bill or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or his or their executors and administrators, if such assignee shall have used due diligence, by the institution and prosecution of a suit against the maker thereof for the recovery of the money or property due thereon, or damages in lieu thereof, with the proviso, that if the institution of such suit

would have been unavailing, or that the maker had absconded or left the State when such assigned note became due, such assignee may recover against the assignor as if diligence by suit had been used.

The note fell due March 23rd, 1858, and on the 21st May, 1858, a summons was issued out of the County Court of Peoria county against the makers, directed to the sheriff of Knox county, where they resided, which was duly served and a judgment by default taken against them, June 8th, 1858, for $195.41. Execution was issued to Knox county only, July 17th, 1858, which was received by the sheriff of that county July 20th, and returned no property found. The return bears no date, nor is the *fi. fa.* marked filed. On the 14th August, 1858, an *alias fi. fa.* issued to Peoria county, which was returned on the same day no property found. The clerk testified that the *fi. fa.* to Knox county, was returned to his office before the alias writ dated 14th August, was issued.

This court judicially knows that there was a regular term of the County Court of Peoria having jurisdiction of this cause, on the first Mondays of every month. The exercise of due diligence then, would have required the suit to be brought to the April term as the note fell due 23rd March. This would have given the defendants a continuance to the May term, at which term, final judgment could be had. But suit was not commenced until the June term—the third term after the maturity of the note.

It was decided in *Lusk* v. *Cook*, Breese R. 53, so far back as 1823, and never since departed from, that where an assignee seeks to recover of an assignor on the ground that he has used due diligence to obtain the money of the maker but has failed, he must show that he commenced his action against the maker, at the first term of the court, which happened after the note became due, provided there be proper time for the service and return of the writ. Though in this case there was not time for the issue and return of a writ to the April term, yet a writ might have issued and been made returnable to that term. And why was the May term permitted to pass? *Bestor* v. *Walker*, 4 Gilm. R. 3; *Allison* v. *Smith*, 20 Ill. R. 106.

We do not know but that a judgment at the May term might have produced the money. There is no evidence proving satisfactorily, that the makers had not the means of paying in the spring of 1858 as late as May. It is all opinion. The facts stated are that in February, 1858, that a mortgage was filled up for $224.54 to J. B. Smith on the stock of goods then owned by the makers of the note. Whether this mortgage was ever in fact executed does not appear, nor that it was for a valid

debt, nor that it had been recorded, nor that it held the goods in any way. The mortgage at any rate should have been produced. *Roberts* v. *Haskell*, 20 Ill. R. 63. A levy should have been made on these goods, and the right of property tried. *Roberts* v. *Haskell*, 20 Ill. R. 59. The goods were worth one hundred and fifty or two hundred dollars, and were all in the visible possession, and *prima facie* ownership of the makers of the note, in which the assignee did not think proper to disturb the defendants, or out of them, attempt to make less than two hundred dollars, the amount of his money against them, and to satisfy which, they were apparently liable.

We have said in *Nixon* v. *Weyhrich*, 20 Ill. R. 600, that in order to recover of the indorser of a note, it must be made to appear that the maker was sued in good time, and that collection of the judgment was pursued with proper diligence, and if from the want of diligence, the money was not made of the maker when it might have been, the assignor is released.

We think too, that the first execution in this case should have been issued to Peoria county, and the inability of the debtor to satisfy it, proved by the sheriff or other officer holding the *fi. fa.* or other competent evidence. In *Sanders* v. *O'Bryant*, 2 Scam. R. 370, it was held that in order to show due diligence it is clearly the duty of the assignee to prove that within the county where the suit was commenced, he had used all the means the law gave him to collect the money. This the appellee has wholly failed to do. So as to the execution to Knox county, why was not the sheriff or assessor of that county called to speak of property? But above all, why was not the mortgage produced and proved to be for a subsisting *bona fide* debt? Too much looseness, and neglect of due diligence is apparent in this case. The first *fi. fa.* was not issued until near forty days after the rendition of the judgment, and though having ninety days to run, was returned in twenty-eight days, unaccompanied by any proof that the officer had made an effort to execute it, and the alias was returned the same day it issued. We see no particular objection to this, for the sheriff, by such extraordinary dispatch, must be prepared to show that holding the writ the ninety days would have availed nothing. That burden he takes upon himself, by such a speedy return of a *fieri facias*. It might be, that before the execution had run out, the defendant had property. But enough of this. The goods and real estate should have been levied on and sold, subject to such subsisting claims as might have been against them, or the adverse right to them tried and determined.

The proof by no means shows, that a suit against the makers, if prosecuted with diligence, would have been unavailing, nor

does it show, that the one which was instituted was prosecuted with diligence. See *Bledsoe* v. *Graves*, 4 Scam. R. 384.

The judgment is therefore reversed and the cause remanded.

Judgment reversed.

Augustus O. Garrett *et al.*, Plaintiffs in Error, *v.* William S. Moss *et al.*, Defendants in Error.

ERROR TO PEORIA.

The opinion in this case, reported in 20th Ill. R., p. 549, approved.

A bill of review only authorizes the court to decide from a recitation of facts, that the law was misapplied to them. The sufficiency of the evidence to establish the facts as found, cannot be questioned. An improper determination of law may be examined into.

A certificate of acknowledgment to pass the title of the land of a married woman, should state, that she was made acquainted with the contents of the deed, or that she was examined separate and apart from her husband, and that she acknowledged it freely, etc., without compulsion, etc.

This was a petition for a re-hearing of the case reported in 20th Illinois R., page 549.

The petition states, that the court in the former decision, did not refer to the interest of Mary G. Garrett, one of the plaintiffs in error, and wife of Augustus O. Garrett, in said premises.

Manning & Merriman, for Plaintiffs in Error.

N. H. Purple, and C. Beckwith, for Defendants in Error.

Walker, J. We have on the re-hearing of this case, fully reviewed the whole of the grounds presented by both parties, and fully considered the authorities relied upon, and after giving the matter our best reflections, feel compelled to adhere to the conclusions arrived at, on each of the questions discussed in the opinion heretofore filed. We do not at this time feel inclined, nor do we deem it necessary, to further discuss them. But as we omitted in that opinion to discuss other questions which are raised by the record, and which have been relied upon, and urged with much earnestness, it is proper that we should at this time, notice a portion of them.

In the first place, a proper examination of the questions which we shall now discuss, renders it necessary that we should consider the nature and object of the bill filed in this case. The whole

frame of this bill indicates its object to have been to impeach the sale of the mortgaged property, under the decrees of foreclosure, upon the grounds of fraud and irregularity in conducting the sale, and to have it resold. It is urged, in addition to those grounds, that the court should go back of the sale, and determine whether the decrees of the Circuit Court were not erroneous, and vacate them, and dismiss the bills filed to foreclose the mortgages, or at least, to grant a re-hearing in those cases. And the reasons for so doing, are that the mortgages were not so acknowledged by Mrs. Garrett, as to subject her interest to sale, on a foreclosure of the mortgages. It might be sufficient to determine this question, to refer to the fact that the bill is not framed with a view to a re-hearing of those causes. Nor is such relief prayed, nor does the bill aver the fact, that the mortgages were insufficiently acknowledged or certified, to pass her title. But treating it as a bill of review, it will then become necessary to determine whether under the bill, if properly framed, upon this whole record, such relief can be granted.

The certificate of acknowledgment, attached to the mortgage to Pettingill and Bartlett, is, in all its material parts, the same as the certificate, which was held sufficient by this court, in the case of *Hughes et al.* v. *Lane*, 11 Ill. R. 123. That was a conveyance by husband and wife, of property, a portion of which was held by each of them; one lot belonged to the husband, and the other to the wife. The court held, that as the deed purported to convey lands, in a portion of which the wife had a right to dower, and a portion that she held in her own right, that the form of the certificate adopted by the officer was sufficient, and passed her lands to the grantee. In this case, the bill alleges, and it is admitted by the answers, that Garrett and wife were the owners in fee of the lands mortgaged to Moss, and to Pettingill and Bartlett. If this allegation be true, and it must be so treated, she held in her own right, some portion or interest in this land in fee, and as the wife of Garrett, she held a right to dower in the remainder, which belonged in fee to her husband. These facts, then, bring this case fully within that of *Hughes et al.* v. *Lane*, and renders that case conclusive of this question. Whatever might have been our inclinations, were the question one of first impression, that decision has become a rule of property, and should remain undisturbed.

The certificate of acknowledgment attached to the mortgage given to Moss, however, is of a different character. It fails to state that the officer acquainted her with, and explained to her its contents, or that he examined her separate and apart from her husband, or that she acknowledged that she executed it voluntarily and freely, and without the compulsion of her hus-

band. Each of these things are essential prerequisites, to pass the title of a married woman's land, and cannot be omitted. The statute requires them, and until they are performed, the deed, as to a *feme covert*, is inoperative and void. It is by the authority of the statute alone, that she can convey her real estate, and a compliance with it is essential to give to it vitality. And this acknowledgment is substantially defective, and as to Mrs. Garrett's interest, it was inoperative.

This, then, being the case, can advantage be taken of the defect on a bill of review, or were the parties compelled to resort to a direct proceeding to reverse the decree of foreclosure of the mortgage? It has been held by this court, that a bill of review will lie in the same court which pronounced the decree, either for error in law apparent on the face of the decree, as applied to the facts found by the court, and stated in the decree, or for newly discovered evidence. *Griggs* v. *Gear*, 3 Gilm. R. 10. "It is a general and well settled rule, that upon a bill of review for errors of law, the court will not reconsider the evidence, but will only inquire whether the law was improperly adjudged upon the facts which the record shows were found by the court, on the former hearing. It is to those facts thus found and established, to which the law is to be applied upon a bill of review for errors of law. Upon such a bill, questions of fact are not open to discussion. To adjudicate properly upon facts, as found, of course the pleadings are to be considered, but for no other purpose." *Evans* v. *Clement*, 14 Ill. R. 209. And in this case the court again say, "In the case before us, the facts which the court found to be established by the evidence, and upon which the decree was entered, are nowhere stated in the record, so that, being uninformed upon what state of facts the decree was made, we have no means of determining that the court erred in applying the law to those facts. It is true, the decree recites the evidence in the case at large, but not the deductions of the court from that evidence, and in making up the original decree, the law was applied, not to that evidence, but to the facts which the court found established by that evidence. In order to sustain a bill of review, it was necessary for the court to examine and determine two questions, one of fact, and the other of law, while the latter alone was before it."

This court again held, in the case of *Turner* v. *Berry*, 3 Gilm. R. 554, that, "Upon a bill of review, the sufficiency of the evidence to establish the facts as found, cannot be controverted. It is not of a misjudging of the facts that a party can complain, but of an improper determination of the law."

Then, tested by this rule, it will be perceived that the decrees in the foreclosure of these mortgages, recite no facts from which

we can determine that there was a misapplication of the law to the facts found by the court rendering those decrees. They find that most of the defendants had been duly served with process, and the others had entered their appearance, and that they had failed to answer, and that the bills had been taken as confessed against them on default, and finds the amount due upon the mortgages. The decree then orders the payment of the money, and in case of a default of payment, that the mortgaged premises should be sold, to satisfy the amounts thus found. No misapplication of the law is perceived to these facts. For aught that appears from the decree, the court may have, upon an abundance of evidence, found that Mrs. Garrett had an interest less than a fee in the premises, and such as did not even require her to join in the deed; but if that were not so, the defect in the acknowledgment, does not appear from the record to have been found as a fact by the court in the case, and if it does appear, it is from the evidence in the case, and not from the facts found by the court. The mortgage and certificate were only the evidence, from which the court could find facts, upon which the law was applied. The court, on a bill of review, as we have seen from the cases referred to, could not have considered the evidence on the former hearing, and reverse or modify the decree of the court rendered in the original case. That could only be done, if erroneous, on appeal or error in the appellate tribunal.

It is not insisted that this proceeding can be maintained upon the grounds of newly discovered evidence, nor is the bill framed with that view. We do not deem it necessary to discuss some other of the many questions presented, as the view we have taken of the case is necessarily conclusive of this proceeding.

The decree of the court below must be affirmed.

Decree affirmed.

C. J. Caton took no part in the decision of this case.

William Panton, Appellant, *v.* Erastus Tefft, Appellee.

APPEAL FROM KANE.

The word "also," in a deed, expressing what is granted thereby, means likewise, in like manner, in addition to, denoting that something is added to what precedes it.

Parol evidence cannot be admitted to explain an ambiguity, which is patent.

A sworn answer must be disproved by two witnesses.

THE complainant, Erastus Tefft, filed his bill in which it is set forth:

That on the 10th day of December, 1847, Joseph Tefft and Benjamin W. Raymond, (who were seized in fee simple of about forty acres of land, situate at Clinton, in Kane county, on the west bank of Fox river, extending several rods above and below the dam, and also of the west half of the dam and water power thereby created), entered into an agreement with one G. M. Woodbury, to convey to him a part of said land, and 1,200 inches of the said water power, to be drawn from a race to be constructed; the same to be the first privilege of said water power, on condition that he should erect a stone flouring mill on said land, repair and raise the west half of said dam, make a bulk-head flume, etc., and construct a race from the dam to the south line of said land.

That said Woodbury commenced work upon said mill, and having made considerable progress, afterwards, on the 9th day of April, 1849, he concluded an agreement with one Hiram J. Brown, by which he agreed to deed to said Brown as soon as he should obtain a deed from Tefft and Raymond, the piece of ground on which said mill now stands, and one-third of said 1,200 inches of water, and said Brown agreed to fulfill the covenants on the part of said Woodbury, in the said agreement between him and Tefft and Raymond.

That said Brown thereupon entered upon the performance of said work.

That afterwards, on the 5th day of February, A. D. 1853, the said Tefft and Raymond (still having the title in fee to said forty acres of land, and the west half of said dam and water power) for a valuable consideration, conveyed to complainant the said forty acres of land and the west half of said dam and water power, by warranty deed.

That shortly after the purchase of said property by complainant, he erected on the opposite side of the street, and about 66 feet below the flouring mill built by said Brown, a large and expensive paper mill, the machinery of which is propelled by the water power created by said dam, and drawn from the race, extending a few rods further south. That since the completion of said paper mill the complainant has carried on and is desirous in future to carry on the business of paper making therein.

That in constructing and putting said paper mill in operation, complainant has expended about $1,500.00, and in carrying it on is obliged to employ from ten to fourteen men and expend about $50 per day, and if deprived of the necessary water to propel said mill, he would suffer great injury in his said business.

That with the dam in repair and tight, a proper bulk-head, the race in repair and tight, and no waste at said flouring mill, at all seasons of the year there would be 600 inches of water for the use of the flouring mill, and all and more water for use of paper mill than needed, of the west half of the water power created by said dam.

That in December, A. D. 1854, complainant obtained from said Woodbury a release of all his interest to the property, etc., mentioned in the said agreement.

That on the 1st day of April, 1854, said Brown had completed the said flouring mill on said premises more particularly described in deed from complainant to said Brown. Had dug and fitted, so as to be used, though not made tight, the race from the dam to the south end of the flouring mill, and repaired to some extent the west half of dam and bulk-head, and put three run of stone in said mill, and three re-acting wheels to drive the same.

That said mill covered the entire ground which Brown was to have by the agreement with Woodbury, and owing to the manner in which the mill was constructed, it would be an advantage to Brown to allow him to carry or conduct the water from the race (which came from the north along the west wall of the mill) across a small piece or part of complainant's land, lying next to the north-west corner of said flouring mill, on to the water-wheels of said mill.

That the amount of water which Brown was to obtain by his contract with Woodbury, was found insufficient for the successful operation of said mill with said wheels. That Brown applied to complainant to execute to him a deed of said ground and 400 inches of water, and at same time solicited complainant to allow him 200 inches more of water, and privilege of conducting it across complainant's land adjoining mill at north-west corner.

It was mutually agreed between complainant and Brown that said Brown should permit complainant, whenever he desired it, to remove the stones at north-west and north-east corners of said mill and erect another building adjoining, so that north wall of mill should be a partition wall, and that complainant should deed to said Brown the ground on which mill stands, and 600 inches of water of said water power, and grant him the privilege of conducting the same across the corner of complainant's lot, in manner before stated; and that the first and exclusive water privilege should be the amount necessary for the paper mill, and the said 600 inches for the flouring mill—and that the said mills should stand equal in drawing their respective amounts as above stated—and that said Brown should keep in repair the west half of dam and the race leading therefrom, to

south side of flouring mill. And in case of fracture in either race or dam, Brown was to repair the same as soon as practicable on request. And that the title to the said 600 inches of water, ground, and the privilege of drawing the water aforesaid, should be subject to the faithful performance of the agreement to keep the said dam and race in repair; and for that purpose said Brown might take stone from complainant's quarry. That having agreed, they called upon S. Wilcox to prepare the necessary papers and explain their agreement to him, and he drew a deed conveying the ground on which said mill stands, and 600 inches of water, (and only 600 inches, as complainant and said Brown then understood it.) And also granting the privilege of drawing the water across complainant's land, as aforesaid; which said deed was executed and acknowledged by complainant and his wife, and delivered to said Brown.

That said Brown, upon the delivery of said deed, sold and assigned to complainant, all his interest in said agreement, and to the land and property therein mentioned.

That said Brown, after the 18th day of April, 1854, has had no title or interest in the ground on which said mill stands, or in the water power on the west side of said river, or any privilege except what he acquired by virtue of last named deed; and the only consideration for which was the erection of said mill, and making the repairs, etc., before stated.

That said Brown owned and occupied the said mill until about the 1st day of June, 1854. That said Brown never pretended or claimed, during that time, any right to more than 600 inches of water.

That on or about said 1st day of June, 1854, Brown sold and conveyed the said flouring mill and the 600 inches of water, and the rights and privileges contained in deed from complainant to Brown, to William Panton, the defendant. That Panton, before and at the time of purchase, understood the grants in his deed from Brown to be identical with those contained in deed from Tefft, the complainant, to Brown, and that neither deed conveyed more than 600 inches of water.

That defendant has run the mill since his purchase—that the three water wheels used in said mill with full head, will pass from 12 to 1,800 inches of water, and that defendant now uses, during ordinary business hours, more than 600 inches of water. That during low water there is not enough water left to propel the paper mill, and thereby occasions him great damage. That with dam and race out of repair, there would have been enough left still for said paper mill, if defendant had only used the 600 inches.

That complainant requested defendant not to use more than the 600 inches, but defendant still continues to use more than said amount, and claims that he has a right by the terms of said deed to use sufficient for propelling his mill.

That defendant may be required to answer the premises and allegations in the bill contained under oath.

Prayer for injunction restraining defendant from using or drawing more than 600 inches of water, and that only on an equality with complainant, for a decree that the deeds may be corrected so as to express and conform to the true intent and meaning of the parties as before stated. And that defendant may be decreed to perform the covenants on his part, as contained in said deed, and upon failure so to do, that said deeds may be declared void, and said property, privileges, etc., may be declared forfeited to complainant, and for other and further relief, etc.

The deed filed with the bill, so far as grants are concerned, is set out in the opinion.

Panton, under oath, filed his answer, and says he has no knowledge of the contracts, rights or interests of the said Tefft and Raymond, G. M. Woodbury, Hiram J. Brown, as set forth in the bill, previous to the time he purchased the said mill property of the said Brown, except what he obtained from the records of Kane county, and from the deed given by said complainant to said Brown, dated 17th day of April, 1854, save as stated by his answer.

Avers that some time and during the first year after this defendant went into possession of said mill, and since the said complainant began to interfere with and deprive this defendant of the rights and privileges in the premises purchased by him of said Brown, defendant has heard various statements in reference to what was understood by others to be the agreements between persons having or claiming to have interests in said premises previous to defendant's purchase of the same, in substance as follows: That some seven years ago, said Woodbury entered into some sort of a contract with said Tefft and Raymond to build a flouring mill on west side of river at Clinton, with four run of stone, and keep the west half of the dam and race in repair, for which said Tefft and Raymond were to deed him certain lots upon which to erect said mill, etc., and also 1,200 inches water for the use of the same—and that said Woodbury made a similar contract with Truman Gilbert, on east side of the river, and erected a mill with four run of stone on said east side, in 1850.

That said Woodbury made a contract with one Hiram J. Brown, to build said mill on west side of river, according to his

agreement with said Tefft and Raymond, except in one particular, viz.: that said Brown was to keep in repair one-half of the west half of said dam and race.

That said Brown, in the year 1850, erected said mill with four run of stone.

That owing to some misunderstanding between the said Tefft and Raymond and said Woodbury, he, Woodbury, did not obtain from them a deed to said premises, but they conveyed their interest in the premises to the complainant, subject to whatever rights Woodbury might have in the same. That said Woodbury subsequently sold out his property, and left the country.

That after said Brown had got his mill into operation, and having no title to the same, (the legal title being in complainant,) he called upon complainant to deed to him what property belonged to him.

That complainant and said Brown differed as to Brown's rights in the premises, and had several conversations on the subject. That said Brown caused a deed to be drawn of said property, giving to said mill the first privilege of water power, as he then understood his rights; but complainant refused to give him such a deed, and finally caused the deed to be made which is described in bill of complaint.

Answer admits that defendant purchased the mill property, together with certain privileges and water power, as described in deed from said Brown. That at the time defendant purchased the same there were four run of stone and three water wheels in said mill. That complainant had a paper mill, located as described in his bill, with three water wheels.

Answer denies all knowledge previous to his purchase of said premises as aforesaid, in relation to the understandings and negotiations between the complainant and said Brown, or of the claims or acts of said Brown as alleged in said bill, or his or their respective rights in the premises; and denies that he was informed by Brown, complainant or any other person, that the deed from complainant and wife to Brown, and the deed from Brown to this defendant, conveyed only those alleged in the bill to have been conveyed; and denies that he was informed, or believed that the quantity of water intended or supposed to be granted in each of said deeds was only six hundred inches; but says that previous to and at the time of his purchase, as aforesaid, he was a miller by occupation, and resided at Aurora, in said county, and being desirous of leasing or buying a mill, and hearing that said mill could be bought, called upon Brown for that purpose, and most all the conversation he had with Brown at that time was in reference to the price and time of

payment for said premises; and desiring to ascertain whether Brown's title to the same was good, and knowing that he derived it from complainant, thought he could obtain from him all necessary information. He therefore called upon complainant, informed him of his intention to purchase said mill, and his object in calling upon complainant. Complainant then informed defendant that he had a warranty deed of said premises from Tefft and Raymond, of the whole village property and water power, and had given a good deed to said Brown of the mill property. Has no recollection of any other conversation at that time, and having received complainant's answer as above stated, defendant closed his contract of purchase with said Brown.

Answer absolutely denies that before his purchase and some time after he went into possession, he had any knowledge or information that complainant claimed that the rights of the parties in said premises were different from those expressed in said deeds; and that in negotiating for and purchasing said property, he was governed and informed wholly and entirely as to the rights and privileges he should acquire by the grants contained in complainant's deed to said Brown, and heard nothing from any source whatever, conflicting with what the defendant supposed to be the true construction of the language contained in said deed.

Answer denies that defendant has failed to keep and faithfully perform all the conditions and obligations incumbent upon him in relation to keeping said dam and race in repair, and that he has carefully repaired said dam and race at all practicable seasons of the year when the same required it. That said dam and race are now and have been since this defendant took possession of the same, in as good repair as they can be with such material. That defendant has not only kept the same in as good repair as when complainant deeded the same to said Brown, but has expended over $400 in making them better and more secure than when he bought the same, and also about $100 upon an embankment along the road, all of which defendant insists is no part of his obligations in the premises; but has expended said money and intends to expend much more to make said dam and race more secure than when he bought, thereby necessarily benefiting the complainant.

Answer admits defendant took possession, and continued therein as stated in complainant's bill, and uses the same wheels and machinery that were in said mill at the time of complainant's sale; and defendant therefore uses the same quantity of water when in operation, as was used by said Brown, and no more.

Answer denies that complainant remonstrated against his using more than six hundred inches of water, but on the contrary thereof says, that soon after he went into possession of said mill, complainant, whenever desirous of repairing or arranging his said mill, would shut off the water at the head of the race and thereby stop defendant's mill, without regard to the injury thereby caused defendant, preventing his reaping profit in operating the same, and also from grinding grain for those who came to his mill for that purpose.

That during the first four or five months, complainant thus stopped defendant's mill in all about one month; and when remonstrated with by defendant, replied he would let the water into the race when he got ready.

That some time about the first of last August, the complainant informed this defendant that he had obtained a copy of the deed from Brown to this defendant, and that it gave him (the defendant) the privilege of drawing water at south end of his flouring mill, and notified the defendant that he should close up the opening at the north end, and take the water at the south end, according to the terms of said deed; and that he would compel defendant to do so, though such change would be no benefit to complainant, and would cost this defendant $2,000.

That as to the other grant of six hundred inches in said deed, did not understand nor was he informed anything in regard to it, and the only construction he could then have given is the same he should now. That the first grant of water was intended to run the mill as it then was, and the six hundred inches was intended to propel such other wheels as might be necessary to operate the stone in the mill for which there was then no wheel.

That defendant then understood as now, that the first privilege of said water power was the quantity required to propel complainant's paper mill and defendant's flouring mill, as it was at the date of complainant's deed to said Brown, and not the six hundred inches for said grist mill. And that the said two mills stood on an equality as to the drawing and using their respective quantities of water as they then were at the date of said Brown's deed, and not that said paper mill, with its additional machinery and wheels, has an equal right with said grist mill, which uses now precisely the same quantity of water that it did at the date of said Brown's deed, and then each mill had three water wheels.

At June term, A. D. 1858, cause was heard before Isaac G. Wilson, Judge. Decree declared that the quantity of water granted in the deed from complainant and wife to Hiram J. Brown, and in the deed from said Brown and wife to defendant, is only six hundred inches, and that the other clause only grants

the right or privilege of carrying the said six hundred inches over complainant's land to defendant's mill.

Injunction made perpetual, and one dollar damages, and costs of suit, decreed against defendant. To which decree defendant, by his counsel, excepted. Appeal allowed.

Appellant assigns for error that the Circuit Court erred in admitting in evidence the depositions of Hiram J. Brown and John M. Smith; in admitting improper evidence for the complainant; and in rendering the decree aforesaid.

W. B. Plato, and B. C. Cook, for Appellant.

S. Wilcox, for Appellee.

Walker, J. The decision of this case depends upon the construction to be given to the deeds from appellee to Hiram J. Brown, and from him to appellant. Both conveyances describe the grant in the same language, and the portion which produces this controversy is as follows: "In consideration of the covenants on the part of said Brown hereinafter contained, and of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, aliened and confirmed, and by these presents do grant, bargain, sell, remise, release, alien and confirm, unto the said party of the second part and to his heirs and assigns forever, all the following described lot, piece or parcel of land situate in the county of Kane, and State of Illinois, and known and described as follows, to wit: A strip fifty feet in width off of the south side of Lot No. Eight (8), in Block No. Seventeen (17), of Clinton Town Plat, as laid out by Tefft and Raymond, being the grounds on which said Brown's flouring mill stands, and being fifty feet on the race and running east to the river; also the privilege of drawing water at the north end of said mill for the use of said mill as it now is; also the said party of the first part grants, bargains and sells unto the party of the second part, his heirs or assigns forever, six hundred inches of water to be drawn from the dam across Fox river at Clinton, on the west side, for said mill. The first privilege of the water shall belong to said Tefft's paper mill and said flouring mill, and between them the privilege to be equal; also the privilege of quarrying and removing stone from said Tefft's quarry in said town of Clinton, sufficient for all repairs, and for keeping up said dam and race, that may hereafter become necessary. This conveyance is made upon this express condition, and the title to the property and priv-

ilege aforesaid shall ever remain subject to the faithful fulfillment of them, to wit: The said Brown, his heirs and assigns, shall henceforth and forever maintain and keep in repair the west half of said dam and race leading therefrom to the south side of said flouring mill, and in case of a breach or fracture in the said dam or race, the said Brown, his heirs or assigns, covenant and agree to and with the said Tefft, his heirs and assigns, to repair the same as soon as practicable after being requested, and that said Brown will allow said Tefft at any time hereafter to erect a building adjoining on the north said flouring mill, and to take out the corner stones at the north-east and north-west corners of said mill, and join the walls of said building thereto so as to make the north wall of said mill the partition wall between the mill and the building so erected. All of which conditions said Brown, his heirs and assigns, hereby covenant and agree to and with said Tefft, his heirs and assigns, to keep, observe and perform."

It is insisted that this deed only conveys the right to Brown and his heirs and assigns, to use six hundred inches of water. The first clause in the grant in terms, conveys to the grantor the land upon which the mill then stood. The next clause, which is introduced with the word "also," the privilege of drawing water at the north end of the mill, for its use as it now is; and then follows the third clause, which in like manner commences with the word "also," and grants in terms six hundred inches of water, to be drawn from the dam across Fox river, on the west side, for said mill. Were it not that each of these clauses are introduced with the word "also," there might be some question, as to the construction which should be given to the language employed in this grant. But that word in its proper sense means "likewise, in like manner," in addition to, and its popular meaning, agrees perfectly with the definition given by lexicographers. It means some other thing, in the same, or like manner. Then when the grant was made of the property, the privilege of drawing water at the north end of the mill for its use as it was then situated, was in like manner granted; and by the third clause six hundred inches of water to be drawn from the dam on the west side, for the mill, was in like manner granted. If these two clauses had been designed as the same, why specify that one was to be drawn at the north end of the mill, and the other from the dam on the west side? Why describe one as a privilege of drawing water for the mill as it then was, and the other as six hundred inches? We do not see by what rule of interpretation these two clauses can be construed as meaning the same thing, or the latter as qualifying, restricting or explaining the first. The word also is

never employed to confine or limit what has been already said, but is used to denote that something else is added to what precedes it. If the latter clause had been designed to limit the privilege of drawing water at the north end of the mill, to only six hundred inches, it seems to us, that very different language would have been employed by the parties. It seems clear that the second granting clause if it had stood alone in the deed would have given the right to use all the water necessary to run it with the machinery then employed, and that the third granting clause does not limit or restrict that privilege, to any other or different amount, but on the contrary grants six hundred additional inches, to be taken from another place, and for additional machinery, or for other purposes in the mill.

We do not perceive how the parol evidence could vary the rights of the parties in this contest. Even if it establishes a mistake, in the grant from appellee to Brown, the defendant by his answer denies all knowledge of any mistake before, or at the time of his purchase, and this answer is sworn to, and must be overcome by the evidence of at least two witnesses, or its equivalent, to entitle complainant to relief. Such proof was not adduced on the trial in this case. Smith in his first deposition states, that at the time the deed was executed, Brown informed appellant that he only sold him six hundred inches of water, but in his second deposition he states that he did not intend to so state the fact, but that the conversation was in reference to the place from which the six hundred inches of water should be taken, whether from the dam or at the mill, and that the other clauses in the deed, were not spoken of, and the amount claimed by Brown was not named. Brown testifies that this clause in the deed was spoken of by appellant, and whether the six hundred inches should be taken from the dam or mill. He states he has no recollection of ever informing appellant, at any time, of the amount of water he claimed under the deed. Then if Smith's first deposition were correct, it is the only evidence of notice to the appellant, and would be insufficient to overcome the sworn answer.

Nor was the parol evidence admissible to explain, vary, or contradict the deed. It must speak the intention of the parties. If there is an ambiguity, it is apparent upon its face, and is not capable of explanation by extrinsic evidence. While a *latent* ambiguity may be so explained, it is because it is made to appear by evidence outside of the instrument, yet a patent ambiguity is not susceptible of any other explanation than that furnished by the instrument itself.

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

Decree reversed.

Ezra C. Read *et al.*, Appellants, *v.* John L. Wilson, Appellee.

APPEAL FROM COOK.

A chattel mortgage which authorizes the mortgagor to retain possession of the property, to use and enjoy the same, according to the usual course of retail trade, is not good—but if it authorizes possession of the goods to be taken, and possession is taken under the power, the possession so taken is not vitiated, because of the vicious provision in the mortgage.

The fact that the mortgagors were continued in the store, under their old sign, and sold goods, for the benefit of the mortgagees, will not destroy the apparent good faith of the transaction.

This was an action of replevin for twenty gold watches and twelve silver watches, valued at $2,500.

Writ issued December 12, 1857, and served December 15, 1857, and property delivered plaintiffs.

Declaration filed, claiming above property.

Defendant pleaded: 1st, Property in himself; 2nd, That he took the property, as sheriff of Cook county, by virtue of an execution directed to him from Cook County Court of Common Pleas, dated December 11th, 1857, against R. W. Roath, impleaded with W. Tyler Roath; 3rd, Property in said Roaths.

Replication: first, That said property was plaintiffs'; secondly, That defendant was not sheriff; thirdly, That it was the property of plaintiffs and not of Roaths.

A jury was waived. Trial by court, and judgment for defendant.

There was a chattel mortgage of property in question, made by the two Roaths to plaintiffs, dated October 23, 1857, duly acknowledged and recorded, November 20, 1857, made to secure a promissory note for $8,000, of same date as mortgage given by the Roaths to plaintiffs, due six months after its date. Mortgage provides that mortgagors should have possession of property mortgaged for two years from the date of the instrument, and use and enjoy the same according to the usual course of their retail trade, unless mortgagees should deem the property mortgaged in danger of being sold, removed, or wasted; then the note secured by said mortgage should become due, and they might in person, or by their agents, take, and hold possession of said property.

It was admitted this mortgage was executed and recorded before the execution under which the levy was made by defendant, was delivered to him, in favor of C. V. Wiley against R. W. Roath, impleaded with W. T. Roath; a valid judgment on which this execution was issued, also admitted.

Defendant objected to introduction of mortgage; objection overruled and mortgage admitted, and read in evidence. Exception taken.

Plaintiffs then offered *R. W. Roath*, one of the mortgagors, as a witness, who testified as follows:

I know the parties to this suit; plaintiffs live in New York city; I carried on the jewelry business at No. 81 South Clark street, in the city of Chicago, Illinois, where we had the stock of goods covered by the mortgage made by me and my son to the plaintiffs; about the first of November, 1857, Charles W. May, as agent for the plaintiffs, came from New York city, to take possession of the goods, store and business under the mortgage; he remained in Chicago until about the 25th of March, 1858; on his arrival he proceeded to take an inventory of all the goods and effects in the store; this was before the issue or levy of the execution of C. V. Wiley against me; May was in the store the day the execution was levied, but had gone to his dinner at the precise time of the levy; the goods in the store were the same included in the mortgage, and were levied on by the sheriff; after his arrival, Mr. May received the proceeds of all the sales made in the store, and they were deposited in the Marine Bank, to the credit of Read, Taylor & Co., these plaintiffs; after his arrival he had the sole control and direction of the business, and forwarded weekly statements of the business to Read, Taylor & Co., at New York; he took and held this possession on account of plaintiffs; at the time of making the mortgage we were indebted to plaintiffs about $8,000, and so continued at the time of levying the execution; Mr. May came to Chicago entirely to look after and see to Read, Taylor & Co.'s interest in this property, and to take possession of the same.

On cross-examination, witness testified that he had done business at 81 Clark street for one year and a half, under sign of R. W. Roath & Son, on a sign board and clock; did not remove signs after making mortgage; no advertisement of change of possession in papers, subsequent to the execution of the mortgage; myself and two sons were employed in the store prior to the date of the mortgage; no one else; I hired no one else after Mr. May came, and I and my sons remained in possession as before, selling goods under direction of Mr. May; he sold many goods, and we all received money and put in the drawer; we retained of proceeds enough to pay expenses of store and our living, or personal expenses, by consent of May; James and Tyler (my sons) slept at store, and had keys of store; I also had keys; one of my boys was in the store all the time; Mr. May did not sleep in the store; he came there in the morning as soon as I

did; did not stay there evenings generally; he sold but few goods in the evening; the day before levy was made we sold Mr. Hyatt (attorney for plaintiff in execution, and for defendant in this suit) some goods; a few to settle an account; his account against us was about $80—ours against him between $60 and $70, balance about $22; I think I consulted Mr. May about propriety of paying Hyatt's account before I paid it; Mr. May was not in store when levy was made, he had gone to his dinner; James Roath was there; we had a lease of the store; no transfer was made of it. Mr. May paid the rent himself, to Dr. Quinlan, our landlord, and had the direction of paying the rent; he paid the rent for November and December for account of Read, Taylor & Co. last, and paid all the other bills against the store; we paid no other debts than to Read, Taylor & Co. after May's arrival, except a few small ones by his consent.

Defendant then called *L. H. Hyatt* as a witness, who testified: the transaction referred to, took place the day. I presented my bill to Roath; balance, I think, of $22; he said that he had no money, but that if I wanted anything out of the store I could have it; he went to the desk and got ledger; I am perfectly certain he did not leave the show case till after he sold me the goods; I saw Mr. May in the store; he was at the desk; Roath did not consult him.

Cross-examined. After I went in, Roath went back to the desk to get his ledger; I cannot state that he did not speak to May; I had presented my bill to him before he went to the desk; I heard that May was there and went partly to find out how the business was done, but principally to get my pay.

Defendant then offered in evidence, execution from Cook County Court of Common Pleas, in favor of C. V. Wiley against R. W. Roath, impleaded, etc., dated December 11th, 1857, delivered to defendant December 11th, 1857, by virtue of which, defendant took property in question, which it is admitted were a part of those mortgaged to plaintiffs by the Roaths.

Plaintiffs offered replevin writ in evidence, with return thereon.

The court found issues for the defendant, and rendered judgment accordingly; plaintiffs excepted.

Plaintiffs below, appellants, assign for error: the court erred in rendering judgment for defendant; the court erred in not rendering judgment for plaintiffs.

Scammon & Fuller, for Appellants.

L. H. Hyatt, for Appellee.

CATON, C. J. The clause in this mortgage, allowing the mortgagors to retain possession of the stock of goods and to sell them, is substantially like that in the case of *Davis* v. *Ransom*, 18 Ill. R. 396, and must be held not sanctioned by our statute relating to chattel mortgages, so as to protect the mortgagees against subsequent creditors and purchasers, while the mortgagor is allowed to continue in the possession of the property. The clause allowing the mortgagor to retain possession is inadequate to the purpose designed, and so far as it was designed to effect that purpose, it was fraudulent and void, as to subsequent creditors and purchasers. A chattel mortgage without the provision dictated by our statute, authorizing the mortgagor to retain possession is held to be fraudulent, if the mortgagor continues in the possession, and so it must be held in relation to this mortgage, which must be treated the same as if this mortgage contained no clause authorizing the mortgagor to retain the possession, for the clause in this mortgage, was not sufficient to justify such a course. Such possession was fraudulent under this mortgage. This reduces the inquiry to the simple question of the transfer of the possession from the mortgagor to the mortgagee, under the mortgage, for if there was such a transfer of the possession before the rights of creditors actually intervened, at the moment of such transfer of the possession, that clause become a dead letter in the mortgage. It was void before and it was void still. Because that clause could not justify the possession by the mortgagor. Such possession while it continued, was fraudulent. The fraud, whatever there was, consisted in the possession by the mortgagor, rather than in the clause in the mortgage which attempted to authorize such possession. Had the mortgagees taken possession of the goods, under the mortgage, at the time the rights of the judgment creditor intervened? Upon an examination of the evidence in this case, we are satisfied they had. Indeed the evidence on that subject is all one way. The mortgagees residing in New York, sent their agent to Chicago, for the express purpose of taking possession of the goods and disposing of them, in satisfaction of their debt, under another clause in the mortgage. This agent did take possession of the goods, according to the undisputed evidence. He acquired and continued in, the absolute and undisputed dominion of the goods, sold them from day to day, to customers, as opportunity offered, and deposited the money in bank to the credit of the mortgagees, except the amount required for incidental expenses, in carrying on the business. It is true he continued the mortgagors in the store to assist him in the sale of the goods, but we know of no law which forbids this. Indeed it was very proper that he should do so, for they,

it must be presumed, were better qualified to assist him in the advantageous sale of the goods than any strangers could be. They were acquainted with the business, and with the customers of the establishment, and were particularly desirable as servants in the business. We cannot doubt from the proof, that they were nothing else. Indeed, the only fact in the whole case which we think worthy of any serious consideration as tending to a contrary conclusion is, that the sign of the mortgagors was continued over the door of the house, after the possession was taken and while the business was continued by the agent of the mortgagees. But this fact is by no means absolutely inconsistent, with a *bona fide* change of possession. It may have been accidental or from inadvertence, or it may have been under the belief, that an old and well known sign, would draw customers, who were in the habit of trading with the mortgagors, and hence continued with upright intentions. At any rate, we do not think that that fact alone, should control the case, in despite of the positive and unsuspicious testimony, that the possession was absolutely taken and continued, by the agent of the mortgagees.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Franklin H. Whitney, Plaintiff in Error, *v.* Truman Roberts, Defendant in Error.

ERROR TO STARK.

Where a party, by the use of fraud and deception, obtains a conveyance, the parties who have made it, may disregard it and convey to a third party, who may establish the fraud in equity, and be protected in his rights.

So long as the parties defrauded, do not ratify the act done by them, they or their grantees will be sustained in their equitable rights.

The facts upon which the decree in the court below is reversed, are stated in the opinion of the court. The bill in the Circuit Court was dismissed by Powell, Judge, on bill, answer, exhibits and testimony, at April term, 1857, of the Stark Circuit Court.

N. H. Purple, for Plaintiff in Error.

M. Shallenberger, for Defendant in Error.

Walker, J. The evidence in this case shows that defendant in error procured a conveyance from the Austins for the premises

in controversy. That they were the heirs of the patentee. That defendant in error represented to them that he was the owner of the title to the land, but by the loss of a portion of his title papers, it would render it necessary to proceed by suit in equity to correct the defect, unless they would obviate the necessity by conveying the land to him. That their uncle, Reuben Scriptor, had agreed to procure a conveyance of the land from them to him, and pretended to read a letter from Scriptor to one of the Austins, urging him to convey the land to defendant. Scriptor testifies that he had not agreed to procure their conveyance to defendant, but on the contrary had refused to do so before defendant had seen the Austins. He also represented to them that the land was of little value, to one not more than one dollar and twenty-five cents per acre, and to the other that the tract was not worth more than seventy-five dollars. These facts appear from the evidence of Thomas and Charles Austin, the common grantors of both the complainant and defendant in this case. Their evidence is corroborated by that of other witnesses. They likewise swear that they would not have made this conveyance to defendant if they had known the facts as they existed, and that they were not aware that they were owners of any interest in this land, until defendant applied to purchase. Charles testified that defendant paid him only a three dollar bill, which was pronounced worthless at a bank, and the evidence shows that Thomas received but five dollars, as the consideration for the conveyances, made by them to defendant. Charles also testifies that he was induced to make the conveyance to save his uncle from trouble. The defendant exhibited papers which he represented to be deeds to himself for this land, averred he was the owner, and threatened to institute legal proceedings, unless they should convey to him. Upon this evidence, the court below dismissed complainant's bill, from which decree he brings the case to this court and asks its reversal.

This evidence we think clearly establishes a case of fraud, on the part of defendant. Here were parties wholly ignorant of the fact that they owned this land, who are applied to for a deed to confirm what was represented to be an equitable title, and are threatened with legal proceedings in case of refusal, and when time for inquiry is requested, he becomes more urgent, and pretends to read from a letter from their uncle, requesting them to convey. When in fact he had no title, but a conveyance by an attorney in fact of the patentee, the power having been executed before the patent was issued, was by the act of Congress absolutely void, and there is nothing in the record by which it appears the conveyance made under it, had ever been confirmed in any manner by the patentee. Scriptor denies that he ever

agreed to procure a conveyance by the Austins to defendant, but had refused to do so, before he applied to them to purchase, and from this statement it may be reasonably inferred he had not written him any letter advising them to convey. And he pays to one of them, only a worthless three dollar bill, and to the other five dollars, and all of this is done by him, knowing that they were acting in ignorance of their rights, an ignorance which he had been the sole instrument in producing. They relied upon him for information, and in giving it, he conceals facts which he should have disclosed, and made statements which the evidence shows not to have been true. These statements must have been made with the design of defrauding them, and they relied upon their truth when he made them, and were misled and induced to make these conveyances. His conduct in the whole transaction seems to be marked with a want of good faith. When he undertook to give them information touching their rights, he should have done so truly, without concealing any material fact. While it might be, that no one fact in the case, would of itself and unsupported by other circumstances, be sufficient evidence of fraud, all the circumstances when taken together, induce an irresistible conviction, that the transaction was fraudulent. And being so, the conveyances thus procured were void, unless subsequently ratified by the grantors. And in this case we find no evidence of such ratification. But on the contrary, their subsequent conveyance to complainant, shows that they regarded these conveyances to defendant as having no binding effect.

When they made the conveyance to complainant, they, as far as it was in their power, by their own acts, disaffirmed their former conveyances to defendant. And by the latter conveyance, they transferred to complainant all the rights which they held in the property. Before it was made they had the equitable title, and by applying to a court of chancery could have compelled defendant to reconvey to them, and complainant by the conveyance to him, succeeded to the same rights. *Choteau* v. *Jones*, 11 Ill. R. 300.

In cases of fraud, whatever shape it may assume, concealed and disguised as it may be, when discovered, equity will render the transaction void. Fraud, covin, collusion and deceit, are often used as synonymous terms, and it is said in whatever shape it appears, it is always odious in the eye of the law. And it may be laid down as a general rule, that all fraud and deceit, by which a person is deprived of his rights, renders the act void. And courts of equity have gone so far as to hold, that if an instrument be obtained from persons ignorant of their rights, but whose rights are known to the party obtaining the instrument,

they will relieve, even though no fraud or imposition has been practiced.

The rule as stated by Chitty in his work on Contracts, p. 527, is believed to be recognized as correct by all courts. He says, "Fraud avoids a contract *ab initio*, both at law and in equity, whether the object be to deceive the public, or third persons, or one party endeavors thereby to cheat the other. For the law will not sanction dishonest views and practices, by enabling an individual to acquire through the medium of his deception, any right or interest." And courts of equity from their organization and large powers, in cases of fraud, have given the relief which will do complete justice amongst all the parties in interest. And in cases of conveyances, obtained by fraud, may decree that they may be canceled, or that the party holding under them shall convey to the party entitled to the property, as may best promote justice and protect the rights of the parties.

The court manifestly has jurisdiction to give full relief, and erred in not decreeing the relief prayed by the bill and established by the proofs. The decree of the court below must be reversed and the cause remanded, with directions to enter a decree in conformity to this opinion.

Decree reversed.

Willard Hadlock, Appellant, *v.* Samuel Hadlock, Appellee.

APPEAL FROM TAZEWELL.

A verdict in ejectment, which finds that the plaintiff is the owner of the land, is sufficiently explicit as to title.

Where a deed has been obtained surreptitiously and placed upon record by the grantee, nothing short of an explicit ratification of the deed, or such an acquiescence, after a knowledge of the facts, as would raise a presumption of express ratification, can give it vitality.

Where a judgment in ejectment does not award the plaintiff possession of the land, the Circuit Court at a subsequent term may correct it, or the Supreme Court may do so on appeal.

In 1856, Samuel Hadlock commenced this suit in the Circuit Court of Woodford county, for certain tracts of land, described in the declaration. On the application of appellant, the venue in the cause was changed to Tazewell county, where, at the April term, 1858, the same was tried by jury, and a verdict and judgment rendered in favor of appellee; from which defendant appealed to this court.

The verdict finds the "defendant guilty of withholding the premises in the plaintiff's declaration mentioned, and that the plaintiff is the owner thereof, and assesses his damages at one cent"; and the judgment is, "It is therefore ordered and adjudged by the court, that the plaintiff recover of the said defendant the damages aforesaid, and the costs and charges by him about his suit expended, and that execution issue therefor."

Plaintiff offered a deed from David Hadlock to him, dated January 16, 1856, and recorded August 25, 1857, for the land in controversy.

The defendant objected to said deed, but it was admitted, and defendant excepted.

The plaintiff next offered two certificates, which are as follows:

"Pre., 1834.

LAND OFFICE AT SPRINGFIELD, ILL.,

No. 13,444. November 2, 1835.

Received from David Hadlock, of Tazewell county, Illinois, the sum of one hundred dollars ——— cents, being in full payment for the W. 1-2 of the N. W. quarter of section No. 23, in township No. 28 north, of range No. 3 west of the third principal meridian, containing eighty acres and ——— hundredths of an acre, at the rate of $1.25 per acre.

$100. JOHN TAYLOR, *Receiver.*"

"No. 19,253. LAND OFFICE AT SPRINGFIELD, ILL.,

September 19, 1838.

Received from David Hadlock, of Tazewell county, Illinois, the sum of one hundred dollars ——— cents, being in full payment for the E. 1-2 of the S. W. quarter of section No. 14, in township No. 28 north, of range No. 3 west of the third principal meridian, containing eighty acres and ——— hundredths of an acre, at the rate of $1.25 per acre.

$100. JOHN TAYLOR, *Receiver.*"

Benjamin Tounger, plaintiff's witness, testified that he knew the premises; that David Hadlock was living on them fifteen or sixteen years ago; was in possession several years; don't know how long; that he, David, was in possession in 1849—claiming to be owner; supposed he remained in possession till 1850 or 1851; Willard then moved on the land, and is now in possession; did not understand he went on as a tenant; has been there since 1850 or 1851, claiming to be the owner of the land.

Defendant then gave in evidence a deed from David Hadlock to him, for the same premises, dated February 4, 1850, and recorded February 12, 1852. This deed was read without objection, and conveys the same land described in the plaintiff's declaration.

The plaintiff again called Benjamin Tounger, who testified as follows: I wrote the deed from David to Willard Hadlock; he

then resided on the premises; made the deed at David's request; Willard was there when it was acknowledged; understood it was to be kept in old man's possession until his death; understood so from the parties when the deed was acknowledged; I handed it to Willard, and he handed it, I believe, to the old man, who, I think, took and put it in his trunk; that was the last I ever saw of it until I saw it here this morning; as I understood it, the old man was dividing his land between his children, and gave Willard this as his portion. Don't remember anything being said about Willard's supporting the old man and his wife; the orchard was reserved to the old man as long as he chose to use it. (There was no consideration paid at the time the deed was made.) There was no agreement at the time the deed was made, that Willard should support the old man.

The evidence in parenthesis was objected to, and exception taken.

James Edwards, called by plaintiff, stated: Something over two years since, I had a conversation with defendant, at his house; my wife was present; Willard said the deed from David to him was made out and put in the old man's trunk; the old man went up to Samuel Hadlock's and was then taken sick with erysipelas, and that while he was sick, he, Willard, took the deed out of the trunk and got it recorded; told the old man he had given Benjamin Hadlock all his property to support him, and that he should go there for his maintenance, that he would not support him any longer; that the old man was sick at Samuel's, and he supposed he would die.

Mrs. Edwards, wife of James, testified to the same facts, and both stated they were on a visit at Willard Hadlock's at the time.

Philip Denny, called by plaintiff, stated: About two years since, Willard Hadlock told me that while the old man was sick at Samuel's with erysipelas, he had taken the deed from his trunk and got it recorded.

Mrs. Denny, plaintiff's witness, testified the same as her husband.

Benjamin Hadlock, called by defendant, testified: Some time after the 12th February, 1852, David Hadlock told me that he had given Willard up the deed for the land, and that he had got it recorded; that David, the old man, never was sick at Samuel's with erysipelas, but that he was sick at Willard's with that disease in March, 1852.

Abner Mundell, *William Crank*, *Tilton Howard*, *Thomas Pritchett*, and *William Dunn*, called by defendant, testified substantially to the same admissions, made at various times by David Hadlock, as those testified to by Benjamin Hadlock—and

all of which were said to have been made after the deed was recorded; and also that the old man, David, never was sick at Samuel Hadlock's, but was sick at Willard's with erysipelas in March, 1852.

Francis Sweet and *Abial Sweet*, called by defendant, testified: That while Willard and the old man were both living on the land in controversy, they went to the old man for some hedge plants; he told them he had given up the farm to Willard, and had nothing to do with them; they then applied to Willard.

The defendant read the deposition of *James Wagner*, taken by plaintiff. In this deposition the witness states that he was at the house of Willard and David about 1852; that he saw David take the deed out of the trunk and give it to Willard, and tell him to take it and do as he pleased with it. At this time Willard and the old man were living on the land together. At the time of taking the deposition, witness thought the old man between seventy-five and eighty years old.

David Hadlock, called by plaintiff, testified that he had never told Benjamin Hadlock, nor any other person, that he had delivered the deed, from himself to Willard, to said Willard Hadlock.

The following instructions were asked by the plaintiff, and given by the court:

"4th. If the jury believe the deed was taken from the possession of David Hadlock wrongfully and against his will, and placed upon record, the jury cannot infer a ratification of the deed from the mere delay of David Hadlock to prosecute for such wrongful act, unless the delay is so long as to bar the plaintiff by the statute of limitations."

"5th. To constitute a ratification in such case, it is necessary to show a full, free, and positive acknowledgment by David Hadlock that he had ratified and confirmed the deed, or such acts on his part as are equivalent to an express consent."

Exceptions were taken to these instructions.

The errors assigned are:

1. Admitting improper and rejecting proper evidence.
2. Entering judgment upon the verdict of the jury, the verdict not finding what estate appellee had in the premises.
3. Entering judgment for damages and costs only, without rendering any judgment for the possession.
4. In giving appellee's 4th and 5th instructions, and refusing instructions asked by appellant.
5. In overruling appellant's motion for a new trial, the verdict being against law and the evidence.

N. H. Purple, for Appellant.

H. M. Wead, for Appellee.

Caton, C. J. It has been repeatedly decided by this court, that a verdict in ejectment which finds that the plaintiff is the owner of the land, is sufficiently explicit as to the plaintiff's title. It is equivalent to saying that he owns the entire estate in the land—the fee simple. This verdict was good.

The two instructions, to the giving of which, exception was taken, we think were correct. Where possession of a deed, which has never been delivered, has been surreptitiously obtained and placed upon record by the grantee, nothing short of an explicit ratification of the deed, or such an acquiescence, after a knowledge of the facts, as would raise a presumption of an express ratification, could give the deed vitality. In this respect it would stand on the same footing with a forged deed. If the party relied upon the statute of limitations, with possession under the deed, nothing less than the period required by the statute for possession would do, and certainly no less possession under the deed with the knowledge of the grantor, would raise the presumption of ratification; and we are far from expressing the opinion that that possession would have that effect. The instructions were right.

Upon the merits of the case we do not hesitate to say, that we should have been better satisfied, had the verdict been for the defendant below. But although we may be of opinion that the preponderance of the evidence was against the verdict, yet, the evidence was very conflicting, and there was an abundance to support the verdict, although we think there was much against it. In such a case it is not our province to disturb the verdict. We shall therefore let it stand.

The judgment is no doubt incomplete in not awarding to the plaintiff the possession of the land. But the court could, at a subsequent term, have remedied this oversight by completing it, or this court, having the case before it, may do the same. It will save costs to have this now done. The judgment will be affirmed, and a further judgment will be entered here, that the plaintiff below recover the possession of the premises.

Judgment affirmed.

Augustus W. Thompson and Robert Coleman, Plaintiffs in Error, *v.* John N. Turner, Defendant in Error.

ERROR TO WINNEBAGO COUNTY COURT.

A judgment by default may be rendered against a defendant regularly served with process for an amount greater than is stated in the summons, if within the damages claimed by the declaration.

An amendment of the summons by making the amount claimed by it, correspond with the præcipe, is proper.

Advantage cannot be taken on error, of a variance between the writ and declaration, when the parties were regularly defaulted in the court below.

This was an action of assumpsit. The præcipe was filed on the 26th May, 1858, praying a summons in damages $600.

On the same day a summons was issued, "to the damage of the said plaintiff, as he says, one hundred dollars." The declaration was filed on the 26th May, containing a special count on a promissory note for $400, and also the common counts—*ad damnum* $600.

The summons was served on both defendants, on the 27th of May.

The defendants did not appear.

Their default was taken on the 8th of June, and damages assessed by the clerk, at $428.20, for which judgment was rendered. At the same term, on the 16th of June, on motion of the plaintiff, leave was granted to amend the summons; but it was not amended.

The errors assigned are, that the court erred in rendering judgment against the defendants below, for a greater sum than was claimed in the summons.

That the court erred in making the order granting leave to amend the summons, without notice to the defendants below.

And that the court erred in rendering judgment in said cause.

J. L. Loop, for Plaintiffs in Error.

Breese, J. It is insisted by the plaintiffs in error that a judgment by default, the defendants not appearing although duly served with process, could not be rendered against them for a greater amount than is claimed in the summons. No authority is cited for this position, and the doctrine seems to be that the plaintiff's declaration is the limit of his recovery. He can recover no more damages than he has laid in his declaration. 1 Ch. Pl. 339.

The præcipe in this case directed the clerk to issue a sum-

mons laying the damages at six hundred dollars. Through his negligence, the damages claimed in the summons were but one hundred dollars. The damages in the declaration were laid at six hundred dollars. Here was a variance simply, between the declaration and summons, of which the defendants might have availed, they having been regularly served with the summons. This they did not do, and they cannot on error, take advantage of this variance.

It is cured by the eleventh section of the statute of Amendments and Jeofails (Scates' Comp. 252.) There has been a writ and service regularly issued and made, and we hold in such case, by virtue of the omnipotent act cited above, a judgment rendered under such circumstances, where no greater damages are recovered than are declared for, cannot be reversed or set aside.

The court below, did right to allow an amendment of the summons, so that it should conform to the præcipe. So would this court allow it upon appeal or writ of error, it being a plain misprision of the clerk. Same statute, secs. 2 and 3, ibid. 250.

The judgment is affirmed.

Judgment affirmed.

Charles Prescott *et ux.*, Appellants, *v.* Joseph W. Fisher *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The records of a court in which a suit is pending, are admissible as evidence, and prove themselves.

A bill filed for a divorce, is to be taken against the party filing it, as true. The recitals in a decree are conclusive against the party who sought it.

A deserted wife may acquire property and control it and her person, and may be sued as a *feme sole*, and if divorced and again marries, her husband will be jointly liable with her for debts contracted.

The declaration of plaintiffs consists of three counts in assumpsit, for goods, wares and merchandise, sold and delivered to the said Mary A. Prescott, before she was married to Charles Prescott, in the year 1856, charging the same was sold and delivered to her while she was a *feme sole*. Damages claimed, $500.

Defendants plead the general issue, and issue was joined.

The trial was before a jury, and had in said court, J. M. Wilson, Judge, January, 1859.

Robert Rae testified, that he had been one of the attorneys in this cause; that he called upon Prescott and wife, and presented two bills for millinery goods which Mrs. Prescott had purchased of plaintiffs, and Mrs. Prescott admitted she had purchased the articles in the bill mentioned, and that upon the first bill there was a balance of $309.50 due to plaintiffs, and the second bill she admitted was correct, and that she had received the goods therein mentioned. And Charles Prescott, the defendant, promised to pay in one month thereafter. But he failed to pay either of the bills. That Mrs. Prescott had been engaged, both before and since her marriage with Prescott, in the millinery business. That they were married shortly after the first bill of goods was purchased, during the year 1857, and that she was known as Mrs. Lloyd previous to her marriage with Prescott.

A witness testified that she was present at the marriage of Mrs. Prescott, one of the defendants, when she married Bartholomew F. Lloyd, in England. That Mr. Lloyd was still living; went to California in 1852.

Another witness testified, that he knew Lloyd, and that he and Mrs. Prescott lived as man and wife, and were regarded as such in this city. They carried on millinery business. Lloyd went to California in 1852. It was publicly and well known when he left, and where he was going; Lloyd left his business and what he had with the defendant, Mrs. Prescott, and she carried on the business after he left.

The plaintiffs below then took from the files of the Cook County Court of Common Pleas, papers, purporting to be a petition for a divorce, and also a decree, and introduced and read the same in evidence without other proof, (both of which respectively were objected to, and objections were overruled,) in which, the petitioner, Mrs. Lloyd, (Mrs. Prescott,) stated she was married in 1833, in England, to B. F. Lloyd; lived with him there and then until 1852, when she charges that he deserted her, and has not lived with her since.

The petition also charges against said B. F. Lloyd, that she was in equity the owner of the property she had then on hand, as she had to support three children, and had commenced the said business in 1852, (the time as then alleged of the desertion,) and had carried on the millinery business since.

The petition then alleges that Mrs. Lloyd had three lots, stock, household furniture, etc., except a piano, which was owned by her said husband, Lloyd.

Asks a decree of divorce, and that the property be declared hers.

The paper purporting to be the decree, decreed a divorce, and that this property be hers, and she have the care and custody of the children, and recites the desertion for two years.

Defendants then called a witness, who stated that he knew Mr. Lloyd. When he left for California, he sold his stock of stationery to him for the sum of four hundred dollars, which he paid to Mrs. Prescott, his wife, thereafter, in four installments.

Cause was submitted to the jury, under the following instructions on the part of the plaintiff, both of which were objected to by defendant:

1st. That if the jury believe, from the evidence, that the aforesaid Mary Ann Lloyd was, at the time the plaintiffs' debt was contracted, trading, and that her husband had before that time, permanently deserted her, and afterwards intermarried with the defendant, Charles Prescott, then said defendants are liable for whatever you, the jury, find due the plaintiffs upon said account.

2nd. That if the jury believe that the defendants admitted there was due and unpaid the plaintiffs, the sum of $425, and refused to pay the same for and on account of goods sold and delivered by plaintiffs to defendant's wife, whilst a trader, and doing business after she was permanently deserted by her first husband, at her special instance and request, then the plaintiffs are entitled to recover.

Defendants' instruction, which was refused:

4th. If the jury believe that she was a married woman at the time the account, or any part of it, accrued, then the plaintiffs cannot recover, although if she traded after her husband had abandoned her, she might be sued as a *feme sole*, but no action can be maintained against her and Prescott.

Verdict for plaintiffs, $425.

Defendants filed their motion for a new trial, because the verdict was contrary to law and evidence, and the court had erred in overruling defendants' objections and exceptions above mentioned. Motion overruled.

Judgment entered for $425, and a *remittitur* entered, of $115.

A. Garrison, and S. M. Felker, for Appellants.

Grow & Storrs, for Appellees.

Breese, J. The papers in the divorce case of *Lloyd* v. *Lloyd*, in which the present defendant, then Mrs. Lloyd, was complainant, were files of the court in which the present action against her and her present husband was tried, and were properly admissible in evidence without any proof—they proved them-

selves. The bill she filed for a divorce, is to be taken, as an admission by her of the facts therein stated, and consequently, evidence against her in this suit, and constitute an estoppel of record. 2 Smith's Leading Cases, 687, and the cases there cited. It is not now in her power, nor in that of her co-defendant, her present husband, to deny them. It is there admitted by her that her husband abandoned her without cause and failed to make a suitable provision for her, and that she carried on business as a sole trader whilst thus deserted.

This court has held in the case of *Love* v. *Moynehan*, 16 Ill. R. 277, that in such case, the deserted wife may acquire property, control it and her person, contract, sue and be sued as a *feme sole*. For her contracts thus made, her present husband is responsible jointly with her. 1 Ch. Pl. 65; *Angel* v. *Felton*, 8 J. R. 149; *Gage* v. *Reed et al.*, 15 ib. 403; 7 T. R. 348.

Her *status* is no longer an open question. The decree of the court establishes that beyond all future controversy, and must be conclusive. The great and general principle is, that a record of the proceedings and judgment of a court of competent jurisdiction is conclusive evidence of the facts appearing therein, and this whether the status, rights or property of parties be involved, and cannot be attacked or questioned in a collateral manner. The decree is competent evidence in any action, no matter who may be the parties, and the recitals in it, are conclusive of the facts sought to be established in this suit.

The instructions given for the plaintiffs were based on the principles we here announce, and were correct. The fourth instruction being the converse of these propositions, asked by the defendants, was properly refused. The judgment of the court below is affirmed.

Judgment affirmed.

Michael Diversy, Appellant, *v.* Adolph Loeb, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

An accommodation acceptor of a bill, cannot set up as a defense, that he never received any consideration.

This was an action of assumpsit, brought to the Cook County Court of Common Pleas.

The plaintiff declared upon a bill of exchange, dated the 3rd day of December, A. D. 1857, for five hundred dollars, drawn

by S. D. LaRue, upon the defendant, Diversey, at three months, payable to the order of the drawer, at the office of Greenbaum & Brothers, Chicago; and also upon the common money counts.

The defendant pleaded to the declaration the general issue, and to the count upon the said bill the following plea of want of consideration:

And for a further plea in this behalf, as to the first count in said declaration, said defendant says *actio non*, because he says that he accepted the said bill of exchange in said count mentioned, without any good, valuable or sufficient consideration therefor, which was well known to the said plaintiff at the time he received the said bill, to wit, at Chicago aforesaid. And this he is ready to verify, wherefore he prays judgment, etc.

To this plea the plaintiff demurred generally, and the court, J. M. Wilson, Judge, sustained the demurrer, and rendered judgment in favor of said Adolph Loeb, for the sum of five hundred and twenty-three dollars and twenty-five cents.

The defendant prayed an appeal, which was allowed.

The decision of the court in sustaining the said demurrer is assigned for error.

Scates, McAllister & Jewett, for Appellant.

B. S. Morris, for Appellee.

Walker, J. An accommodation acceptor, like a surety on a promissory note, cannot be heard to say that there was no consideration received by him. That such acceptance or indorsement as surety, gives the paper of the drawer of a bill, or the principal in a note, credit with the person to whom the bill is negotiated, or to whom the note is drawn, is a sufficient consideration to bind the acceptor of the bill, or the surety on the note. It is usually the credit of the acceptor or surety, that enables the drawer or maker to procure money or property on the instrument, and it would be unjust to permit the acceptor or surety to avoid payment because he had not himself received the consideration for which it was given, but had enabled another to procure it, who could not have done so without his indorsement. And the fact that the person receiving the instrument knew that he was an accommodation acceptor, can make no difference, as he had put his name on the paper, and sent it into the world, and thereby given it credit, which may have alone rendered it valuable in the market. If the holder gives a *bona fide* consideration for it, he has a right to recover against the accommodation acceptor, whether he got the money for which it was negotiated or not. Edw. on Bills, 316; 3 Esp.

R. 46. This is known and acted upon in the commercial world, it is believed almost without exception, as well as by most of the legal profession.

In this case, there is nothing disclosed by the record, such as fraud, payment, or any other fact which would authorize a court to decide in favor of appellant, but the law and facts are clearly with the appellee, and in the absence of any error in the record the judgment of the court below must be affirmed.

Judgment affirmed.

John Hathorn and Loren Heath, Plaintiffs in Error, *v.* Seth Lewis, Defendant in Error.

ERROR TO KANE.

A chattel mortgage which is good as to the parties executing it, will hold, as to third parties who purchase with knowledge; such purchasers not considered as *bona fide*. The purchasers acquire only the right of redemption.

This suit was commenced by defendant in error, by writ of replevin, and tried at the January term of the Kane county Circuit Court for 1858, I. G. Wilson, Judge, presiding, and a jury, and resulted in a verdict for the defendant in error. The property replevied was a quantity of goods in a store.

On the trial below, the plaintiff offered in evidence a chattel mortgage, in the words and figures following, to wit:

This Indenture, Made this twenty-third day of October, 1857, between George W. Alexander, party of the first part, of the town of Virgil, county of Kane, and State of Illinois, and Seth Lewis, of the town of Virgil, same county and State aforesaid, party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of ten dollars in hand paid, received by the said party of the second part, do grant, bargain, and sell unto the said party of the second part, his heirs and assigns, the following goods and chattels, to wit: All the goods of every kind and quality, prints, clothing, drugs, groceries, medicines, ready-made clothing, dry goods, hardware, crockery, and all and singular every article and articles in said store, formerly owned by Seth Lewis, and situated on block two, and lot four, in Lodi, Kane county, Illinois. Also, all the goods and materials of every kind and description, belonging to said mortgagor in said store, during the continuance of this mortgage. Also, all accounts and notes, book accounts, and indebtedness or debt of any individual or individuals in favor of said mortgagor, sole and belonging to the party of the second part; also, all the goods which may be in said store at the time when this mortgage shall be due and payable. One span of horses, color bay, medium size, black mane and tail, about eight years old. Also, one

horse power, and planing machine, tenoning machine, circular saw, upright saw, and all machinery, belonging to said planing mill, and machine shop, situate in said shops, or attached thereto, being in Lodi, on the north side of railroad track, between the residence of John Pickett, and the warehouse, owned by Solomon White, Kane county, State of Illinois. To have and to hold, all and singular the goods and chattels, hereinbefore granted, bargained, and sold unto the said party of the second part forever, said goods and chattels now remaining and continuing in the possession of the said party of the first part, in the said town of Virgil. Provided always, and these presents are upon these express conditions, that if the party of the first part, shall and do well and truly pay, or cause to be paid, to the said party of the second part, the sum of two thousand six hundred and thirty-seven dollars and forty-five cents, payable as follows: One note due and payable on the 9th of November, 1857, $315.38-100 dollars; one of two hundred and forty-six dollars, payable 26th day of November, A. D. 1857; one of one hundred and eight y-four dollars 81-100, payable December fifth, A. D. 1857; one hundred and fifty-two dollars and sixty-four cents, payable January nineteenth, A. D. 1858; one hundred sixteen dollars 38-100, payable January eighth, A. D. 1858; five hundred and forty-two dollars 50-100, payable March 8th, A. D. 1858; five hundred forty-nine dollars 29-100, payable March 17th, 1858; four hundred and four dollars 24-100, payable 21st day of March, A. D. 1858; one hundred fourteen dollars 88-100, payable fifth day of April, A. D. 1858; then these presents and every matter herein contained, shall cease and be null and void. But in case default shall be made in the payment of said sum of money above mentioned, at the time above limited for the payment of the same, or any part thereof, it shall and may be lawful for the said party of the second part, to take possession of the said goods and chattels, wherever the same shall be, and to sell and dispose of the same for the best price which can be obtained therefor, at public vendue, or otherwise (giving six days' notice to the said party of the first part, of the time and place of such sale,) and out of the money to arise by such sale thereof, to retain the said sum of money above mentioned, and all charges for keeping said property, and of such sale (if so much there shall be), rendering the surplus money (if any there shall be) to the said party of the first part. And it is hereby agreed by and between the said parties, that in case the said party of the first part, shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of any of said goods and chattels, or remove, or attempt to remove, from said county, any of said goods and chattels, or if the same shall be levied upon, or seized by virtue of any execution, writ, or attachment, or other process, against the said party of the first part, it shall and may be lawful for the said party of the second part, to take possession of the said goods and chattels, and sell the same, in the payment of the said sum of money, above mentioned, in the manner aforesaid.

In witness whereof, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

G. W. ALEXANDER. [SEAL]

STATE OF ILLINOIS, }
KANE COUNTY. } This mortgage was acknowledged before me, by George W. Alexander, this 22nd day of October, A. D. 1857.

E. P. ROBERTSON, *J. P.*

Filed for record, October 24th, A. D. 1857, at 4 o'clock, P. M.

To the offering of which chattel mortgage, in evidence, the defendants objected. Objection overruled.

The plaintiff offered as a witness, *E. P. Robertson*, who testified that he was a justice of the peace, in Virgil, in October last. This mortgage was acknowledged before me. I have no means of knowing whether it was executed before the acknowledgment. Alexander signed it before me. It was filled up at the time I first saw it.

Jacob M. Armstrong. I know the parties to this suit. I have lived in Lodi two years. I know the store and goods mentioned in mortgage. Am clerk for Lewis. Lewis sold the goods mentioned in mortgage to George W. Alexander about the 22nd of October last. I was present at the time of the replevy. Same goods replevied as covered by mortgage. I heard of the sale by Alexander to the defendants. I was present when demand was made by Lewis of the defendants for the goods. It was about the 6th or 7th of December, on Wednesday, some three days after the sale to defendants. James Lewis and myself were with Seth Lewis. Mr. Seth Lewis came in and asked John Hathorn if he had bought the goods of Alexander. He said he had. He then asked if he knew that he had a mortgage. He replied that his brother had been to Geneva, and his lawyer, Mr. Mayborne, said the mortgage was not good. Lewis demanded possession. Hathorn said, you will have to get it by law, and the extent of the law. It was a very short time before that he had heard of it. That Alexander and defendant Hathorn were going in partners—that Hathorn heard of the mortgage and took in Heath.

I *had been* clerk for Lewis. I owned the store when the sale was made to Alexander. The sale was on the 22nd day of October, 1857. Alexander went into immediate possession. Defendant Heath was his clerk. Alexander commenced selling goods at once, and kept right on selling like any other store, until sale to defendants. Plaintiff Lewis was in and about all the time.

Stipulation between the parties:

"It is stipulated and agreed, that the notes mentioned in the chattel mortgage from G. W. Alexander to said Lewis, dated October 23, 1857, were notes given by said Lewis and said Alexander, for goods, purchased by said Lewis before he sold out to said Alexander, and were the same as mortgaged and in the store at Lodi, at time of the making said mortgage, and that said Lewis was held as security on the same, and that Alexander has not paid said notes, and are the same notes as the notes described in the mortgage, and are given to pay the indebtedness originally contracted for said goods, mentioned in the mortgage. This stipulation to be used in each of the cases above entitled. Geneva, February 8th, 1858."

The jury rendered a verdict for the plaintiff for $425.

Plaintiff remitted the $425 damages. Court overruled motion of defendants for a new trial.

MAYBORNE & SMITH, for Plaintiffs in Error.

W. B. PLATO, A. HERRINGTON, and B. C. COOK, for Defendant in Error.

BREESE, J. Alexander had purchased the goods taken on the writ of replevin, of Seth Lewis, plaintiff in the action, and executed to Lewis a chattel mortgage in due form, to secure the payment of the notes which he had given to Lewis for the goods. The mortgage stipulates, that they should remain in Alexander's possession, in the same store in which they were when Lewis sold them to him, and it then provides that "in case the said party of the first part (Alexander), shall sell, assign or dispose of, or attempt to sell, assign or dispose of any of said goods and chattels, or remove or attempt to remove from said county, any of said goods and chattels, or if the same shall be levied upon or seized by virtue of any execution, writ or attachment, or other process against the said party of the first part, it shall and may be lawful for the said party of the second part (Lewis), to take possession of the said goods and chattels, and sell the same in the payment of the said sum of money above mentioned in the manner aforesaid," that is, at public vendue or otherwise, after six days' notice to Alexander.

The plaintiff in error, bought the goods of Alexander, with full notice of this mortgage, and below their value.

The mortgage was executed in good faith, and seems liable to none of the objections made to it, by the counsel for the plaintiff in error. But if it were so liable, if the mortgage was not properly acknowledged and a proper entry made on the justice's docket,—if it does not provide that the possession of the property shall remain with the mortgagor, and if such possession did remain with him contrary to the provisions of the mortgage, still, the mortgage is good as between the parties to it, and as to all persons, except creditors and *bona fide* purchasers.

The facts show, that when they purchased the goods of Alexander, he expressly told them they were subject to this mortgage, and they took the title subordinate to the mortgage. They acquired then, the right of redemption only, as that was all the claim Alexander then had, the mortgage being valid as between him and Lewis, and Hathorn and Lewis by the purchase stood in Alexander's shoes, and were not *bona fide* purchasers, in the sense we understand that relation. They purchased

simply, the right of Alexander, which was the right of redemption, and nothing more.

But we see nothing defective in the mortgage, either in form or substance, and Lewis had the right to assert his claim under it. The facts show that only the old goods which Lewis had sold to Alexander, were replevied. We do not see any error in admitting evidence, or in giving or refusing the instructions complained of, and the evidence fully sustains the finding of the jury. The judgment must be affirmed.

Judgment affirmed.

The Galena and Chicago Union Railroad Company, Appellant, *v.* Amelia Pound *et al.*, Appellees.

APPEAL FROM KANE.

In an action of trespass against a railroad company, for the use of a right of way, the proceedings of the company procuring the condemnation, are competent evidence, and are not to be impeached collaterally. All presumptions are in favor of the regularity of the proceeding.

The service of the preliminary notice, was a question in the proceeding, and if then adjudicated, cannot be attacked indirectly.

The same land sought to be condemned, must be described in the orders and judgment of the person who condemns.

This was an action of trespass *quare clausum fregit*, in the Kane Circuit Court.

The declaration contains two counts, and alleges divers trespasses, which were, in substance, that the appellant constructed a part of its railroad through the close described. The damages are laid at $2,000.

There was a plea of not guilty, with a stipulation, that the defendants in the court below, should be allowed to give in evidence upon the trial of the cause, any and all matters of defense that would be proper if specially pleaded.

At the May term, 1857, of the court, Manierre, Judge, presiding, there was a trial, which resulted in a verdict and judgment against the appellant for the sum of $650.

Adin Mann testified as follows: I am county surveyor; I know where the Bennett place is; it is on the east side of the river; it is the place that was deeded from German to the heirs of Comfort Bennett; the land is a part of the north-west quarter of section 12, and part of the north-east and north-west quarter

of section 11, township 39, range 8, in Geneva, Kane county; there is a railroad running through the land; it enters east side of the farm, twenty chains from north-east corner, and runs across it in nearly a westerly direction; it is the Galena and Chicago Union Railroad, air line; there are about nine $\frac{3}{100}$ acres included in the railroad fence; there is a cut, an excavation through the central part of the farm. The depth of it is about ten feet in the deepest part; the house on the farm is about opposite to the cut, and pretty near it; the earth taken out of the cut is on the north side of the track; there is some on the south; it remains as it was dropped from the cart; it is piled in a strip, in some places the dirt is thrown on the farm beyond the railroad fence; it is one hundred feet between the fences; one pile ran out about two rods; the narrow part is ten or twelve feet wide; there are other places where it is thrown beyond the fence; the soil is gravel; the height of it is two or three feet; the rut of the road is a slight embankment through the farm; the house is not far from the woods; it is quite near to the bushes. There is an orchard west of the house; the house is perhaps ten rods from the road, crossing over the road from one part of the farm to the other; the barn is not far from the house; south from the house, and a little west of the centre of the cut; the cut is not far from nine hundred feet in length; on north side of fence, the dirt is thrown about a rod from fence, for twenty rods. The soil is a mixture of clay and gravel.

The witness on his cross-examination testified: That the house is opposite the cut; the cut is near the west side of the farm as a whole; I know where the east line of the farm is; it is prairie on the east side, and timber on the west end. One-fourth part of distance run through by road is timber or brush, mostly cut off, and the rest is prairie; three-fourths of the distance is prairie; the cut is partly on fields and runs into the timber. The timber extends further east on the north side of the track; the timber extends quite a distance along the cut; in going east, I think the timber extends back before you leave the cut.

I know where the old house is, it is east of the crossing about forty rods; I saw but one crossing; there is another crossing near the farm. I measured the distance between the railroad fences west of the house; I did not see any dirt on the west side of the house. The cut begins and ends on the farm; after you leave the cut it is prairie and slight fill; towards the east end there is a slight cut again; after leaving the farm there is a slight fill, then a cut again; cut is ten feet, not including spoil. The rail road fences are one hundred feet apart, the line of the road is the centre; in the deepest part of the cut the fence is

thrown back farther than one hundred feet. In the highest part on the north side of the cut, the dirt is thrown more than forty feet beyond the fence, and fifty feet from the centre of the road. I did not measure where the fence was thrown back; at the deepest part, and on the north side of the cut, the dirt is thrown one hundred feet from the centre of the road; I measured from the centre of the road, just west, where the fence was thrown back some forty feet; the condition of it is, that it appears to be as it was left when the dirt was taken out and dumped; it is pretty rough and uneven; it was some ten or fifteen feet outside of forty feet from the centre, along the centre as above noted. This is my judgment, I did not measure it; the cut is fifty rods long; the road is fenced out one hundred feet, and the dirt is thrown out beyond the fence for twenty-five rods in all. The cut was shallow where I measured, one side is perhaps six, and the other two feet deep; it is a railroad fence. On the north side, the timber extends further east than on the south side; east of the cut the fence comes in to one hundred feet, the fence recedes for six hundred and thirty-five or six hundred and forty feet; I measured the distance, commencing at a point on north side, eighteen hundred and sixty-three feet from the east line of land, thence west seven hundred and five feet, it will reach a little beyond where the fence is thrown back; the cut does not extend to the east line of the farm. No dirt is deposited outside at the rail of the one hundred feet line; on the north line, fifty-five feet would be the extent; the dirt is thrown beyond the fifty feet from the centre.

It is admitted by the defendants' counsel, that the plaintiffs, as the children and widow of Comfort Bennett, are the owners of and were in possession of the farm from the time of the commencement of building said road until the commencement of this suit.

The defendants offered to read to the jury, as evidence in the case, from the records in the recorder's office of Kane county, Illinois, the record of the report of the appraisers, and the order of the judge upon the same, being the proceedings had for obtaining the right of way through the lands in question, under the charter of said defendants, as follows:

To the Hon. Isaac G. Wilson, *Judge of the* 13*th Judicial Circuit, and Judge of the Circuit Court of Kane County, Illinois:*

The undersigned, appraisers appointed by your honor, on the 15th day of June, 1853, as appraisers in the matter of the petition of the *Galena and Chicago Union Railroad Company* v. *Mary Pound* and others in said petition named, for the right of

way for said company over the lands therein set forth, in obedience to the following order, to wit:

"In the matter of the petition of the Galena and Chicago Union Railroad Company, for the appointment of appraisers for right of way over lands in Kane county, in the State of Illinois, the Galena and Chicago Union Railroad Company having heretofore, on the 9th day of June, 1853, presented to me their petition for the appointment of appraisers to assess damages the owners of land mentioned in said petition will sustain by reason of the appropriation of the lands belonging to them, in the county of Kane, for the construction of said road; and this 14th day of June, 1853, having been appointed by me for a hearing upon said petition, at the clerk's office in Geneva, in the county of Kane, by my order on said petition indorsed,

"Now this 14th day of June, 1853, at the clerk's office in Geneva, in said county, at one o'clock, P. M., of said day, appeared the said Galena and Chicago Union Railroad Company, by John A. Holland, their attorney, before me, the undersigned Isaac G. Wilson, Judge of the thirteenth judicial circuit of the State of Illinois, and of the Circuit Court of Kane county aforesaid, and the owners of the several parcels of land described in said petition; Charity Herrington also appeared by A. M. Herrington, her attorney; the other owners did not appear. And it appearing that Sarah Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett and Harriet Amelia Bennett, in said petition named as owners of land therein described, are infants, Augustus M. Herrington, Esq., a discreet and reputable person, is hereby appointed to act in the premises in their behalf.

"And it appearing that notices have been served on the several owners of land described in said petition, by affidavits shown to the undersigned herein, and it appearing to the undersigned that the Galena and Chicago Union Railroad Company are desirous of appropriating for the use of said company, for the right of way and for depot and other purposes, the several tracts of land described in said petition, and hereinafter described, and belonging to the several owners hereinafter named, which several tracts of land, situated in Kane county aforesaid, which are to be appropriated by said company for the purposes aforesaid, and upon which damages are to be assessed by reason of said appropriation, are particularly and specifically described as follows, to wit: 'Part of the north-west quarter of section twelve, and of the north-east quarter of section eleven, in township thirty-nine north, in range eight east of the third principal meridian, belonging to Lyman German, in whom is the legal title, and Mary Pound, Sarah Elizabeth Bennett, Jane Bennett,

Josiah Bennett, John Bennett, William Bennett and Harriet Amelia Bennett, have an equitable interest. The centre line of said railroad enters section twelve on its east line, seven hundred and fifty feet from its north-east corner, and runs thence south 83° west, four thousand five hundred and fourteen feet, to the land of said Bennetts; thence on the same course, one thousand one hundred and sixty-eight feet; thence on a curve deflecting to the south with a radius of twenty-two thousand nine hundred and twenty feet, five hundred feet; thence on a course tangent to said curve, south 81° 45′ west, two thousand two hundred and eighty-three feet, to the west line of said land, taking for the use of said railroad, a strip of land fifty feet wide on each side of the centre line of said railroad, as the same is staked off and located over and through said land, containing nine $\frac{9}{100}$ acres, and an additional strip of land, forty feet wide, adjoining lands taken as above for right of way, on the north side thereof, commencing at a point one thousand eight hundred and sixty-three feet from the east line of said land, and running thence westerly seven hundred and five feet, for the purpose of depositing waste thereon, and containing in all, being the land above taken, and this land, nine and $\frac{13}{100}$ acres.'

"And it also appearing to the undersigned, he having examined said petition of the said Galena and Chicago Union Railroad Company, touching the appropriation of lands in said county of Kane, as above described and specified, belonging to the aforesaid owners, and it appearing to be necessary for the construction of said railroad, that said land above mentioned should be appropriated by said company, and the damages arising thereby, appraised as prayed in said petition, and no cause being shown against the prayer of said petition, and why such appraisers should not be appointed according to the prayer of said petition; now, therefore, it is hereby ordered that William B. West, Joel McKey and William B. Plato, three disinterested freeholders, and residents of the said county of Kane, be, and they are hereby appointed appraisers for the purpose of assessing the damages which the several owners of land hereinbefore mentioned, shall sustain by reason of the appropriation of the lands above mentioned, and particularly specified; which several lands, appropriated by said company, and to be occupied by them as above particularly specified. And it is further ordered that said appraisers after being duly sworn, assess said damages by viewing the said premises above described, and such evidence as may be submitted to them, and make report to the undersigned in writing, and therein specify the damages which the several owners of said land may sustain respectively. In pursuance of the power and authority in me vested, by the act

entitled 'An act to incorporate the Galena and Chicago Union Railroad Company,' approved January 16th, 1836. Done at Geneva, in the county of Kane, at the clerk's office, this 14th day of June, 1853.

ISAAC G. WILSON,
Judge of the 13th Judicial Circuit Court, of the County of Kane, in the State of Illinois."

Beg leave to report that on the 22nd day of June, 1853, after being duly sworn by James Herrington, clerk of the County Court of Kane county, an officer properly authorized to administer oaths, honestly and impartially to assess such damages as the several owners of the respective parcels of land in said order described, will sustain by reason of the appropriating of said respective parcels of land for the use and accommodation of said Galena and Chicago Union Railroad Company, proceeded to view said parcels of land, and hear such other evidence as the said several persons produced before us, the said Augustus M. Herrington appearing before us in behalf of the several persons above named, for whom he was appointed to act in the premises, and also as attorney for Charity Herrington. George P. Hanson and Timothy Kune, also appeared before us in respect to the lands severally owned by them, as above mentioned. The other owners above mentioned did not appear before us. The said Galena and Chicago Union Railroad also appeared by their attorney; and thereupon, and being fully advised in the premises, we assess the damages that Lyman German, Mary Pound, Sarah Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett and Harriet Amelia Bennett, will sustain by reason of the appropriation of that part of their land by said Galena and Chicago Union Railroad Company, in manner and form as set forth in said order, at the sum of fifty dollars.

All which is respectfully submitted.

WILLIAM B WEST,
JOEL McKEY,
W. B. PLATO.

STATE OF ILLINOIS.

The foregoing Report having been made to me, and none of the parties therein named expressing any dissatisfaction with their respective assessments, said Report is hereby approved. In case it shall become necessary to deposit any of the sums aforesaid, for the use of any of said parties, the money is to be deposited with Charles Patten, Esq., of Geneva, Kane county.

ISAAC G. WILSON, *Judge 13th Circuit.*

Filed and recorded July 6th, 1853, at 6 o'clock, P. M.
L. DEARBORN, *Recorder.*

To the introduction of which record the plaintiffs objected; the court sustained the objection, and refused to allow the same to

be read as evidence, to which decision of the court in excluding said record, the defendants, by their counsel, excepted.

The defendants then introduced and read to the jury, from the printed statutes of this State, the act and amendments incorporating said defendants, as a railroad company, viz.: charter and amendments.

The defendants then offered in evidence, to prove a compliance with the terms and conditions of their charter in relation to right of way, through the lands in question, the following papers, viz.:

To the Hon. Isaac G. Wilson, Judge of the 13th Judicial Circuit and Presiding Judge of the Circuit Court of the county of Kane, in and for the State of Illinois:

Your petitioners, the Galena and Chicago Union Railroad Company, by John A. Holland, their attorney, represent to your Honor that said company are about to construct a railroad through said Kane county, and over certain lands lying in said county, and hereinafter described, belonging to the several owners hereinafter mentioned, over a portion of which lands the said company are desirous of constructing said road, and obtaining the right of way therefor, and are also desirous of obtaining other lands along the line of said proposed railroad for depot grounds and for the purpose of locating thereon depot and other buildings of said road, and appendages thereof, and for the purpose of obtaining earth and other materials for the construction of said road. That said company have heretofore been, and now are, unable to obtain from said owners of said land, the right of way over said land or the said lands wanted for the depot and other purposes above mentioned, by purchase, release, conversion or otherwise; that said lands, which the said company have been unable to obtain the right of way over, and which they have been unable to obtain for the other purposes aforesaid, are severally described as follows, to wit: part of the north-west quarter of section twelve, and of the north-east quarter of section eleven, in township thirty-nine north, in range eight east of the third principal meridian, the legal title to which, or a part thereof, appears of record to be in Lyman German of said county of Kane; but your petitioners have been informed, and believe, that one Comfort Bennett, formerly of said Kane county, but now deceased, in his lifetime occupied said land, claiming to be the owner thereof, and that since his decease, his widow and heirs at law have occupied and continue to occupy said land, under a like claim of title. That the names of said widow and heirs at law, are Mary Pound, widow of said Bennett of Kane county aforesaid, and Sarah Elizabeth, Jane, Josiah, John, William, and Harriet Amelia, all of said heirs being infants, not

arrived at full age, and all are residents of the State of New York. The centre line of said railroad enters section twelve on its east line, seven hundred and fifty-seven feet from its north-east corner, and runs thence north 83° west four thousand five hundred and fourteen feet, to the land of said heirs; thence on the same course, one thousand one hundred and sixty-eight feet; thence on a curve deflecting to the south with a radius of twenty-two thousand nine hundred and twenty feet, five hundred feet; thence on a course tangent to said curve south 81° 45′ west two thousand two hundred and eighty-three feet, to the west line of said land, taking for the use of said railroad a strip of land fifty feet wide on each side of the centre line of said railroad, as the same is staked off and located, over and through said land, containing nine and $\frac{2}{100}$ acres.

Your petitioners further show, that they will also need for the purpose of depositing waste thereon, an additional strip of land sixty feet wide, adjoining land taken as above for right of way, commencing at a point one thousand feet westerly from the west line of said land and running thence easterly one hundred feet, containing one and $\frac{1}{100}$ acre.

And your petitioners further show that the survey of said lines as aforesaid, were made within three months last past, and that the lands mentioned in the aforementioned descriptions were all run by the magnetic meridian.

Your petitioners would therefore pray your Honor to fix some day, as soon as will be convenient and proper, for the appointment of appraisers, as provided in the charter of said company, to appraise the damages the said owners above mentioned will sustain by reason of the appropriation of said lands, belonging to them and above described, for the construction of said railroad and its appendages. And your petitioners will ever pray, etc.

Dated this ——— day of June, 1853.

JOHN A. HOLLAND, *Attorney for said Company.*

The above petition of the Galena and Chicago Union Railroad Company, having this day been presented to me, for the appointment by me of appraisers to assess the damages arising from the appropriation of certain lands mentioned in said petition for the construction of said road, and for obtaining the right of way over said land, according to the charter of said company,

Now, therefore, I do hereby appoint Tuesday, the 14th day of June, instant, at one o'clock, P. M., at the clerk's office in Geneva, in said county of Kane, when and where I will be present and appoint said appraisers; and I do hereby further order, that said railroad company give three days' notice to the per-

sons mentioned in said petition, of the time and place of making such appointment in the matter of the petition.

Dated this 9th day of June, 1853.

ISAAC G. WILSON,
Judge of the 13th Judicial Circuit in the State of Illinois, and Presiding Judge of the Circuit Court of Kane county, in said State.

In the matter of the petition of the Galena and Chicago Union Railroad Company, for the right of way over lands in Kane county, in the State of Illinois.

The Galena and Chicago Union Railroad Company having heretofore, on the 9th day of June, 1853, presented to me their petition for the appointment of appraisers, to assess damages the owners of lands, mentioned in said petition, will sustain by reason of the appropriation of the lands belonging to them, in the county of Kane, for the construction of said road, and this 14th day of June, 1853, having been appointed by me for a hearing upon said petition, at the clerk's office in Geneva, in the county of Kane, by my order on said petition indorsed,

Now, this 14th day of June, 1853, at the clerk's office in Geneva, in said county, at one o'clock, P. M., of said day, appears the said Galena and Chicago Union Railroad Company, by John A. Holland, their attorney, before me the undersigned, Isaac G. Wilson, Judge of the 13th Judicial Circuit of the State of Illinois, and of the Circuit Court of Kane county aforesaid, and the owners of the several parcels of land described in said petition; Charity Herrington also appears, by A. M. Herrington, her attorney; the other owners did not.

And it appearing that Sarah Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett, and Harriet Amelia Bennett, in said petition named as owners of land therein described, are infants, Augustus M. Herrington, Esq., a discreet and reputable person, is hereby appointed to act in the premises in their behalf.

And it appearing that notices have been served on the several owners of land described in said petition, by affidavit shown to the undersigned, herein; and it appearing to the undersigned, that said Galena and Chicago Union Railroad Company, are desirous of appropriating for the use of said company—for right of way, and for depot and other purposes, the several tracts of land described in said petition, and hereinafter described, and belonging to the several owners hereinafter named, which several tracts of land, situate in Kane county aforesaid, which are to be appropriated by said company for the purposes aforesaid, and upon which damages are to be assessed, by reason of such appropriation, are particularly and specifically described as follows, to wit: part of the north-west quarter of section twelve,

and of the north-east quarter of section eleven, in township thirty-nine north, in range eight east of the third principal meridian, belonging to Lyman German, in whom is the legal title, and Mary Pound, Sarah Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett and Harriet Amelia Bennett, have an equitable interest.

The centre line of said railroad enters section twelve on its east line, seven hundred and fifty-seven feet from its north-east corner, and runs thence south 83° west four thousand five hundred and fourteen feet to the land of said Bennetts; thence on the same course one thousand one hundred and sixty-eight feet; thence on a curve deflecting to the south with a radius of twenty-two thousand nine hundred and twenty feet, five hundred feet; thence on a course tangent to said course south 81° 45′ west, two thousand two hundred and eighty-three feet, to the west line of said land, taking for the use of said railroad, for the right of way purposes, a strip of land fifty feet wide on each side of the centre line of said railroad, where the same is staked off and located over and through said land, containing nine $\frac{9}{100}$ acres, and an additional strip of land adjoining the above, at the north side thereof, forty feet wide, and extending from a point one thousand eight hundred and sixty-three feet from the east line of said land, westerly seven hundred feet, for the purpose of depositing waste thereon, and containing in all, being the lands above taken, and this land, nine and $\frac{13}{100}$ acres. The survey of said lines as aforesaid, were made within three months last past, and that the courses mentioned in the aforementioned descriptions, were all run by the magnetic meridian.

And it also appearing to the undersigned, he having examined said petition of the said Galena and Chicago Union Railroad Company, touching the appropriation of land in said county of Kane, as above described and specified, belonging to the aforesaid owners, and it appearing to be necessary for the construction of said railroad, that said land above mentioned should be appropriated by said company, and the damages occasioned thereby appraised as prayed in said petition.

And no cause being shown against the prayer of said petition, and why such appraisers should not be appointed according to the prayer of said petition; Now, therefore, it is hereby ordered, that William B. West, Joel McKey and William B. Plato, three disinterested freeholders and residents of said county of Kane, be and they are hereby appointed appraisers for the purpose of assessing the damages which the several owners of land hereinbefore mentioned shall sustain by reason of the appropriation of the lands above mentioned and particularly specified, which several lands appropriated by said company, and to be occupied

by them, are above particularly specified. And it is further ordered, that said appraisers, after being duly sworn, assess said damages by viewing the said premises above described and such evidence as may be submitted to them, and make report to the undersigned in writing, therein specifying the damages which the several owners of said land may sustain respectively. In pursuance of the power and authority in me vested, by the act entitled "An act to incorporate the Galena and Chicago Union Railroad Company," approved January 16th, 1836. Done at Geneva, in the county of Kane, at the clerk's office, this 14th day of June, 1853.

ISAAC G. WILSON,
Judge of the 13th Judicial Circuit, and of the Circuit Court of the County of Kane, in the State of Illinois."

To the HON. ISAAC G. WILSON, *Judge of the 13th Judicial Circuit and Judge of the Circuit Court of Kane county, Illinois.*

The undersigned, appraisers appointed by your honor, on the 15th day of June, 1853, as appraisers in the matter of the petition of the Galena and Chicago Union Railroad Company *v.* Mary Pound and others, in said petition named, for the right of way for said company, over the lands therein set forth, in obedience to the following order, to wit:

In the matter of the petition of the Galena and Chicago Union Railroad Company for the appointment of appraisers, for the right of way over lands, in Kane county, in the State of Illinois, the Galena and Chicago Union Railroad Company, having heretofore, on the 9th day of June, 1853, presented to me their petition, for the appointment of appraisers to assess damages the owners of land mentioned in said petition will sustain by reason of the appropriation of the land belonging to them in the county of Kane, for the construction of said road, and this 14th day of June, 1853, having been appointed by me for a hearing upon said petition, at the clerk's office in Geneva, in the county of Kane, by my order on said petition indorsed,

Now this 14th day of June, 1853, at the clerk's office in Geneva, in said county, at one o'clock, P. M., of said day, appeared the said Galena and Chicago Union Railroad Company, by John A. Holland, their attorney, before me, the undersigned, Isaac G. Wilson, Judge of the 13th Judicial Circuit of the State of Illinois, and of the Circuit Court of Kane county aforesaid, and the owners of the several parcels of land; Charity Herrington also appeared by A. M. Herrington, her attorney; the other owners did not appear. And it appearing that Sarah Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett and Harriet Amelia Bennett, in said petition named as owners of land therein described, are infants, Augus-

tus M. Herrington, Esq., a discreet and reputable person, is hereby appointed to act in the premises in their behalf.

And it appearing that notices have been served on the several owners of land described in said petition, by affidavit shown to the undersigned herein, and it appearing to the undersigned that the said Galena and Chicago Union Railroad Company are desirous of appropriating, for the use of said company, for the right of way, and for depot and other purposes, the several tracts of land described in said petition, and hereinafter described, and belonging to the several owners hereinafter named, which several tracts of land, situate in Kane county, aforesaid, which are to be appropriated by said company, for the purposes aforesaid, and upon which damages are to be assessed by reason of such appropriation, are particularly and specifically described as follows, to wit: part of the north-west quarter of section twelve, and of the north-east quarter of section eleven, in township thirty-nine north, in range eight east of the third principal meridian, belonging to Lyman German, in whom is the legal title, and Mary Pound, and Sarah Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett, and Harriet Amelia Bennett, have an equitable interest. The centre line of said railroad enters section twelve, on its east line, seven hundred and fifty-seven feet from its north-east corner, and runs thence south 83° west, four thousand five hundred and fourteen feet, to the land of said Bennetts; thence on the same course, one thousand one hundred and sixty-eight feet; thence on a curve deflecting to the south with a radius of twenty-two thousand nine hundred and twenty feet, five hundred feet; thence on a course tangent to said curve south 81° 45′ west, two thousand two hundred and eighty-three feet, to the west line of said land, taking for the use of said railroad, a strip of land fifty feet wide on each side of the centre line of said railroad, as the same is staked off and located, over and through said area, containing nine and $\frac{9}{100}$ acres; and an additional strip of land, forty feet wide, adjoining land taken as above, for right of way, on the north side thereof, commencing at a point one thousand eight hundred and sixty-three feet from the east line of said land, and running thence westerly seven hundred and five feet, for the purpose of depositing waste thereon, and containing in all, being the lands above taken and this land, nine and $\frac{13}{100}$ acres.

And it also appearing to the undersigned, he having examined said petition of the said Galena and Chicago Union Railroad Company, touching the appropriation of land in said county of Kane, as above described and specified, belonging to the aforesaid owners, and it appearing to be necessary for the

construction of said railroad that said land above mentioned should be appropriated by said company, and the damages occasioned thereby, appraised as prayed in said petition.

And no cause being shown against the prayer of said petition, and why said appraisers should not be appointed according to the prayer of said petition; Now therefore, it is hereby ordered, that William B. West, Joel McKey and William B. Plato, three disinterested freeholders, and residents of said county of Kane, be, and they are hereby appointed appraisers, for the purpose of assessing the damages which the several owners of land hereinbefore mentioned will sustain by reason of the appropriation of the lands above mentioned and particularly specified, which several lands appropriated by said company, and to be occupied by them, are above particularly specified. And it is further ordered, that said appraisers, after being duly sworn, assess said damages, by viewing the said premises above described, and such evidence as may be submitted to them, and make report to the undersigned in writing, and therein specify the damages which the several owners of said land may sustain respectively. In pursuance of the power and authority in me vested, by the act entitled, "An Act to incorporate the Galena and Chicago Union Railroad Company," approved January 16th, 1836.

Done at Geneva, in the county of Kane, at the clerk's office, this 14th day of June, 1853.

ISAAC G. WILSON,
Judge of the 13th Judicial Circuit Court, of the county of Kane, in the State of Illinois.

Beg leave to report, that on the 22nd day of June, 1853, after being duly sworn by James Herrington, clerk of the County Court of Kane county, an officer properly authorized to administer oaths, honestly and impartially to assess such damages as the several owners of the respective parcels of land in said order described will sustain, by reason of the appropriation of said respective parcels of land, for the use and accommodation of said Galena and Chicago Union Railroad Company, proceeded to view said parcels of land, and hear such other evidence as the said several persons produced before us. The said Augustus M. Herrington appearing before us in behalf of the several persons above named for whom he was appointed to act in the premises, and also as attorney for Charity Herrington. George P. Hanson and Timothy Kune also appeared before us in respect to the lands severally owned by them, as above mentioned. The owners above named did not appear before us. The said Galena and Chicago Union Railroad also appeared by their attorney, and thereupon and being advised in the premises, we assess the damages that Lyman German, Mary Pound, Sarah

Elizabeth Bennett, Jane Bennett, Josiah Bennett, John Bennett, William Bennett and Harriet Amelia Bennett, will sustain by reason of the appropriation of that portion of said lands by said Galena and Chicago Union Railroad Company, in manner and form as set forth in said order, at the sum of fifty dollars. All of which is respectfully submitted.

WILLIAM B. WEST,
JOEL McKEY,
W. B. PLATO.

STATE OF ILLINOIS.

The foregoing report having been made to me, and none of the parties therein named expressing any disatisfaction with their respective assessments, said report is hereby approved. In case it shall become necessary to deposit any of the sums assessed, for the use of any of the said parties, the money is to be deposited with Charles Patten, Esq., of Geneva, Kane county.

July 1st, 1853. ISAAC G. WILSON, *Judge 13th Circuit.*

Filed and recorded this 6th day of July, 1853, at 6 o'clock, P. M.

L. DEARBORN, *Recorder of Kane County.*

To the introduction of which, as evidence to the jury, the plaintiffs, by their counsel, objected; the court sustained said objection, and refused to allow said papers to be read as evidence of title or right of way in the defendants, but not for the purpose of showing good faith on their part in making their entry on the land in question; but the defendants insisted on the reading of said papers, as evidence of title or right of way, and declined to offer them for any other purpose—whereupon the court excluded the same from the jury; to which decision of the court in excluding said evidence, the defendants, by their counsel, excepted.

The defendants then offered to prove that the amount of compensation allowed the plaintiffs by the appraisers as mentioned in their report, was deposited at the place and with the person named, and in pursuance of the orders of the judge, made upon that subject, and still remains with him, and that the defendants had paid the expense of said appraisement, all of which was admitted to be true by the plaintiffs.

The plaintiffs then introduced as a witness, *J. H. Mayborne*, who testified as follows: "I received this paper from my client, as a paper purporting to be a notice in the condemnation of the land; I received this notice about 1st of August, 1853, from John Bennett; it may have been later—it was during the fall of 1853."

It was admitted by the defendants, that the notice spoken of and exhibited by Mr. Mayborne, was in the hand-writing, and signed by the attorney of the said defendants.

The plaintiffs then offered, as evidence in the case, the notice mentioned by said witness; to the introduction of which evi-

dence, the defendants objected; the court overruled the objection, and allowed the paper to be read to the jury as follows:

To Mrs. Mary Pound, John Bennett, William Bennett, Sarah Elizabeth Bennett, Jane Bennett, Joseph Bennett, Harriet Amelia Bennett and Lyman German:

Please to take notice, that the Galena and Chicago Union Railroad Company will apply to the Honorable Isaac G. Wilson, Judge of the 13th Judicial Circuit, of the State of Illinois, and presiding Judge of the Kane county Circuit Court, at the clerk's office, in Geneva, in the county of Kane, on the 14th day of June, 1853, at 1 o'clock, P. M., of that day, to appoint three disinterested persons, freeholders, and residents of the said county of Kane, appraisers, to assess the damages which you, the said several persons above named, may sustain by reason of the appropriation of so much of your land as is required for the use of said railroad company, pursuant to an act entitled, "An Act to incorporate the Galena and Chicago Union Railroad Company," approved January 16th, 1836, which said land so required is described as follows, to wit: a strip of land one hundred feet wide, being fifty feet wide on each side of the centre line of said railroad, where the same is located over the north-west quarter of section twelve, and the north-east quarter of section eleven, in township thirty-nine, in range nine east of the third principal meridian, and for the distance of one thousand feet from the west line of said land, crossed by said railroad, a strip of land one hundred and sixty feet wide, being eighty feet wide on each side of said centre line of said railroad.

Yours, &c., JOHN A. HOLLAND,
Attorney for the said Galena and Chicago Union Railroad Company.

Dated June 10th, 1853.

It is admitted, that this notice is in the hand-writing of the authorized attorney of the company, at its date, and made at engineer's office, at Geneva, and in the usual form of like notices for such purposes.

To which decision of the court in overruling said objection, and allowing said paper to be read as evidence, the defendants by their counsel at the time excepted.

The jury rendered a verdict for the plaintiffs, for $650.

The defendants moved the court to set aside the verdict, and grant them a new trial, because the court erred—

1st. In admitting improper evidence on the part of the plaintiffs.

2nd. In excluding proper evidence offered by defendants.

3rd. The verdict was contrary to the law and the evidence.

The court overruled said motion for a new trial, and rendered judgment on the verdict, to which decision of the court in

overruling said motion for a new trial, and rendering a judgment on said verdict, the defendants, by their counsel, excepted.

The following errors are assigned:

The court below erred in admitting improper evidence on the part of the plaintiffs below.

The court below erred in excluding proper evidence offered on the part of the defendants below.

The court below erred by giving oral instructions to the jury.

The court below erred in rendering judgment upon the verdict of the jury, which was contrary to law and evidence.

The court below erred in overruling a motion for a new trial.

E. Peck, for Appellant.

J. H. Mayborne, for Appellees.

Caton, C. J. We are of opinion that the record of the proceeding before Judge Wilson, for the purpose of obtaining the right of way, which was offered on the trial below, was competent evidence and should have been admitted. The judge before whom that proceeding was had, was exercising a special jurisdiction, conferred upon him by statute, and hence it was necessary to show that it was such a case as authorized him to act,—that the facts existed, or at least were alleged to exist, which gave him jurisdiction of the subject matter. It was sufficient if those facts appeared in the averments of the petition or in the order of the judge, or indeed in any part of the record. When such an application was presented as required him to act, then he acquired jurisdiction over the subject. He was then properly set to work. When jurisdiction is once shown to have attached, his authority to act, was as complete as is the authority of the Circuit Court in any matter of which it has jurisdiction, and the intendments and presumptions in favor of the correctness of the action had and judgment pronounced, are as strong in the one case as in the other. In this case every necessary fact appears in the record to require the tribunal to act,—to give it jurisdiction. It then had a right to adjudge as to all matters within its jurisdiction, and its judgments were conclusive in all collateral proceedings, and the correctness of such judgments could only be examined upon a direct proceeding, before a superior tribunal for the purpose of reversing them. The service of a proper notice in this case, was in *pais* to be proved, the same as any other fact. The court heard the proof of the service of such a notice, and found and adjudged "that notices have been served on the several owners described in said petition by

affidavit shown," etc. That affidavit was a part of the record, and if it did not contain sufficient evidence of the fact thus found to be true, that would have been sufficient to have reversed the order on a direct proceeding, but the court could not look into it nor pass upon its sufficiency in any collateral proceeding. The necessary jurisdictional facts appearing in the record, the court was authorized to adjudge, and its judgment is conclusive in this action. The record should have been admitted. This record can of course afford no justification for depositing the waste material outside or beyond the line of the land, mentioned in the petition, and the order of the court as condemned to the use of the road. In order to give the court jurisdiction to condemn, the land sought should be mentioned in the petition, and the same land must be described in the several orders of the court where it should properly occur, and in the final order.

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

Judgment reversed.

WALKER, J. I dissent from the conclusion at which the majority of the court has arrived in this case.

FRANCIS WARNER, Plaintiff in Error, *v.* ROWLAND CARLTON, Defendant in Error.

ERROR TO LASALLE.

A vendor of goods with a warranty, is a competent witness, in an action between his vendee and a judgment creditor.

Where a bill of exceptions does not state that it contains all the evidence, the presumption is in favor of the verdict.

Where a vendee employs his vendor as a clerk to sell goods, although the fact may excite suspicion, it is not *per se* fraudulent, and may be explained.

THIS was a suit commenced in the Circuit Court of LaSalle county, at the February term, A. D. 1859, by a writ of replevin. The articles replevied, were merchandize in a store.

The coroner of LaSalle county, to whom the writ was directed, returned the same with the indorsement following, to wit:

ROWLAND CARLTON, *vs.* FRANCIS WARNER. } *Writ of Replevin.*

Executed this writ by reading to defendant, Francis Warner,

and delivering the within described goods and chattels to David L. Hough, attorney for plaintiff.

ROBERT M. McARTHUR, *Coroner.*

There are no damages alleged or asked for in the præcipe, affidavit or writ. The declaration was filed on the 18th January, A. D. 1859, and is in the words and figures following, to wit:

STATE OF ILLINOIS, } LaSalle County Circuit Court.
LASALLE COUNTY. } February Term, A. D. 1859.

Rowland Carlton, plaintiff in the suit, by Greenwood & Hough, his attorneys, complains of Francis Warner, sheriff of said county, defendant in this suit in a plea of replevin, for that whereas he unlawfully took and unjustly detains the goods and chattels of the said plaintiff, for that the said defendant heretofore, to wit, on the 15th day of January, A. D. 1859, to wit, at the county aforesaid, unlawfully took and unjustly detained from the said plaintiff, four barrels of C. powdered sugar, three barrels B. fine yellow sugar, five boxes family soap, eight boxes chemical soap, seven boxes starch, four boxes candles, three boxes saleratus, two half chests tea, fourteen boxes tobacco, twenty-three boxes tobacco, three boxes ginger wine, one keg prunes, five boxes cream tartar, four boxes ground allspice, two boxes pimento, one box pepper, two boxes pepper sauce, three boxes tomato catsup, one box pickles, one box chocolate, one box citron, eight boxes herrings, two and one-half dozen wooden pails, four hundred and ninety pounds cheese, one dozen half-bushel measures, twenty reams of wrapping paper, ten reams of wrapping paper, one barrel lard oil, four barrels vinegar, one barrel spirit gas, one barrel rye whiskey, two barrels sugar, six half-barrels mackerel, three half-barrels white fish, two boxes codfish, one and one-half barrels napes and fins, sixteen kits mackerel, sixty boxes cigars, twenty-one boxes cigars, fifteen boxes cigars, sixty-two bottles brandy, one cask gin, twenty gallons brandy, one cask port wine, one part barrel Bourbon whisky, one keg Jamaica rum, one cream colored horse, one wagon, one harness, one fire proof safe.

Which said goods and chattels were then and there the property of said plaintiff, and of great value, to wit, of the value of fifteen hundred dollars, and from thence, hitherto, the said defendant hath unlawfully and unjustly detained the said goods and chattels from the said plaintiff, and still detains the same against gages and pledges, to the damage of said plaintiff, in the sum of three thousand dollars, and therefore he brings this suit.

The defendant filed four several pleas:

1st. Non detinet.

2nd. Property in R. H. Carlton.

3rd. Property in defendant.

4th. That he was sheriff of LaSalle county, and as such, he took the property by virtue of three executions in his hands, as such sheriff, against R. H. Carlton, and that the property belonged to R. H. Carlton.

The defendant filed replications traversing each of said pleas.

The trial resulted in a verdict in favor of the plaintiff below, and an assessment of one cent damages against the defendant.

There was then a motion for a new trial, which was overruled by the court. Also a motion in arrest of judgment, which was also overruled by the court, HOLLISTER, Judge, presiding.

The plaintiff, to maintain the issue on his part, called *Volney G. Hatch*, who testified in substance as follows:

I am acquainted with Rowland Carlton; he resides in Sedgwick, Maine; he has been making investments in this county in real estate; have known R. H. Carlton about three years; have been in partnership with him in LaSalle; we went into partnership two years ago last June; remained in partnership about eighteen months; he put in $1,600; that money was furnished him by his father, the plaintiff; I sold out my interest in the business to R. H. Carlton; he paid me for my interest and assumed the liabilities of the firm; the liabilities were about $4,000; between $2,400 and $2,600 was a debt due the plaintiff for money furnished Hatch & Carlton; Rowland Carlton held Hatch & Carlton's notes for that amount; when I sold out to R. H. Carlton, R. Carlton took up Hatch & Carlton's notes, and R. H. Carlton gave R. Carlton his notes for that amount; a portion of the debts secured by R. Carlton were due to Chicago parties, and R. Carlton and R. H. Carlton gave joint notes for those debts; I sold out to R. H. Carlton about the 6th February, A. D. 1858; R. H. Carlton carried on business at the same stand after I sold out to him; the business was grocery and provision store; the plaintiff was not there when I sold out to R. H. Carlton, but R. H. Carlton sent on his notes for what Hatch & Carlton owed the plaintiff, and Hatch & Carlton's notes came back canceled; there was a sale of said grocery store by R. H. Carlton to the plaintiff; the sign was changed.

The sale took place in LaSalle; don't know anything about the terms of the sale; don't know positively that R. H. Carlton owed the plaintiff anything at that time; plaintiff owns considerable real estate about LaSalle; the general reputation is that he is a man of considerable property; the plaintiff said he would advance the $1,600 for the purpose of setting up R. H. Carlton in business with me; the plaintiff came into our store one morning and said he had bought out R. H. Carlton, meaning R. H. Carlton, his son; that he would attend to the business himself, and see if he could not get matters into better

shape; this was after the sale; R. H. Carlton had his name painted on each window, as grocer; on top of the awning he had a board with his name; this sale was made in the fore part of October last; the first time I noticed the sign on the awning was changed, was within two weeks; don't know when it was changed; it now reads R. Carlton; there is another sign suspended over the sidewalk under the awning; don't know when it was placed there; I think within from four to five weeks; it reads Carlton's; don't know who put it up; it is most conspicuous to those on the sidewalk; most of the people that trade at the store pass on the sidewalk; the signs on the windows are taken off entirely; I don't know whether the plaintiff went in and conducted the business or not; he has not been in LaSalle since he bought out; he resides in the State of Maine.

I saw a notice of the sale in the newspaper, in the "LaSalle Press," on the 16th day of October, A. D. 1858.

Plaintiff then introduced the said *R. H. Carlton* as a witness; to the competency of which said witness, on the ground of interest, the defendant, by his attorney, then and there objected. The court overruled the objection, and defendant excepted.

The said witness gave in substance the testimony following:

I am the son of R. Carlton; I was indebted to R. Carlton $1,600 at the time I went into business with Hatch; Hatch & Carlton were indebted to R. Carlton, at the time I bought Hatch out, $2,400, and he, R. Carlton, was security for about $1,800, which was on notes; R. Carlton signed notes with me for about $1,800; in last October, at the time of sale, there was an inventory of amount of stock, notes and accounts; this indebtedness was released; security was entered into; possession was given of store and books, and all that belonged to the store; R. Carlton employed two clerks and discharged two; he thought there was too much help; the very day the sale was made, the sign in front of the awning was taken down, and the next day the painter made it R. Carlton; R. Carlton was here at the time of the sale, and staid three weeks; sale took place about October 6th, 1858; the sign across the sidewalk, which reads Carlton's, has been up three weeks or more; he loaned me money to go into business; he loaned me money to invest in property, and I invested it; he took back the property and let me have the money; it was sold back to Rowland Carlton; he loaned me in the first place $300, and subsequently enough to make $2,100 or $2,200; I drew on him for first money.

I have been in the store ever since the sale to R. Carlton, and have taken charge of matters as formerly, only that I acted as agent for my father; I kept one key to the safe and Telfer kept one; took charge of business same as others in the store; have

not taken quite as much charge of business since as before; most of the goods since that time have been bought in LaSalle; Telfer often made purchases without letting me know; he never assumed to act in the store in opposition to my expressed wishes; father did not give Telfer a power of attorney, but he did give me a power of attorney to transact his business; he gave a written order to Cruickshanks to honor Telfer's checks.

R. Carlton employed and paid me; some of the goods taken, quite a large portion that were taken, were purchased by my father after the sale.

Could not state what the articles were that were taken that were purchased after the sale to R. Carlton—some sugar and other articles that I cannot enumerate; R. Carlton has not personally bought any of the goods after the sale; has not been notified of the purchases; I have not advised him of the profits or losses of the concern; I have been paid seventy-five dollars per month since the sale.

George M. Cook was then called by the plaintiff, who testified: I was employed in the store by Carlton; was there at the time of the sale to R. Carlton; helped to take an account of stock; book contains a correct account of the amount of stock; could not state that all the articles are correct; I called off correctly; Telfer did the writing; was one of the clerks; R. Carlton kept no bill after inventory; told me he should want me to stay there until after the inventory, and should want me no longer; the store was open as much as usual while we were inventorying.

There was nothing more there to indicate a sale except taking account of stock; don't know that there was anything more than my being out of the store, that would indicate a change; saw nothing different after sale from what it was before; to all appearance, things were same after as before the sale; signs in window were changed from R. H. Carlton to R. Carlton, by scratching out the H.; part of name in one window prior to sale was broken out by the glass getting broken; part of the time R. Carlton was around with me while I was calling, and a part of the time he was not in the store at all; don't know when the signs were changed; one of the window signs was changed by me, and the other by some one else; part of the paint was left on the glass after the H. was scratched.

The plaintiff then introduced *G. W. Telfer*, who testified as follows:

I was clerk for R. H. Carlton at time of sale; took account of stock correctly as called by Cook; have been since employed by R. Carlton; R. H. Carlton has been there since the sale, and in his absence I took charge of the store; I was there at the

time of the levy by the sheriff; some of the goods that were purchased since the sale were taken by the sheriff; R. Carlton invested at one time since the sale, $900, and at another time $400; on the 6th of October, new books were opened in name of R. Carlton; receipts, bank account, etc., were kept in name of R. Carlton; have told customers, and so has R. H. Carlton, that the goods had been sold to R. Carlton; the signs on the windows were R. H. Carlton, Grocer; the H. was scratched out; the sign under the awning was changed to R. Carlton; it formerly being down under the awning, but was subsequently put on top; R. Carlton took charge of the business and continued it while he remained; I never had any direct or different authority from R. Carlton to purchase goods.

I never went to Chicago to purchase goods when R. H. Carlton was there, without his advice; both I and R. H. Carlton kept key to safe; the assignment of the notes and book accounts was made in my presence; the books were all posted up at that time except our account; there was an actual delivery of book by R. H. Carlton to R. Carlton; they delivered a book in the name of all the accounts; there was money paid at time of sale to R. H. Carlton; R. Carlton did not figure up amount of books at any time; at the time we took account of stock he was with me all the time; the difference between the accounts, notes and stock and amount of indebtedness of R. H. Carlton to R. Carlton, not paid, was about $50; amount of indebtedness of R. H. Carlton to creditors, not paid, about $3,000; the accounts due R. H. Carlton's creditors were in the same books turned over to R. Carlton; the bill book, if properly kept up, would show amount of R. H. Carlton's indebtedness; I think R. Carlton had the means of knowing the amount of R. H. Carlton's indebtedness; there were notes transferred, not by actual indorsement on the back, but on another piece of paper; R. H. Carlton got money whenever he wanted it; he did not take out $70 per month; I kept cash book until sale; some of the notes that were transferred have been paid to R. H. Carlton; there has been no remittances made to R. Carlton, who lives East, as far as I know; R. H. Carlton corresponds with R. Carlton; I know how books have been kept; there never was any balance sheet of old books; any stranger glancing through the books might ascertain amount of R. H. Carlton's indebtedness.

The plaintiff's instructions were given by the court to the jury, as follows:

1st. If the property was in possession of the plaintiff by his agent or agents, claiming to be the owner thereof at the time it was taken on the execution mentioned in the plea, and

the same was taken by the defendant, the jury should find for the plaintiff, unless it is shown by the proof that the plaintiff did not own the property, or that the sale thereof from R. H. Carlton to the plaintiff was made with the view, on the part of both R. H. Carlton and the plaintiff, of hindering, delaying or defrauding the creditors of R. H. Carlton.

2nd. Fraud cannot be presumed, but must be proven; and the jury are not at liberty to infer that the sale from R. H. Carlton to plaintiff (if such sale was made) was fraudulent, but the same must be proved to the satisfaction of the jury before they can find the property to be the property of R. H. Carlton.

3rd. A sale of property for a valuable consideration, when there is a delivery of the property sold, passes the title to the purchaser, and the fact that the seller was in debt will not, of itself, invalidate the sale, although the purchaser may have known that fact at the time of the purchase.

4th. If R. H. Carlton was indebted to the plaintiff, and the plaintiff assumed and agreed to pay debts due from R. H. Carlton to third persons, these constitute a good consideration for the sale (if proven) from R. H. Carlton to plaintiff.

5th. If there was a delivery of the property sold to the plaintiff by R. H. Carlton, that was all that was necessary to vest the title in the plaintiff, (if there was a sale on a good consideration,) and the fact that the plaintiff afterwards employed R. H. Carlton to assist in carrying on the business, and left him in connection with others in charge of the property, as plaintiff's agent, would not invalidate the sale.

6th. Although a delivery of property sold, is necessary to pass the title thereto, yet such delivery need not be an actual manual delivery; but anything which clearly shows a surrender of ownership by the seller, and an assumption of ownership by the purchaser, accompanied by such circumstances as would reasonably advise the world of such change of ownership, is all that is necessary on that point.

7th. Even if the jury should believe, from the evidence, that the object and purpose of R. H. Carlton in making the sale, was to hinder, delay or defraud his creditors, yet unless the jury are satisfied, by the proof, that R. Carlton, the plaintiff, knew that fact, and bought the goods with such knowledge, the jury cannot find that the sale was fraudulent for that reason.

8th. A party may be in possession of property by his agent as well as by himself, and if the goods were sold for a valuable consideration, and the possession delivered to the purchaser, it is not necessary that he should remain in the actual possession of the property sold, to guard his title; but such possession may be by an agent or agents, and such agent may be the seller of

the property, if such possession is such as to advise creditors of the change in the title of the property.

The defendant then and there asked the court to instruct the jury in his behalf as follows:

If the jury believe, from the evidence, that the sale alleged to have taken place on or about the 8th day of October, A. D. 1858, was made by Rowland H. Carlton with the intention of preventing his creditors from collecting their demands against him, and if they further believe that plaintiff had notice of such intention on the part of the said Rowland H. Carlton, or was so situated that he might have known it, then the sale was void as to Rowland H. Carlton's creditors, although a valuable and adequate consideration may have been paid by the plaintiff for the goods in question, and the jury should find for the defendant.

If the jury believe, from the evidence, that the sale in question was made by Rowland H. Carlton with the intent to hinder, delay or defraud his creditors, and that such intent was at the time of said alleged sale known to the plaintiff in the suit, then the sale would not be legal, as against the creditors of the said Rowland H. Carlton, and the jury should find for the defendant. And for the purpose of deciding upon this question, the jury may consider the means of knowledge possessed by the plaintiff, at the time of the alleged sale, of R. H. Carlton's business affairs, and the relationship existing between the parties.

The court qualified the said defendant's 1st and 2nd instructions, as follows:

The first by the insertion of the words following, to wit: "Yet if the jury believe, from the evidence, that Rowland H. Carlton was indebted to the plaintiff, and that the sale, if any was made, by R. H. Carlton to plaintiff, was with the *bona fide* intention to pay such indebtedness, it is valid, even against other creditors of R. H. Carlton."

And to the 2nd instruction, by the insertion of the following words, to wit: "Yet if said sale was made to pay a *bona fide* indebtedness to plaintiff, it is a valid sale, if not made to defraud, hinder or delay other creditors."

D. P. Jenkins, for Plaintiff in Error.

W. H. L. Wallace, and D. L. Hough, for Defendant in Error.

Walker, J. The first question presented by this record, for our consideration, and which was urged with most earnestness, is whether R. H. Carlton was a competent witness on the trial

below. It is a rule of uniform application that a person not a party to the record, and whose interest is equally balanced, is competent. *Stokes* v. *Kane*, 4 Scam. R. 167. This witness was the vendor of the goods in controversy, and it is urged that his interest is not balanced between his execution creditor and his vendee. In numerous cases of this character it has been held that his interest is balanced, and that he is competent. *Bailey* v. *Foster*, 9 Pick. 139; *Prince* v. *Shepherd*, ib. 176; *Ragland* v. *Wickware*, 4 J. J. Marsh. 530; *Lumpton* v. *Lumpton's Ex'rs*, 6 Mon. 116; *Rice* v. *Austin*, 17 Mass. 197; *Martin* v. *Jackson*, 1 Carr. and Paine, 17. There are, however, cases which seem to militate against this doctrine, but the weight is, we think, most clearly in its favor.

This rule has been recognized by former adjudications of this court. In the case of *Clifton* v. *Bogardus*, 1 Scam. R. 32, where an execution in favor of Bogardus and against Moses Clifton was levied on property claimed by Mary Clifton, it was held that Moses Clifton was a competent witness on a trial of the right of property, and his competency is placed upon the ground that his interest was against the party calling him. The judgment debtor in that case, as in this, was called as a witness, by his vendee. And we are unable to perceive any distinction in the two cases. If the interest of the witness was against the party producing him in the one case, it most undoubtedly is, in the other. Again in the case of *Miller* v. *Dobson*, 1 Gilm. R. 572, which was an action of replevin, it was conceded by counsel, and acted upon by the court, as the settled common law rule, that in replevin by the claimant of property levied upon under execution, the judgment debtor is a competent witness. It is true, counsel conceded the rule in that case, but the court say they would not hesitate to exclude the witness under the statute if they could have done so, and they must have regarded the rule as inflexible, or they would have done so on common law grounds.

We have no hesitation in saying, that whether considered on principle or upon authority the witness was competent. If he has sold with a warranty, and a warranty of title is always implied in sales of chattels, and a trial results in favor of its liability to the execution, he thereby becomes liable to his vendee for a breach of warranty, for the price, whilst if the vendee recovers the property his liability to pay the execution, remains unimpaired. In either event his liability is the same, and his interest is balanced. We therefore see no error in permitting the witness to testify.

The bill of exceptions fails to state that it contains all of the evidence introduced on the trial in the court below, and we cannot inquire whether the verdict is supported by the evidence,

but it must be presumed that it is. The evidence that is contained in the bill of exceptions, tends to prove a delivery of possession by witness to plaintiff at the time of sale. Such being the case it was for the jury to determine whether the title and possession went together or not. It would have been error in the court when there was such evidence before the jury, to have instructed them, that the sale was fraudulent *per se*. Had there been an entire absence of all evidence of a change of possession accompanying the sale, then such an instruction would have been proper, but so long as there was evidence of that fact, however slight it might be, and however clearly it might have been rebutted, it was still a question for the jury and not for the court. The defendant's 13th instruction was, therefore, properly refused.

His 12th instruction is based upon the hypothesis that the vendee had no right to employ the vendor as a clerk to sell the goods, in connection with others. There is no doubt that it is a circumstance to be considered on the question of fraud, but undoubtedly may be explained, but it is not *per se* a fraud that admits of no explanation. If the vendor after the sale without a delivery of the goods, were to remain in the sole and exclusive possession, it would amount to a fraud in law, but such is not the evidence in this case. No evidence showed that R. H. Carlton was in the sole and exclusive possession, but it tended to show that he was only acting as a clerk, and that Telfer was the person having charge of the concern, and was the principal in its management. And for aught that appears the evidence may have been conclusive of that fact. This instruction without modification, so as to have left it to the jury to determine from the evidence whether he had remained in the exclusive possession and control of the goods, without ever having delivered them to the purchaser, was erroneous, and therefore properly refused.

There is no objection perceived to the modification made to defendant's first and second instructions. The various other instructions as asked and given presented the law fairly, as it arose on the facts of the case so far as we can determine from that contained in the bill of exceptions. We see no error in the record, and the judgment of the court below is affirmed.

Judgment affirmed.

Anna B. Foote, Appellant, *v.* William E. Foote, Appellee.

APPEAL FROM McLEAN.

Alimony will be granted in proportion to the wants of the party asking it, and the ability of the person who is to pay it. The allowance depends upon a judicial exercise of discretion, which may be inquired into on appeal.

An allowance for alimony may be increased or diminished.

Bill in chancery, filed by appellant against appellee, for divorce.

The bill was taken as confessed by defendant.

A decree was entered dissolving the bonds of matrimony theretofore subsisting between the complainant, Anna B. Foote, and the defendant, William E. Foote; and that the custody of the infant children of said parties be given to the appellant, Anna B. Foote. It was further decreed, that said William E. Foote pay as alimony to the said Anna B. Foote, for the support of herself and her two children, the sum of $500 per annum, in equal quarterly installments.

The complainant excepted to the allowance for alimony, as being inadequate.

It appeared by the evidence of *Thomas Lonergan*, that when complainant married defendant, she had a piano worth from $200 to $300; that on the day of her marriage, witness gave her $100; that since their marriage witness had let her have money and furnished her house, amounting in the aggregate, to between $700 and $800. That the two children are both boys. That in his opinion $1,200 per year would be the ordinary and necessary expenses for the support of complainant and her two children.

It appeared in evidence, by the testimony of *John S. Auby*, that $1,200 would be a fair estimate for the support of complainant and children per year.

It was also proved, by the testimony of *Robert Hill*, that $1,400 would be the annual necessary expenses for their support.

It was further proved that the defendant, about eighteen months before the decree was made, told Thomas F. Warrell that he was worth $10,000, and was clear of debt.

That the proceeds of the job part of his office (he was a printer,) was worth $1,500 or $2,500 per month. That the children are aged, one seven years, the other two years.

It also appeared, from the testimony of *William Thomas*, that witness was an insurance agent; that on the 15th of January, 1858, defendant applied to him to insure his printing establish-

ment, and defendant then stated that the value of the property to be insured, at last invoice, was $12,000. That a short time afterwards the witness remarked to defendant, that he thought the appraisement was too high, when defendant replied that he had, since such appraisement, purchased upwards of three thousand dollars worth of property and put it in the office, making between $15,000 and $16,000 worth of materials and apparatus connected with the office.

Brier & Birch, and E. Van Buren, for Appellant.

Swett & Orme, and J. M. Scott, for Appellee.

Breese, J. It is true, as claimed by defendant's counsel, the court, in determining the question of alimony, will take into consideration the circumstances of the parties and their social position—the amount of property and resources of the husband, and his ability to pay the sum the court may award against him; in other words, alimony will be granted in proportion to the wants of the person requiring it, and the circumstances of the party who is to pay it. The allowance is said to be discretionary with the court. It is so, but it is a judicial, not an arbitrary discretion which is to be exercised, and is therefore a subject of appeal, and while it is so, it should be only upon a strong and decided difference of opinion, where an appellate court would be disposed to disturb a decree.

Our statute provides, (Scates' Comp. 151,) when a divorce is decreed, the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children or any of them, as from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just.

The decree in this case finds the wife to be the meritorious cause, and whilst there is nothing proved against the husband but exhibitions of unrestrained anger against the wife, amounting in one or more instances, to unmanly violence towards her, which was fully proved, enough is developed by the whole case to show that there was great incompatibility of temper, irreconcilable disagreement between the parties, producing a breach only to be healed by separation. The defendant did not answer the charge of cruelty, nor attempt to recriminate; the bill was taken for confessed against him. The proofs show, that the complainant on her marriage had property of the value of about eight hundred dollars, which the defendant restored to her, and also furnished her, between the time of her leaving his bed and board and the trial of the cause, that is, from December, 1857, to April, 1858,

the sum of two hundred dollars, so that all that he received with her, has been restored to her. The proofs further show, throwing all estimate of his real estate out of the question, as its value and the existing liens and liabilities upon it, are about equal, that his annual income from his business—that of proprietor of a large printing establishment in the city of Bloomington—is twenty-five hundred dollars. The proofs further show that there are two children of the marriage, both boys, one six, and the youngest about two years of age, who are, by the decree, committed to the complainant, for their nurture and education. It is also in proof, that the complainant is in delicate health, and not able to do much labor, and that the health of the eldest child is also feeble, and that they all reside together, with her relatives, at Chicago.

It will be observed, our statute requires that the court, in decreeing a separation from the bonds of matrimony, may make an order, touching not only the alimony and maintenance of the wife, but for the care, custody and support of the children.

It becomes therefore, a very important subject of inquiry, did the court, in exercising its discretion in this case, regard this provision of the statute. Has any provision been made for the support of the children? Five hundred dollars per annum, payable quarterly, may be considered as ample for the decent support of the wife, added to the small income she may and ought to obtain from her own labor. It is not the design of the law, that she shall be supported by her husband in idleness, but, as when the marriage relation existed, she should contribute her own services in aid of the family establishment, if not by manual labor, which is not expected from the rich, but by overseeing and carefully watching and protecting the common interests, and advancing them to the extent of her power. So when a separation is decreed, it is expected she will do something for her support, if exertion be necessary to that end. Whilst provision is made by the court for her support, the children seem to have been wholly overlooked. By law, it is the bounden duty of the father to provide for the support of his own offspring, and having the means he can be compelled to do so. By the divorce, he is relieved of the care and responsibility attending their nurture, all being devolved upon the mother, and it seems from the proof, though never treating his children unkindly, he never manifested very much regard for them. Their support is a fair claim upon his property. With an annual income of two thousand five hundred dollars, he is abundantly able, not only to pay six hundred dollars to the complainant, but a sufficient sum for the support of the children.

It is urged by defendant's counsel, that his property is of a perishable nature, not enhanced in value by time. This is true as to the materials of which that property is composed, time and use will deteriorate it, but it is not true as regards the establishment itself. Time, there is every reason to believe, will, by a proper application of his skill and industry to it, enhance its proceeds. Experience proves, that such establishments well conducted, as his appears to be, in our growing cities, produce certain, and large incomes. The net income from the establishment now, is admitted to be twenty-five hundred dollars, full ten per cent. on all the capital invested and employed, and with the growth and expansion of the city and county in which it is located, the chances are greatly in favor of a continued annual increase. We agree with the defendant's counsel, that alimony and maintenance, should be so graduated, as not to trench too deeply upon a defendant's capital and resources, for by so doing, the object of the allowance may be defeated. Yet such as the defendant has, be it much or little, must be resorted to, out of which to provide a fund for the children. If he has no property, a certain proportion of the avails of his own skill and labor, must be applied—in short, courts can resort to all the means, for such purpose, in the power, possession or control of the defendant, or in reasonable expectancy. But in this case, we do not touch the capital of the defendant, we only propose to take from the net income derived from its use, a certain proportion, for the support of the wife and the children, which the law compels him to support. If, by his misconduct, he is deprived of their company and caresses, he is still bound to give them a decent support and education. We think one thousand dollars, not one half of his income—six hundred dollars thereof for the complainant, and the residue, four hundred dollars, for the support of the children—will be as fair an allowance as could, under the circumstances, be made, leaving out of view, the defendant's real estate or any increase in its value, and this will be our decree.

It is equally the duty of the court decreeing a divorce, under our statute to provide for the children as to provide alimony for the wife. Taking into consideration their respective ages—the delicate health of the oldest, and also that of the mother, we cannot think four hundred dollars a year too much for their support and education, certainly not whilst they are so young as to be unable to earn anything for themselves. In process of time, should they live, they may be able to earn a portion of their own support, when the amount now allowed for such purpose, may be diminished, as such matters always remain under the control of the courts, and subject to any alterations that

varying circumstances may render necessary. *Davis* v. *Davis*, 19 Ill. R. 343.

All the cases, both English and American, sustain the view we have taken of this case. In *Cook* v. *Cook*, 1 Eng. Ecc. R. 178, one moiety of the husband's property was given to the wife for permanent alimony, and the same in *Smith* v. *Smith*, ib. 244, and *Otway* v. *Otway*, ib. 203. *Kirby* v. *Kirby*, 1 Paige Ch. 261; *Prince* v. *Prince*, 1 Richardson Eq. Rep. S. Car. 282; *Mc Crocklin* v. *Mc Crocklin*, 2 B. Monroe, 372, where the court say when the husband owns little or no property, that fact does not absolve him from his duty to contribute, even by his labor, something towards the maintenance of his wife and infant child in her possession and under her care. *Lawrence* v. *Lawrence*, 3 Paige Ch. 267; *Bursler* v. *Bursler*, 5 Pickering, 427, where alimony was allowed without regard to the husband's income alone. *Prather* v. *Prather*, 4 Desaussure S. Car. 33; *Taylor* v. *Taylor*, ib. 175; *Williams* v. *Williams*, ib. 183; *Reavis* v. *Reavis*, 1 Scam. R. 242. Many other cases, to which those cited refer, might be cited, but it is unnecessary. The principles established are too plain and just to require authority in their support.

The judgment of this court is, that the decree of the Circuit Court as to allowance of alimony be reversed. and the cause be remanded to that court, with instructions to allow to the complainant as alimony, the sum of six hundred dollars annually to be paid quarterly, and the further sum of four hundred dollars payable to the complainant, for the support and education of the children committed to her care and custody, the same to be paid quarter-yearly, and that the same be a lien on the estate real and personal of the defendant, and that he pay the costs.

Decree reversed in part, and changed.

John B. Angle, Appellant, *v.* William Hanna, Appellee.

APPEAL FROM STEPHENSON.

A party who engages to labor for another for a specified time, cannot recover for his services unless he performs his contract, or is excused by his employer, or is justified in leaving the service.

That he is called upon to do severe, or unpleasant labor, does not excuse him for leaving his work.

THIS was an action for work, labor and services, brought by the appellee against the appellant, before a justice, in Stephenson county, and was taken by the appellant to the Circuit Court of said county, and tried by a jury before SHELDON, Judge, at the September term of said court, 1858. Judgment was rendered in favor of the appellee in said court, for the sum of $46.80, and costs, from which judgment the said Angle took an appeal to this court.

The appellant resisted the recovery in the court below, on the ground that the work and labor for which the suit was brought, was done under a special contract, by which the appellee was to work for the appellant, on his farm, for the period of four months, or from the 14th day of May until the 1st of October, 1857; and that the appellee violated his contract, in departing from the service of the appellant without a lawful excuse, and for that reason was not entitled to recover.

The appellee proved by three witnesses, that he worked for the appellant, on his farm, from about the 14th of May until about the 7th of August, 1857, and that the work consisted in the work ordinarily done on a farm, and in carrying brick on a new house the appellant was then building. Carrying brick worth from $1.00 to $1.25 per day. The appellant showed that during that time, wages of the kind were worth about $16 per month.

The appellant proved on the trial, that the work was done under a special contract, by which the appellee agreed to work for the appellant four months, or until the first of October, 1857, for the sum of $18 per month; and that he commenced work on the 14th of May, 1857, and quit on the 6th or 7th of August, 1857.

The following is the testimony, which shows under what circumstances appellee left the service of appellant:

Daniel Krider, witness for appellee, stated that he is acquainted with the parties to the suit; that on the 8th or 9th of August, A. D. 1857, plaintiff below came to his house, and told witness he had left defendant; that he had left him two days before; that he had agreed to work for the defendant four months, or until the 1st of October, 1857, at eighteen dollars per month; that he commenced work about the 14th day of May, 1857, and worked until the 6th of August following. Witness asked plaintiff why he had left the work of defendant, and told him he could not recover for his labor unless he had good reason for leaving. Plaintiff told him that he and defendant, on the day he left, commenced cutting flax with a machine; that there were two pair of horses attached to the machine; that defendant put him on the horses to drive them, because it

was easier to drive them than to pitch off, and defendant got on the machine to pitch off; defendant complained that plaintiff did not drive fast enough, so that the machine would clear itself, and requested him to drive faster; plaintiff did not drive fast enough so that the machine would clear, and then the defendant got on the horses and drove, and the plaintiff got on the machine to pitch off; and after going once round the field, plaintiff got off the machine and stuck his fork into the ground, and declared that he would not pitch off any more; it was too hard work for him, and he would not pitch off; defendant drove the horses fast, when plaintiff said he would not pitch off; defendant then told plaintiff if he would not pitch off, he would have to get some one else, and after some few words between the parties, the plaintiff left the defendant and went away; plaintiff did not say that defendant told him to leave; plaintiff stated no other cause for having left except as above stated.

The testimony further shows that the appellee was well treated and that he made no complaint of bad treatment while working for appellant.

The cause being submitted to the jury, they returned a verdict in favor of the appellee, for $46.80; and thereupon the appellant moved for a new trial, for the reason that the verdict was against the evidence, and the court overruled said motion; to which decision of the court, overruling said motion, the appellant, by his counsel, excepted, and judgment was entered for the appellee.

Meacham & Bailey, for Appellant.

J. H. Goodhue, and R. S. Blackwell, for Appellee.

Walker, J. The principle is well established and fully recognized, that a party who engages to labor for a specified period, has no right to recover unless he performs his contract, or is excused by the employer, or is in some manner justified in quitting before the expiration of the time. If the employee is prevented from performing his contract by the employer, or is discharged from his employment, or is from ill usage compelled to abandon his service, he may then recover on a *quantum meruit*. But, unless he is thus excused or prevented, he has no such right. In this case, the engagement was to labor four months, at eighteen dollars per month, or from the 14th of May until the first of October, 1857. After entering upon the performance of the contract, appellee quit work for the appellant about the 6th or 7th of August, 1857. There is no evidence in this record showing that the appellant discharged or in any manner excused the

appellee from completing the performance of the contract. And it fails to show ill usage, but on the contrary it appears that he was well treated, and that he at no time complained of his treatment, of his board or of his lodgings. And the only excuse which he made, after leaving, was that cutting flax with a machine was too hard work. And from his statement and other evidence, the appellant was engaged with him at the same labor. He was employed on the farm in the performance of labor incident to that occupation, and he had no right to insist upon the right to perform only the lighter portions of it, and an exemption from the more onerous portions. If he had not been willing to perform such labor as is usual and customary on a farm, he should have stipulated in his contract for an exemption from its performance.

It was urged that the appellant had no right, under the general contract for labor as a farm hand, to require him to carry brick, which was worth more than ordinary farm labor. It does not appear that appellee was only employed as a farm hand. The evidence shows that he was employed to labor for the period stipulated, without any kind of labor being specified, and it may have been that carrying brick was a part of the labor contemplated by both parties, when he was employed. And if it were not, the presumption is, that he would at the time have objected to its performance. But where it does not appear that such labor was not contemplated by the parties when the contract was made, and no objection was made at the time of its performance, we must conclude that it was a portion of the labor intended by the parties when the contract was made. And even if it was not, we cannot say it was not embraced in the contract.

The appellee has wholly failed to show a right of recovery; he having violated his part of the agreement, without any legal excuse, the finding of the jury was wrong, and unsustained by the evidence. The court below erred in not granting a new trial. The judgment must be reversed, and the cause remanded.

Judgment reversed.

Thomas Speer, Plaintiff in Error, *v.* R. Solon Craig, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where a declaration only sets out an indorsement in substance, there is not any variance if the declaration calls the indorsee R. Solon Craig, and the indorsement R. S. Craig.

Assumpsit upon a promissory note, made October 10, 1857, by Samuel A. Hatch and Thomas Speer, for $813.48, payable to John Craig. Indorsed to R. S. Craig. The declaration is filed in the name of *R. Solon Craig*. Plea non-assumpsit, and sworn to. In the descriptive allegation relating to the indorsement, it is simply stated that John Craig indorsed the note to the *plaintiff*.

Errors assigned:

The court erred in admitting the note and indorsement in evidence.

The court erred in not excluding the note and indorsement from the jury.

R. S. Blackwell, for Plaintiff in Error.

C. Beckwith, for Defendant in Error.

Caton, C. J. The declaration in this case is by R. Solon Craig as plaintiff against Hatch and Speer. Speer alone was served with process and pleaded non-assumpsit. The declaration avers that the defendants made their note, giving date and amount and when payable, by which they promised to pay to the order of John Craig, etc., and that afterwards the payee indorsed the note to the plaintiff. Upon the trial, the note as described was introduced in evidence and the indorsement by the payee, as follows: "For value received I transfer the within note to R. S. Craig," and it is objected that this was a variance from the indorsement described in the declaration. The declaration pretends to set out nothing but the substance of the indorsement, without pretending to give a description of the form. It does not pretend to say by what name, description, addition or designation, the order to pay to the plaintiff was made. Had the declaration averred that the payee had indorsed it to the plaintiff by the designation aforesaid, or by the name of R. Solon Craig, then there would have been a variance. As it was, there was the simple question of fact to be determined

whether the note was really indorsed to the plaintiff by any name or description. The court found that it was, and we think properly.

The judgment must be affirmed.

Judgment affirmed.

Letty M. Clark, Plaintiff in Error, *v.* Buckner S. Morris, *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A party who sets up a claim to real estate, founded upon an unrecorded deed, from a brother, must show such facts as were sufficient to put any one upon inquiry who was dealing with the estate. Negligence in giving notice to those to whom it was known the estate was about to be conveyed, might amount to an estoppel.

The fact of possession by such a party must be considered, in connection with all the circumstances surrounding it; as to who was the head of the family; how far the conveyance was kept concealed; the motives for the conveyance; the consideration, and all the incidents affecting the transaction.

The opinion of the court, contains a full statement of the case, condensed from a very voluminous record, which it is not deemed necessary to present, otherwise than as it is there presented.

R. S. Blackwell, and Gookins, Thomas & Roberts, for Plaintiff in Error.

B. S. Morris, for Defendants in Error.

Breese, J. We cannot but admire and approve the brief and pointed manner in which one of the counsel for plaintiff in error states this case. From a very voluminous record, he extracts four points only, as worthy the consideration of this court, and when considered, such will be found to be the fact.

The points are: 1st, That complainant was in possession of the property in question at the time of the execution of the trust deed by Lewis W. Clark to Burch, the trustee of Corning, under an unrecorded deed from Lewis W. Clark, her brother, and if this was true, Burch the trustee and Corning the *cestui que trust*, had notice, in equity, of the complainant's rights. Second, If Lewis W. Clark and complainant were both in possession, then it was a mixed possession, and the law in such case is, that the possession shall be adjudged to the party having the

right—that complainant had the right, and consequently it was her possession, and this possession put the trustee and *cestui que trust* upon inquiry which constitutes notice in equity of the unrecorded deed to the complainant. Third, The recital in the deed of a pecuniary consideration and the support of the father and mother of the grantor and grantee, cannot be contradicted by loose hearsay, and fourth, If the unrecorded deed be invalid as against the trustee and *cestui que trust*, the complainant has a right to redeem from the trust deed.

These are the grains of wheat winnowed by diligence from the superfluous matter with which the case is encumbered, and which is the fortune of all cases in chancery where large values are involved.

We think the above propositions present all of the case necessary for us to consider in order to a correct decision on the merits.

The first and leading question is, was the complainant at any time, in legal contemplation, in the possession of the premises in controversy?

We understand by possession, in the connection, an adverse and an exclusive possession against all the world, claiming the property during the time, under an unrecorded deed, and such is the allegation in the bill of complaint.

And it is further alleged in the bill, that the complainant was put in possession of the lots, "on or about the 8th of November, 1845, by said Lewis W. Clark, and that she continued in possession from thence until about the 23rd of March, 1850, by actual residence thereon."

The proof that the house in which she resided, was built on the lots by Lewis W. Clark, is clear and unequivocal, and that he designed it as a home for his aged parents, and for the complainant, his sister, who had then passed her climacteric, unmarried, and with no prop of support, but her kind-hearted and generous brother, is equally conclusive.

A brief history of this family may tend to illustrate the character of this possession now set up by complainant. Previous to their removal to Chicago, it seems they were residing at Utica, New York. Whilst living there, the old gentleman was not known to do anything for a living, and he had been heard to say that he was supported by his son Lewis. In 1836, Lewis, it seems, brought his parents and family to Chicago, to take care of them, as he always declared. He first rented a house for them, called in the pleadings, the Hubbard House, where they resided three years. The family then consisted of his father and mother, the complainant, another brother who died in that house, and his son, a lad. He paid the rents and furnished for

the most part, the family supplies. Lewis was the head of the family, to whom all seem to have looked for support and protection. He was then engaged in trade in Chicago, but embarassed in his circumstances and driven to many expedients to meet his engagements. His difficulties of this nature, would appear to have been such, as to have overwhelmed and discouraged an ordinary man, but he seems to have been one of very considerable energy—of some financial ability, and in whom the organ of hope was largely developed. The father's name was Humphrey.

We hear nothing in particular of the parties, or of their tenor of life until they removed from the "Hubbard House" to the Clark Street House, being the premises in controversy. Having possessed himself, in 1842, of a contract with the agent of the owner, for the purchase of six lots in block 22, on the north side of the river and beyond the then improved part of the city, he, in August, 1843, executed a deed for three of these lots to the complainant, who kept it in her possession, never letting any member of the family, who were sworn as witnesses on her part, see it, or declaring to any of them she held a deed, until in March, 1850, after a disagreement with her brother and his family, and who had required her to leave the house, she placed the deed on record. In 1845, Lewis inclosed the six lots with a fence—set out shade trees gathered from the forest, and erected a neat dwelling-house, occupying part of three of the lots, declaring at the time, that it was for his father and mother to live in, who accordingly, with the complainant, were removed by Lewis from the "Hubbard House" to the house erected on these lots, though then in an unfinished state. Previous to this, Lewis had married and occupied, with his wife, a house on Michigan Avenue, known as H. O. Stone's, supporting, as it would appear from the testimony, his father's family living in the Clark Street House. In 1847, the father, Humphrey Clark, died in the house, and between his death and the death of the mother in 1849, Lewis going East with his family in the spring of 1849, broke up house-keeping on the Avenue, sold off some of his furniture, sent other portions to his mother's, on Clark street, and finally, removed there himself, bringing his wife with him on her return from the East. This was in the autumn of the year 1849. Soon after the mother died and the complainant remained in the family of Lewis until the spring of 1850, when in consequence of a serious quarrel with her brother and his wife, he desired complainant to leave the house; that she should never live under the same roof with him and his wife, but should never want while he lived. He told her to go and get a house and he would pay

the rent. She swore at him and told him to go and get it himself. He accordingly got a house for her, but not being agreeable to her he got another, to which she repaired, after destroying some shrubbery she had planted about the house, declaring that Mrs. Clark should not enjoy anything she planted in the way of shrubbery. It seems her conduct in the house was so violent as to cause Mrs. Clark to faint. About this time she exhibited to Mr. Morris, one of the defendants, the deed of 1843, and asked his opinion if it was worth anything to her, all of which he details in his answer. After Lewis had built the house, pressed by his debts, he assigned in July, 1846, the contract of purchase of these lots to M. D. Ogden, as security for a certain debt of which Ogden had the collection, and in January, 1847, further assigned it to E. W. Tracy, together with the buildings on the lots, subject to the trusts in the assignment to M. D. Ogden. Bushnell, the trustee under this assignment in 1846, conveyed the lots by deed to W. B. Ogden, who, with Lewis W. Clark, on the 27th July, 1848, conveyed the lots in fee to I. H. Burch in trust, to sell and pay a certain debt due from Lewis to Corning & Co., of Albany, N. Y., and as security for other advances to be made by them to Lewis of merchandise in the way of his business. The debt not being paid to Corning & Co., on the 9th October, 1851, after due notice given, Burch, as trustee, sold the lots at public auction, at the door of the court house, in the city of Chicago, to B. S. Morris, he being the highest and best and only bidder, for the sum of $3,800, which he paid to the trustee, and a proper memorandum in writing made of the sale by him. Lewis was at the time of the sale absent, and Morris gave the trustee to understand, that he bought the property to secure himself, as he was under large liabilities for Lewis, but if Lewis on his return would discharge them, and the costs, with some compensation for his trouble and expenses, he intended Lewis should have the property again; that he did not design speculating on an absent friend. The trustee has not made a deed to Morris. Lewis still continued in possession of the property, paying no rent to Morris, and finally bargained and sold it to one Honore for over $20,000. Lewis died 31st March, 1855, leaving a wife and infant child, who, with Morris, W. B. Ogden, Burch, Corning & Co., and Honore, are made defendants to the bill. They severally deny all knowledge of possession of the premises by the complainant.

We have examined the record, voluminous as it is, with great care, on this point of possession of the premises by complainant, and making due allowances for the witnesses on her behalf, who for the most part, are her brothers and other relatives, who

presume to speak positively in relation to it, and comparing their testimony with undeniable facts in the case, and with that of others who are wholly disinterested, we think there is before us no satisfactory evidence of any possession by the complainant of this property. That she lived on it with her father and mother, who were both quite infirm, and incapable of exertion, and managed the household affairs, is undeniable, and that she set out with her own hands, some shrubbery, and beautified and adorned the place in some degree, is not to be denied. By the testimony of her own brother, who is not slow to speak in her behalf, Jonas C. Clark, the father, Humphrey Clark, was the head of the family while living on these premises, for he speaks of the family there residing, as "Humphrey Clark's family." This witness also swears that "it was universally conceded that complainant was not only in possession of the premises, but owned them,"—and again, "it was a matter of general notoriety in the city, among the entire circle of the acquaintance of the family, that complainant was in possession and owned the premises." He says, in this connection, that William B. Ogden, Gurdon S. Hubbard and Mahlon D. Ogden, were neighbors of Humphrey Clark, (again speaking of him as the head of the family,) from two to five years, but never saw but one of them, Hubbard, in the house. Now all these gentlemen are sworn, W. B. Ogden as one of the defendants, and the others as witnesses on their behalf, and they all deny this notoriety, and assert the contrary thereof; that it was Lewis W. Clark's possession and property, and G. S. Hubbard swears he had passed the house frequently, but was never in it. This witness, Clark, seems determined to believe the complainant was the owner, but he does not allude to any single act of ownership, nor that she claimed to have a deed, or occupied under any claim whatever. This wholesale swearing amounts to nothing, especially where stubborn facts are absent, or when present, speak a different language. Nor is any reliance to be placed on the testimony of Charles H. Clark, one of the witnesses of complainant, for the reason he betrays such an over anxiety, seeming to have no regard for his dead brother, the family's best friend and benefactor, as to lead to the suspicion that he has a secret interest in the property. He says she claimed to be in possession by virtue of the deed that had been previously given by Lewis to her, and the possession delivered by him to her. Other witnesses, entirely disinterested and not related to the parties say, that before the house was finished, Lewis removed his parents and family, of whom complainant was one, from the Hubbard House to the Clark Street House, and she was but an adjunct or member of the family. How does this witness know

of the deed? He does not say he ever saw it, or that complainant even told him she had a deed. This witness speaks of occurrences in 1851, after the quarrel in 1850, when complainant was required to leave the house—speaks of an offer by Lewis to assign complainant a policy of insurance on his life for $3,000, if she would re-convey the property to him. He says after she went into the newly rented house, Lewis refused to pay the rent, and that she then took counsel. Lewis then advanced her something on her rent. He proceeds to say, "In 1853 he told '*us*' to rent a new house, and he became responsible for the rent, one hundred and eighty dollar house; he paid her about one hundred and fifty dollars to defray expenses. In the spring of 1854 rents rose from eighty to one hundred per cent. Witness went to Lewis, and he said to witness from that time he would pay her rent and thirty dollars per month; he did so until September of that year or thereabouts, when a proposition came from her brother to pay her an annuity of five hundred dollars if she would release her interest in the lots, which she refused. If it be true, as sworn by Mr. Morris in his answer, that this deed of 1843 was left with her under the circumstances stated, and to be canceled on the recovery of health by Lewis, and it would seem to be true, from the fact of her concealing it from the eyes of every one until after the quarrel in 1850, both complainant and her adviser, her principal witness in this case, have shown not only a want of good faith, but a heartlessness and ingratitude to a kind and generous brother, and a disrespect to his memory, a parallel to which, would be hard to find. Nothing detailed by any of the complainant's witnesses, prove such possession as should be notice to any one to put them upon inquiry. Something more is required than planting a rosebush or gathering vegetables.

At the time of the execution of the trust deed from Ogden and Lewis Clark to Burch, July 27, 1848, Humphrey Clark was dead, and his widow with her family, of whom complainant was one, was in the possession of the property and so remained, until the summer or fall of 1849, when Lewis with his family entered into possession, required the complainant to leave the house in the spring of 1850, and remained in the undisturbed possession of it until his death in March, 1855.

Something may be gathered from the fact, that in this quarrel with her brother Lewis and his family, she never alluded to her possessing a deed for the property which she was required to leave, nor did she set up any claim to it whatever, but took one house after another which her kind brother provided for her, thereby manifesting her continued dependence upon him though reproaching him for his rascality and for his want of respect to the

memory of his deceased father, by neglecting, with all his valuable property, to furnish a slab to cover his grave.

No possession then having been shown in complainant under an unrecorded deed or in any other legal and sufficient mode, no person can be chargeable with notice of any right she may have possessed. Nothing is shown sufficient to put any one upon inquiry even, certainly not when the trust deed to Burch was made in July, 1848, for at that time the mother was in possession, and all the facts of building the house, and the purpose for which it was originally built as a home for her, were matters of such general knowledge and notoriety as to preclude the idea of an ownership or claim of title in another member of the family, to be implied from planting shrubbery and ornamenting the grounds with flowers. It was no act sufficient to put any one on inquiry. But it seems by her own showing that she knew of these arrangements and conveyance to Burch. Why did she not give him notice of her claim through her unrecorded deed? Why suffer him to take such security for Corning's honest debt? Honesty required if she held a claim, that she should have disclosed it, and not having done so she ought to be estopped from setting it up against Burch or any one claiming under him. 1 Johns. Ch. 343. If complainant was exercising acts of ownership over it—leasing it—appropriating parts of it to her own exclusive use—listing it for taxation and paying taxes upon it, all these would be evidence of some claim which ought to put parties upon inquiry, but nothing of this kind appears. Lewis appropriated it to his own purposes—built a stable on one of the lots (14) without the knowledge of complainant—paid the taxes upon it, and was the acknowledged owner in the judgment of those best situated to know all about it, and who have testified without bias, prejudice, or partiality. There is nothing in the whole record going to show any different fact.

The circumstances attending the possession in 1848, when Burch took the deed from Ogden, and his presumed knowledge of them, do not evince a fraudulent turning away from a knowledge of the facts which the *res gesta* would suggest to a prudent mind. Cases of this kind must be examined by the light of all the surrounding circumstances, which have a tendency either to excite or check those inquiries to which it is the natural effect of notorious adverse possession to give rise. Planting a tree or shrub and gathering fruit, or giving directions about the location of a door, or the ornaments of the house, are not circumstances constituting such notice as to prompt inquiry.

That Lewis should have been desirous to arrange the claim the complainant so unexpectedly set up to the property, is not at all surprising. It is consistent with his whole conduct toward

her and his parents. He said when he told her to leave the house, that she should never want while he lived, and provided her most generously with a house and allowed her $360 a year in money. Few instances of greater fraternal kindness by one in his circumstances, overwhelmed with debt, and driven from one expedient to another, to keep his head above water, he yet has his sister in his mind, and amid all his disasters, determines to provide for her, and does so.

The consideration of this point, going as it does to the very foundation of complainant's equity, disposes of all the minor points.

It must be borne in mind, that Lewis Clark was, during all this time, and to the day of his death, largely in debt, and so far as ready means were concerned with which to meet them, insolvent. No consideration whatever being shown for the deed to the complainant, it was voluntary on his part, in fraud of creditors and void. It was not a *bona fide* transaction but shall be intended as designed to defraud creditors. *Townsend* v. *Windham*, 2 Vesey, 10 ; 1 Story's Eq. Jurisprudence, 384, and notes.

There is another consideration connected with this case which should have some bearing upon the rights of parties here. This voluntary deed was made but a few days before the marriage of Lewis and without the knowledge of his intended wife. Of this marriage there is issue, an infant of tender years. The design to possess this property, in total disregard of the rights these new relations have created, is fraught with so much injustice, as to entitle it to no support in any quarter, for although Morris is entitled to the legal estate, it is evident from his answer and repeated declarations, that he holds it only as a means of being reimbursed his advances and protected in his liabilities for Lewis—the balance to go to the benefit of the estate of Lewis.

All the defendants, Ogden, Burch, Corning & Co., Honore, and Morris, all deny any kind of notice actual or constructive, of this claim of complainant, now for the first time set up, nor is there any sufficient proof of an open, notorious, exclusive and adverse possession.

We think it has no foundation to support it, and affirm the decree of the Circuit Court. It is wholly unnecessary to examine other questions made in the argument of this case. They all resolve themselves into this one of possession and the supposed equitable notice growing out of it.

Decree affirmed.

Charles Hanson, John Grayam and James K. Edsall, Plaintiffs in Error, *v.* Jacob Armstrong, Defendant in Error.

ERROR TO LEE.

Before a party can introduce the copy of a deed, he must lay the proper foundation, and then he must introduce a copy from the record book, not the book itself.

It is not necessary in ejectment, to make any other party than the occupant a defendant; a judgment against him binds all persons who are in privity.

This was a declaration in ejectment, in the usual form, by defendant in error, against plaintiffs in error, filed in the Lee county Circuit Court, as of the June term, A. D. 1858, for premises therein particularly described, together with notice of rule to plead, affidavit of service, etc.

Plea not guilty, etc., by plaintiffs in error, to which defendant in error added a *similiter*.

Trial by jury at November term, 1858, of Lee Circuit Court, and verdict for defendant in error. Motion for a new trial by plaintiffs in error, which was overruled by the court, and judgment thereupon for defendant in error.

The bill of exceptions shows the following: Defendant in error, to maintain the issue on his part, introduced in evidence a deed for the premises in question from John Manehan and wife to Samuel Herrick.

Defendant in error called as a witness *Henry T. Noble*, who testified that he knew the bounds of the old Gilbraith estate, and the premises in controversy, they being part of the same; knew that Gilbraith owned the premises in question, and other grounds; Grayam, one of defendants below, is now in possession of some of said lands, and was so in possession June 29th, 1858; Mr. Manehan succeeded Gilbraith in the possession of the premises; Herrick has possession of some of lands now; he gave up possession of remainder to Hanson several years since; do not recollect precise time Grayam, one of the defendants below, succeeded Hanson in the possession of the premises in controversy, and has been in possession of the same for more than a year prior to June 29th, 1858.

Whereupon the plaintiffs in error admitted, for the purposes of the trial, that defendant, Grayam, was, at the time of the commencement of the suit, in the sole and exclusive actual possession and occupancy of the premises described in plaintiffs' declaration.

Defendant in error next gave in evidence a deed for premises in question, from Samuel Herrick to himself.

Defendant in error thereupon offered to read in evidence from book B. of powers of attorney, kept by the recorder of Lee county, the copy of an instrument purporting to be an assignment of the premises in question, among other things, from Hanson, plaintiff in error, to plaintiff in error, Edsall, for the benefit of Hanson's creditors, to the reading of which, from said book of records, the plaintiffs in error objected. Objection overruled by court, and such record was thereupon read to the jury accordingly.

The cause was then submitted to the jury.

The defendants (plaintiffs in error) asked the court to instruct the jury as follows:

1st. That unless the evidence shows that the plaintiff (defendant in error) has a good legal title to the premises in question, the jury should find for the defendants.

2nd. That if the evidence and admission of the respective parties show that the defendant, Grayam, was in the sole and actual possession and occupancy of the premises in question at the time of the commencement of this suit, the jury should find the defendants, Hanson and Edsall, not guilty; even if the evidence shows that they, said Hanson and Edsall, claimed title to the premises in question.

3rd. That unless the jury believe, from the evidence, that the premises in question, at the time of the commencement of this suit, were vacant and unoccupied, the jury should find the defendants, Hanson and Edsall, not guilty, notwithstanding the jury should believe, from the evidence, that they, said Hanson and Edsall, claimed title to the premises.

4th. That if the jury believe, from the evidence, that defendant, Grayam, was in the actual possession of the premises in question, and resided thereon at the time of the commencement of this suit, and also that defendants, Hanson and Edsall, were not in possession, but claimed title to, or some interest in, the same, the jury should find in favor of said defendants, Hanson and Edsall.

5th. That it is only in cases where lands are vacant and unoccupied that this form of action, ejectment, can be maintained against parties upon the ground that they claim title to, or some interest in, such lands.

The court refused to give said 2nd, 3rd, 4th and 5th instructions, to which refusal the defendants (plaintiffs in error) excepted. And the court thereupon gave said 1st instruction, but appended thereto, of its own motion, the following qualification, to wit: "If the jury believe, from the evidence, that the plaintiff has shown a legal title, derived from a party shown to have been in possession of the premises several years ago, this,

in the absence of any title shown by defendants, is sufficient to authorize the finding of a verdict for plaintiff. If the jury also find that the defendants, at the time of the commencement of this suit, were in possession of said premises, or claimed title thereto, the jury can find one or more of defendants guilty, or one or more or all of defendants not guilty."

To the giving of which said qualification of said 1st instruction, the defendants below, by their attorney, excepted.

The errors assigned are as follows:

1st. That the court erred in admitting evidence objected to.

2nd. That the court erred in refusing instructions asked for by plaintiffs in error.

3rd. That the court erroneously qualified instructions of plaintiffs in error.

4th. That the court erred in overruling motion for a new trial.

5th. That the court erred in rendering judgment, etc.

James K. Edsall, for Plaintiffs in Error.

B. C. Cook, for Defendant in Error.

Walker, J. The evidence in this case shows that Gilbraith was first in possession of the premises in controversy. Also that Manehan succeeded him in its possession, and that he conveyed it to Herrick, who succeeded Manehan, and was in possession of a portion, at the time of the trial. That Hanson acquired the possession of another portion under Herrick, and that Grayam succeeded Hanson in the occupancy of that portion, and had so continued, till the time of the trial below. The plaintiffs below also read in evidence, a deed from Herrick to himself, and produced the book of record of deeds, from which he read, what purported to be the copy of a deed from Hanson to defendant Edsall, in trust, for the benefit of his creditors. To the introduction of which, defendants excepted. Upon this evidence and under the instructions of the court, the jury rendered a verdict of guilty against all of the defendants, and found that plaintiff below was seized of an indefeasible estate in fee simple, in the premises described in the declaration. Defendants entered a motion for a new trial, which the court overruled, and rendered a judgment on the verdict. To reverse which this writ of error is prosecuted.

The defendant in error by conveyances, connected himself with Herrick, from whom the defendant Grayam derived his possession. Hanson succeeded Herrick in the possession of this portion of the premises, and Grayam succeeded Hanson,

and the presumption is, that Hanson entered into possession under Herrick, and if so, he nor those claiming under him, have any right to dispute the title of Herrick or his grantee. This evidence established *prima facie* a right of recovery by defendant in error, as against Grayam, and no evidence was adduced to rebut this *prima facie* case, and failing to do so, the right to recover against Grayam, was sufficient.

If Hanson or Grayam held under a different title from that of Herrick, it should have been shown to defeat a recovery against Grayam.

Again, it was objected that the plaintiffs below failed to lay the proper foundation for the introduction of the copy of the deed from Hanson to Edsall, and that the court erred in admitting it in evidence. The bill of exceptions fails to show that any foundation by affidavit or otherwise was laid. There was no proof of the loss of the original, or that search had been made, or that the original was not in the possession or power of the party offering the copy. No foundation was laid making the copy admissible either at common law or under the statute, and the court erred in permitting it to be read. *Booth* v. *Cook*, 20 Ill. R. 129; *Rankin* v. *Crow*, 19 Ill. R. 626; *Mariner* v. *Saunders*, 5 Gilm. R. 117; *Roberts* v. *Haskell*, 20 Ill. R. 59. Even if the proper foundation had been laid for the introduction of a copy under the statute, it only authorizes a copy certified to be a true copy from the records to be used, and it was error to introduce the book against the objection of the opposite party. The right to use the copy is given by statute, and when claimed, the statute must be complied with by the party availing himself of its provisions.

It is also urged that the defendant in error had no right to recover against defendants not connected by possession or title with those in the occupancy of the land. And that the court erred in refusing so to instruct the jury. The 4th sect. 36th chap. R. S. 1845, p. 205, provides that, "If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declaration; if they are not so occupied, the action shall be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit." By the provisions of this section the action of ejectment can only be brought against the person in possession of the premises if they are occupied, or against a person claiming title, etc., when out of possession and the premises are vacant and unoccupied. When occupied, persons not in possession cannot be made defendants to the action. When a recovery is had against the occupant, the judgment

binds not only him, but all persons under whom he occupies, together with all persons in privity of estate or possession with himself. When a recovery is had against a tenant, the landlord is bound by it. So a recovery against a tenant in common who holds for himself and under the other tenants in common, is binding upon all his co-tenants as well as himself. There is, therefore, no necessity for making any other than the occupant a defendant to bind all persons in privity, by a recovery. And if there is no privity between those in and those out of possession, by joining them would involve the necessity of trying two or more separate, distinct titles and causes of action, in one suit. This was not the practice before, nor is it since the adoption of this statute. The court below, therefore, erred in not giving some one of the appellants' instructions numbered two, three, four and five, all of them containing the same proposition, it was immaterial which, but some of them should have been given.

For these errors the judgment of the Circuit Court must be reversed, and the cause remanded.

Judgment reversed.

Lawrence Van Buskirk, Appellant, *v.* James Murden, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

In an action to recover damages for work improperly performed by a plasterer, it is erroneous to refuse to instruct the jury, that a warranty might exist in a contract, without the use of any particular word, if such was the intention; and that if the plastering fell off, it may be inferred the work was not well done, unless it be shown that the plasterer was not in fault.

A party who has accepted work, is not held to have waived defects in it, if, like plastering, it may have latent defects, which are not open to inspection.

This action was commenced before a justice of the peace, of Peoria county, and taken by appeal to the County Court of Peoria county, and tried at January term, 1859.

The account filed before the justice was as follows:

James Murden,

To Lawrence Van Buskirk, *Dr.*

To money paid, laid out and expended, and given to said Murden	$100.00
To damages sustained by the non-performance of contract, with regard to plastering, etc.	200.00
	$300.00

On the the trial of said cause in the County Court, the plaintiff introduced witnesses who proved that Murden agreed to plaster certain rooms in a house, for Van Buskirk, and to do a first rate work, for which Van Buskirk was to furnish the material. That good material was furnished, but the plastering fell off in several places, and had to be restored. Murden was paid in full for his labor. That on the completion of the plastering, Van Buskirk accepted it.

The objectionable instructions are copied in the opinion of the court.

H. Grove, and M. Williamson, for Appellant.

J. T. Lindsay, for Appellee.

Breese, J. There is no difficulty about this case. The plaintiff has shown by the testimony, a clear right to recover of defendant for not performing his contract to do a good job of plastering for him, and would doubtless have so recovered, had not the court misdirected the jury as to the law of the case.

Defects in plastering are not, at the moment the job is finished, generally discoverable, and a proprietor may well express himself satisfied with the work from the appearance of it. Time, as it does all things, tries such jobs as that, and a few days or weeks may determine the question whether it is a good job or not.

After the evidence was heard, the plaintiff asked the court to instruct the jury, "that it is not necessary to constitute a warranty that the word warranty or any particular word should be used in the contract, but if the jury believe, from the evidence, that the parties intended a warranty, and if there was a warranty of the work the burden of proof is on the defendant to show that the fault is in the plaintiff or in the materials furnished by the plaintiff;" and "If the jury believe, from the evidence, that the defendant, at the time he contracted with plaintiff, promised to do a good job of plastering, and if they further believe, from the evidence, that the plastering done by the defendant fell off, this is a matter of consideration for the jury, and the jury may infer that the defendant did not do a good job, unless the defendant shows that the falling off of the plastering was occasioned by some cause not within the power of defendant."

These instructions the court refused to give and gave no others equivalent to them. They should be given, for they declare the law as applicable to such cases.

After various instructions for the defendant, not important to be particularly noticed, though objectionable in a degree, the court distinctly charged the jury, on the application of the defendant, as follows:

"The jury are instructed by the court, that an acceptance of the work, without objection and in satisfaction of the contract by the plaintiff, was a waiver in law of all defects that may have been in the plastering of plaintiff's house, unless it has been shown that fraud and circumvention was used by defendant to induce the plaintiff so to accept the same."

Every one can see that this is too broad altogether, and well calculated to do great injustice, and is not the law. Had the court restricted it to visible defects, it would have been well. It is monstrous to say, in reference to plasterer's work, that all defects are waived when such work is accepted without objection and in satisfaction of the contract—all visible defects, or such as could be ascertained by inspection and examination, would be waived, but how can the employer tell, by looking at a smooth coat of plastering, everything fair to the eye, whether the lathing has been done properly, or the mortar well made with due proportions of lime, sand and hair, to give it adhesion, hardness and durability? No man can tell, and therefore it is that the party should not be bound by an acceptance, or acceptance considered as a waiver of latent defects, which too often lurk in plastering, which to the eye appears very fine and unexceptionable.

The jury that tried this case seemed to have been struck by this ninth instruction; for they say in their verdict "under the instruction of the court marked 9th instruction for the defendant, they decided in favor of the defendant," clearly intimating, was it not for that instruction, the verdict would have been the other way. The judgment is reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

Judgment reversed.

Samuel Bennett and Matilda Whitman, surviving Executors of Hiram Whitman, deceased, Plaintiffs in Error, *v.* C. Colden Whitman *et al.*, Defendants in Error.

ERROR TO BOONE.

On petition by executors for license to sell real estate to pay debts, and to build a house, etc., and to interpret the will, the court not having jurisdiction, under the statute, should dismiss the proceeding.

In such a case, the court has not power to determine the duty of the executors. The proper proceeding is in chancery; and in that case, the evidence upon which a decree is based should be preserved of record, or recited in it. Where all the essential facts are not shown, the decree will be erroneous.

THIS was a petition, filed by Samuel Bennett and Hiram Whitman, executors, and Matilda Whitman, executrix, of Seth S. Whitman, deceased, against C. Colden Whitman, Ogden H. Whitman, Julia H. Whitman and Charles N. Whitman, in the Boone Circuit Court, setting forth,

That on or about the 1st of January, 1851, Seth S. Whitman, formerly a resident of Boone county, died at Janesville, in Wisconsin, seized of certain real estate situate in Boone and Winnebago counties, giving its description. That letters testamentary had been granted to the complainants, as executors of the last will of said Seth S. Whitman, by the Probate Court of Boone county, in which court said will had been duly admitted to probate. That they had filed an inventory of the personal estate of said Seth S. Whitman, and had proceeded with the administration of said estate and had reported to the said court. That the inventory of personal estate over that set apart to Matilda Whitman as widow of the deceased, amounting to $7,381.92, consisted of demands and choses in action, of which $3,000 was not then due, and a considerable part thereof not till the year 1855; that they had paid debts to $5,240.19, including therein a part of the legacies. Matilda Whitman had expended in support of herself and family, $1,452, making whole sum paid out by complainants in administration of the estate, about $7,000. That they had borrowed money on their own responsibility in order to pay debts, to the amount of $1,400, and other debts then due, about $700. That there were no means of said estate under their control out of which to pay debts aforesaid. That there would become due during that year (1853) $800, and during 1854, $1,000, a large part of which would have to be applied in support of widow and family, and they were of opinion that it would very much promote the interest of the estate to have most or all the real estate sold under the order and direction of the court, in order to raise a sufficient amount of money to pay off and discharge said debts and the various legacies charged upon said estate as speedily as possible; and inasmuch as the whole of the real estate would necessarily have to be sold to satisfy the various charges upon said estate, it would avoid large sacrifices of the choses in action, to make immediate sale of the real estate.

The petition sets out a copy of the will, and says that there are so many imperfections in the said will, particularly in respect to the powers intended or supposed to be conferred by its

provisions upon the complainants to carry out the purposes and intentions of the said testator, that it had become and was necessary, in their opinion, to submit said will to the consideration of that court, for its construction, and determination of the character and extent of their powers and duties, or that of either one of them, in respect to the disposition and future management of the property, both real and personal, of said testator, and for such order as it should please the court to make in the premises.

That said Seth S. Whitman died, leaving said Matilda Whitman his widow, and Ogden H. of age in 1852; C. Colden, aged 19, in August, 1853; Julia H., aged 10, in April, 1853, and Charles N., aged 3, in November, 1852, his children. That Matilda Whitman had been appointed general guardian of said children by the Boone County Court, and since the death of said Seth S. Whitman, had had the care of, and had paid out of the estate for their and her support as above stated.

That having to raise large sums of money to pay, since his death, debts contracted by said testator in purchase of real estate, it had become impossible, or at least impracticable, to build houses in Janesville, in accordance with the provisions of the will; that it would cost $2,000 to build them. Sets forth other reasons why the buildings contemplated by the will should not be built then, and sets forth reasons why they should be built at Belvidere, and prays that the court might make an order allowing them to build a house for said Matilda and children at Belvidere.

They further charge "that it was the purpose and wish of the said Seth S. Whitman, in making his said will, to give the entire use, control and management of all his estate, both personal and real, to your petitioner, Matilda Whitman, for the purpose, among others, of enabling her to have sufficient means out of the avails thereof to provide said residence, and a comfortable and respectable support and maintenance, and education of said children."

That the provision for building at Janesville was not intended as a restriction, but an indication and directory. Sets forth reasons why the court should take jurisdiction, and prays that the court would determine the powers, rights and obligations of the petitioners, and especially of Matilda Whitman, under and by the provisions of said will; and that the court would make such order or decree for the sale or other future disposition of said estate, real and personal; and that such further, or such other relief might be granted as the nature of the case might require, etc.

Upon this petition the following order or decree was entered at the special December term of Boone Circuit Court: It appearing to the court that process has been duly served on the above named defendants, and publication has been duly made for the purpose of enabling the said complainants to present a petition for the sale of real estate according to the provisions of the statute; and it further appearing to the court that the said defendants are the only heirs at law of the said Seth S. Whitman, deceased; and the said Ogden H. Whitman having failed to appear and answer, and the said bill having been taken as confessed as to him, and the said C. Colden Whitman, Julia H. Whitman and Charles N. Whitman, having appeared and filed their answer herein by their guardian *ad litem*, heretofore appointed by an order of this court; and this cause having been brought on for final hearing on the pleadings, proofs and exhibits herein, and counsel having been heard, and the same being submitted to the court; and it appearing to the court from the proof herein made that the said complainants are executors of the last will and testament of the said Seth S. Whitman, deceased, and have been and are engaged in the exercise and discharge of their trust as such executors, and have exhausted all the available personal estate of the said Seth S. Whitman, deceased, in the payment of the debts of said estate, leaving about the sum of three thousand dollars of debts and liabilities unpaid and due from said estate and chargeable thereupon. And it further appearing to the court that the said Seth S. Whitman died seized of the following real estate situate in the counties of Boone and Winnebago, in said State of Illinois, to wit, etc.

And it further appearing to the court that the further object of the said complainants' bill is to ascertain and have defined the power of the said complainants to sell said real estate under the provisions and for the purpose of carrying out the intention and objects of the said last will of said Seth S. Whitman, deceased. And it further appearing to the court that it is impracticable and inconsistent with the true interests of said estate, and that the terms of said will do not require the said complainants to appropriate any portion of said estate for the purpose of erecting a residence for said Matilda Whitman, at or near Janesville in Wisconsin; that under the terms of said will the said complainants are entitled to, and properly may exercise the necessary and sufficient power to sell and convey so much of said real estate as may be necessary to carry out the purposes and objects of said will, and that it has become necessary and proper, and is the interest of said estate that said executors should sell the said real estate, or so much thereof as

may be necessary for the purpose of paying the remaining debts of said estate, and also to provide for the support and maintenance of the said Matilda Whitman and the children of the said Seth S. Whitman, according to the provisions of said will. And the court having duly considered said matters and things, and being fully advised herein, it is ordered, adjudged and decreed, that the said Samuel Bennett, Matilda Whitman and Hiram Whitman, executors of the last will and testament of Seth S. Whitman, late of the county of Boone, deceased, be allowed, authorized and empowered to continue and proceed in the exercise and discharge of their trust as such executors, and that they be released and exonorated from building or erecting a residence at or near Janesville, in Wisconsin, to which reference is had in the third clause of said will. And it is hereby declared, ordered and decreed, that said clause of said will does not contain and express a trust peremptorily to be executed by said executors. And it is further declared, ordered, adjudged and decreed, that the said executors have, and rightfully and lawfully may, exercise the power to sell and convey the above described real estate, of which the said Seth S. Whitman died seized, either at private or public sale, for the purpose and objects specified in said will.

And it is further ordered, adjudged and decreed, that the said Samuel Bennett, Matilda Whitman and Hiram Whitman, executors as aforesaid, do and may, from time to time, sell, at public or private sale, as they shall deem it best for the interests of said estate, such parts or portions of said real estate as may be necessary for the payment of the debts of said estate, and for the necessary and sufficient support and maintenance of the said Matilda Whitman, and the necessary and sufficient support, maintenance and education of the said children of the said Seth S. Whitman, deceased, and that said executors make, execute and deliver to the purchasers a deed or deeds. And it further appearing to the court that the said Seth S. Whitman had, during his lifetime, sold divers tracts or parcels of land, and had executed his bonds to convey the same on payment of the purchase price thereof, and that said bonds were outstanding at the time of his death, but in full force; it is therefore further ordered, adjudged and decreed, that said executors be hereby authorized and directed to make, execute and deliver to the owner or owners of such bonds, all proper and necessary deed or deeds, in pursuance or fulfillment of the terms or conditions of such bonds, in case the amount due or to become due by the terms of such bonds, shall have been or may be paid to said Seth S. Whitman, deceased, or to the said executors. And it is further ordered and decreed that said executors do and shall

make report of all sales they may make, or deeds they may execute, under this decree, to this court, at the next term thereof after such sale or sales, and such sales and conveyances to be and remain subject to the approval or disapproval of said court. And it is further ordered, adjudged and decreed, that the costs of this proceeding be paid by the said complainants in the ordinary course of administration.

The errors assigned are:

1. That the case made by the petition is not such an one as to give a court of chancery any jurisdiction of it to grant any relief whatever.
2. That no notice of the application to sell real estate, under the statute, for the payment of debts, was given to persons interested.
3. That the evidence and proofs upon which the court acted, if any, do not appear of record.
4. That the court erred in its construction of the will.
5. That the court, by its construction of the will, vested the three executors with power to dispose of the estate of the testator.
6. That the court divested the said Matilda Whitman of the exclusive control and disposition of said estate, and vested it in the other two executors with her.
7. That the court below should have held that the property, both real and personal, of said testator, was by the will absolutely vested in said Matilda Whitman, subject to payment of debts and such legacies as by the will are specifically charged upon it, in the absence of personal property.
8. That all persons interested under said will were not made parties.

W. T. Burgess, for Plaintiffs in Error.

B. C. Cook, for Defendants in Error.

Walker, J. This was an application, by the executors of the last will of Seth Whitman, to the Boone Circuit Court, for license to sell real estate to pay debts. Also for a sale, for the support of the widow and family of the testator, and to obtain a construction of the will, and to be released from the erection of a house for a residence for the family, as required by the third clause of the will. The application was entitled as a petition, and was addressed to the judge of the circuit, and not to the chancellor. The executors call themselves petitioners, throughout the application. Service was had by summons on each of the defendants, and by the publication of a notice of

the intended application by the executors for the sale of real estate, according to the provisions of the statute. It is urged that if this is a proceeding under the statute for the sale of real estate, to pay debts, the court in such a proceeding has no power to hear and determine other questions, and to settle other equities, not involved in the question of the necessity for such sale. If this be such a proceeding under the statute, then the court can only exercise the jurisdiction, conferred by its provisions. The statute does not profess to confer nor does it confer general chancery powers, but only such as are necessary to attain the end proposed. And this court in the case of *Smith* v. *Mc Connell*, 17 Ill. R. 135, hold the doctrine, that in these applications, the administrator has no power "to support any possessory or real action, in law or equity, for the recovery or maintenance of possession or title; or to clear up and vindicate title from clouds, from adverse claims." And that his "rights and powers were no broader than his duties; and they are limited to the sale of the title and estate of the intestate, and the due administration of the proceeds." And if an executor has other and greater powers, they are conferred alone by the will, and cannot be conferred by the court in this proceeding. Under the statute, the court is only authorized to license and empower the executor or administrator to sell real estate, for the payment of debts, and in a proceeding under its provisions, all beyond, is unauthorized. If this was a proceeding under the statute, then the court had no jurisdiction to determine, whether the executors were required by the will to erect the dwelling-house, or that it was discretionary, nor to authorize the sale of real estate to support the family. Those questions could only be determined by other and different proceedings. This decree nowhere finds the amount of the indebtedness, or the personal assets to meet them, which was essential, if it were a proceeding under the statute; and it does not limit the sale to that amount, nor does it require that the requisite notice shall be given, and that the sale should be at public vendue, and to the highest and best bidder; but on the contrary authorizes it to be made, either at public or private sale, at the option of the executors. These are fatal errors to a decree, under a statutory proceeding for the purpose of paying debts.

It was not contended, that this was a proceeding under the statute, to sell the property of minors for their support, maintenance, or education, or for reinvestment, or to be loaned. This proceeding has scarcely an element of such an application, and cannot be sustained under its provisions.

If the court had jurisdiction to render this decree, it must be upon the grounds that it was a bill in chancery, and that the

case made by it, falls within the general chancery powers of the court. While it has all the marks of a petition under the statute, and seems to have been so regarded by the solicitor filing it, and although, if designed as a bill, it is very informal and untechnical, it may perhaps be so treated. But even treating it as such, there is none of the evidence, upon which the decree was based, preserved in the record, nor does the decree find or recite facts as having been proved, which will sustain it. The decree does not find the amount of personal assets. For aught appearing, there may have been an abundance for the payment of the debts, and the support of the family. It fails to find the amount of the debts against the estate. Nor does it appear how it is necessary, that this sale should be made for the support of the family. For anything appearing in this record, this real estate may all have been highly improved, and very productive, yielding means more than sufficient for that purpose. Nor does it appear why it was impossible or even injurious to the interest of the estate, to erect the dwelling for the use of the family, as required by the will. The court was not vested with a discretion to change the fund from real to personal estate, and no evidence or finding of the court show such facts as authorize such a change. The will certainly did not contemplate it, and fails to confer the power, and nothing short of the most cogent reasons, should induce a court to authorize such a course, and when the rights of minors are involved, it should only be done on proof that renders it clear and satisfactory that it is for their interest, that such a course should be adopted. And this record fails to disclose such evidence or the finding of such facts from the evidence, and is therefore erroneous.

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

Decree reversed.

Marcellus C. Churchill *et al.*, Plaintiffs in Error, *v.* John Abraham, Defendant in Error.

ERROR TO WINNEBAGO.

The obligee in an attachment bond may recover the damages he has actually sustained by the wrongful issuing of the writ, without having first brought suit to recover for the malicious act in suing it out.

The plaintiff in an attachment, cannot excuse himself, because he has acted in good faith.

Churchill et al. *v.* Abraham.

THIS was an action of debt commenced by John Abraham against the above named appellants in the Winnebago county Circuit Court. The plaintiff below avers that on the 22nd of December, A. D. 1854, Huntington, Wadsworth and Parks, creditors of said plaintiff, sued out of the Winnebago county Circuit Court an attachment against the property of said plaintiff, in pursuance of the statute, on which occasion, for the purpose of procuring the issuing of said writ of attachment, the said Churchill, Huntington, Wadsworth and Parks executed their bond commonly called an attachment bond, in the penal sum of $755.16, subject to a condition there underwritten, whereby, after reciting to the effect following, that is to say, that, Whereas, the said Henry A. Huntington had on the day of the date of said bond prayed an attachment out of the County Court of said county, at the suit of the said Huntington, Wadsworth and Parks, against the estate of the said John A. Abraham, for the sum of three hundred and seventy-seven dollars and fifty-eight cents, the same being about to be sued out, returnable to the then next term of the court, gave the bond, etc., reciting the condition substantially, etc.; that an attachment writ issued out of said court in favor of said Huntington, Wadsworth and Parks and against the estate of the said Abraham, to John F. Taylor, the then sheriff of said county, and that said sheriff levied upon and took the goods and chattels described in the declaration, being the property of the plaintiff, and that afterwards such proceedings were had in said suit that said writ of attachment was quashed and judgment recovered therein in favor of said Abraham and against Huntington, Wadsworth and Parks—and the breaches assigned, are, that the said Huntington, Wadsworth and Parks did not prosecute their said suit with effect, but on the contrary thereof, have wholly failed therein, and that by reason of the wrongful issuing of said attachment writ, the said Abraham has been forced and obliged to lay out and expend, and did necessarily and unavoidably pay, lay out and expend large sums of money in and about the defense of said attachment suit and proceeding, and in procuring counsel and advice in relation thereto, amounting, in all, to the sum of one thousand dollars. Then follows the averment that the said Huntington, Wadsworth and Parks, nor have either of them, nor has any one of them, paid to the said plaintiff all such costs and damages as should be awarded against the said defendants, nor any part thereof, and that the defendants have not paid to the plaintiff all damages and costs which he has sustained by reason of the wrongful suing out of said attachment writ, whereby the said defendants have become liable to pay the debt in this suit demanded.

The defendants filed the plea of *non est factum*, and also three special pleas.

To the plea of *non est factum* plaintiff filed a *similiter*, and to the 2nd, 3rd and 4th pleas a general demurrer.

The court sustained the demurrer, and leave was granted to amend and to file an additional plea.

Defendants filed amendment to 2nd, 3rd and 4th pleas, and at the same time filed in said cause a 5th or additional plea, as follows:

And the said defendants, for a further plea in this behalf, say *actio non*, because, they say that the said plaintiff heretofore, to wit, on the 15th day of August, in the year 1855, commenced a suit in the Winnebago county Circuit Court, in and for said county of Winnebago, against the said Henry A. Huntington, Philip Wadsworth and Calvin C. Parks, wherein the said plaintiff, impleaded with the said Henry A. Huntington, Philip Wadsworth and Calvin C. Parks, in an action of trespass on the case, and afterwards, to wit, at the February term of said court, held in and for said county of Winnebago, issue was joined in said cause, wherein and whereby the said plaintiff claimed to recover of and from the said Henry A. Huntington, Philip Wadsworth and Calvin C. Parks, damages to the amount of five thousand dollars, for and on account of the same identical cause of action in the said plaintiff's declaration mentioned, and such proceedings were thereupon had in said court, in said action, that afterwards, to wit, at the same term, said suit was tried by a jury and their verdict rendered against the said plaintiff, in favor of the said Henry A. Huntington, Philip Wadsworth and Calvin C. Parks. Whereupon, by the consideration of the said court, the said Henry A. Huntington, Philip Wadsworth and Calvin C. Parks then and there recovered judgment against the said John Abraham, for the costs and charges in that behalf expended; whereof the said John Abraham was convicted, as by the record and proceedings thereof, still remaining in said Winnebago county Circuit Court, more fully and at large appeared, which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void; and this the said defendants are ready to verify by the said record. Wherefore they pray judgment, etc.

The plaintiff demurred to second, third and fourth amended pleas, which was sustained as to the third and fourth.

There was a trial by jury and a finding for plaintiff below of debt, seven hundred and fifty-five dollars and sixteen cents, and damages, seven hundred and fifty-five dollars and sixteen cents. Thereupon the defendants moved the court for a new trial herein.

The defendants also moved in arrest of judgment.

On the trial of said cause, to prove the issues on his part, the plaintiff introduced and read in evidence the affidavit of said Henry A. Huntington, made and filed in said attachment suit, setting forth that the said Abraham was indebted to said Huntington, Wadsworth and Parks, in the sum of $377.58, and that he was about to remove his property from this State to the injury of said Huntington, Wadsworth and Parks, and also the writ of attachment issued in said suit, with the sheriff's return indorsed thereon, wherein he said he had levied upon divers goods, stating them; also the declaration in assumpsit filed in said action, with a copy of the note and the amount declared on, and also a plea in abatement, filed by the defendant therein, denying that he, the said defendant, was about removing his property from this State to the injury of the plaintiffs in said suit, and the replication taking issue thereon, and the record of the trial of said cause by a jury, and a verdict rendered in favor of the defendant thereon, and a judgment rendered in favor of said Abraham, defendant, dismissing said writ of attachment. And the plaintiff offered and read in evidence the bond filed in said cause.

The plaintiff then introduced two witnesses, who testified that they were present when the plaintiff, Taylor, took the goods described in his return, indorsed on said writ of attachment; that plaintiff was then carrying on the merchant tailoring business at Rockford, and that said goods constituted his main stock in trade; that the removal of said goods principally broke up his business and was a serious injury to him; that one witness assisted sheriff in making an inventory of said goods, and that the inventory amounted to $987.

The most of them were afterwards sold by the sheriff at a public sale; that plaintiff was then doing a business of from $8,000 to $10,000 a year, and was entirely broken up by the attachment writ; that said goods were all subsequently sold by the said sheriff, at a public sale, except a few which were afterwards boxed up, and which would not exceed in value twenty or thirty dollars.

The defendants introduced in evidence, the recovery of a judgment in the Cook County Court of Common Pleas, on the 12th day of September, A. D. 1855, in favor of said Huntington, Wadsworth and Parks, and against said John Abraham, in an action of assumpsit, for the sum of $349.13, and an execution issued thereon on the 13th of September, 1855, to the sheriff of Winnebago county, and a levy upon the identical property, taken under the attachment writ, by John F. Taylor, and a sale, made by said Taylor under said execution, on the 2nd of Novem-

ber, 1855, of most of said goods, for $368.09, being amount of said judgment, interest and costs.

To sustain the second and fifth pleas, the defendants offered in evidence the verdict and record of a suit instituted in the Winnebago county Circuit Court, by the said John Abraham, against the said Huntington, Wadsworth and Parks, the same being an action on the case. The plaintiff, John Abraham, in that suit avers that before and at the time of suing out the writ of attachment thereinafter mentioned, he was a merchant tailor at Rockford, in the county of Winnebago, and that at the time of the suing out of said attachment suit he was not about to remove his property from this State to the injury of said Huntington, Wadsworth and Parks, nor was he about to depart from this State, with the intention of having his effects removed from this State. Yet the said defendants, Huntington, Wadsworth and Parks, to harass, oppress, impoverish and wholly ruin him, on the 22nd day of December, A. D. 1854, without any reasonable or probable cause whatsoever, falsely, fraudulently and maliciously caused an affidavit to be filed in the office of the clerk of the County Court of Winnebago county, falsely charging that the said plaintiff was then about to remove his property from this State, to the injury of said Huntington, Wadsworth and Parks, and that the said plaintiff was then about to depart from this State, with the intention of having his effects removed from this State, and that the said Huntington, Wadsworth and Parks, then and there maliciously, without any reasonable or probable cause, caused to be issued out of, and under the seal of said court, a writ of attachment directed to the sheriff of said county of Winnebago, commanding him, etc., and that afterwards and at the June term of said court, such proceedings were had in said suit, that the said writ of attachment was by the judgment and consideration of said court quashed. And that by reason of said false, fraudulent and malicious suing out of said attachment writ against him, said plaintiff had been deprived of his goods, merchandise and property, so taken upon said attachment and converted by said defendants, to the value of $3,000; that by that means, his business was broken up and destroyed, and that his credit was thereby impaired and destroyed by said defendants. The second count is like the first, for suing out a writ of attachment on the day and year aforesaid, without any reasonable or probable cause, and caused to be taken on this attachment writ the goods, merchandise and personal property of the plaintiff, of the value of $3,000, and there is a further averment that said writ was subsequently and at the June term of said court, quashed, and claims damages to the amount of $5,000.

That the defendants, Huntington, Wadsworth and Parks, appeared in said suit and filed, first, a plea as the general issue, and second, that said writ of attachment was issued without malice on the part of the defendants, and for reasonable and proper causes. Upon which plaintiff took issue, and concluded to the country.

The cause was tried by a jury, March 3rd, A. D. 1856, and the record showed a verdict and judgment rendered thereon, in favor of the defendants below.

The defendants at the same time then offered and proposed to prove that the same evidence was given by the plaintiff in respect to damages in that suit, as was given by him in this suit, to the introduction of which record, and giving of which testimony, the plaintiff objected. The court sustained the objection, and the defendants excepted.

The defendants moved for a new trial, which motion was overruled.

The defendants moved in arrest of judgment, on the ground that the declaration contains no averment that the plaintiff had recovered any judgment against the said Henry A. Huntington, Philip Wadsworth and Calvin C. Parks, for wrongfully suing out said attachment, and because said declaration does not contain sufficient averments to warrant said verdict, which motion the court overruled.

And the plaintiffs in error assign for error, the decision of the court in refusing testimony offered by the defendants in said suit, to show that the same testimony was given in the suit set forth in defendants' second plea, in respect to damages, as was given in this suit.

The decision of the court, in overruling said defendants' motion for a new trial of said cause.

In overruling defendants' motion in arrest of judgment.

The rendition of judgment in favor of said plaintiff, and against the said defendants.

In sustaining the demurrer to the second, third and fourth pleas.

In rejecting the record of the former trial in the Winnebago Circuit Court, offered under the second and fifth pleas.

In rendering judgment for $755.16 damages, without proper assignment of breaches in the condition of the bond to warrant it.

In the finding of the jury, and the rendition of judgment thereon.

In sustaining the general demurrer to the third and fourth amended pleas, and overruling it as to the second amended and fifth additional pleas.

In sustaining demurrers to the third and fourth amended pleas.

In overruling the objections to the reading of the record of the attachment suit, in evidence.

T. Hoyne, and C. C. Parks, for Plaintiffs in Error.

J. L. Loop, for Defendant in Error.

Caton, C. J. The attachment bond in this case, is drawn in the precise form required by our statute, and it has never been held that the obligee could not recover the amount of the damages actually sustained by the wrongful suing out of the attachment, until he has brought an action for maliciously suing out the writ and recovered a judgment for the damages sustained, for the malicious act. Our statute intends to afford a remedy to the defendant in attachment, if the attachment is not sustained, although it may have been sued out in good faith, and upon probable cause. If the party could only sue upon the bond after he had recovered a judgment for a malicious attachment, he might sustain the most serious loss by the wrongful act of the plaintiff even where it was not malicious. The plaintiff in attachment cannot excuse himself because he acted in good faith. If he occasions damage by an attachment which he cannot sustain, he and his sureties should and must be responsible for those damages. Although the wording of the bond as prescribed by the statute, does not express the liability in language as clear as might have been selected, its meaning has been long and well settled in this State, and we should not, were the language even more doubtful, feel at liberty to disturb it.

Although the goods may have been sold on an execution after they were seized under the attachment, that cannot alter the measure of liability arising by reason of the wrongful suing out of the attachment. The judgment must be affirmed.

Judgment affirmed.

The Atlantic Insurance Company, Appellant, *v.* Edward Wright, Appellee.

APPEAL FROM COOK.

Where the same proof may be offered under the issues in a case, as might be offered under an unanswered plea, it is not ground for a reversal, that a plea is so unanswered.

A verdict which finds the issue for the plaintiff, and assesses his damages, is sufficient.

Where the representatives of an insurance company, express satisfaction with the preliminary proofs of a loss, as offered by the insured, they cannot subsequently withdraw that approval, but will be bound by it.

If the agent of an insurance company is informed of all the facts connected with the interest of the assured in the property described in the policy, and does not require a statement thereof, the company will be bound by his acts, and cannot avoid the policy because the interest of the insured varies from the conditions stated in the policy, but will be estopped by the acts of the agent.

This was an action of assumpsit, brought by Edward Wright, against the Atlantic Insurance Company, upon a policy of insurance. The declaration contains three counts. The first count sets forth in *hæc verba*, a policy of insurance against loss or damage by fire, to the amount of $5,000, upon Wright's five story brick (stone front) building, situate on the north side of Lake street, Nos. 114 and 116, in Chicago—and all the conditions thereof. It then alleges that Wright was the absolute owner of the property insured, the destruction of the same by fire, and a compliance by him with the provisions of the policy on his part to be complied with.

The second count alleges that the defendant, on, etc., by its policy, signed, etc., made insurance upon the five story brick building of the plaintiff, and then sets forth the policy and its conditions by a reference to the first count. It alleges that the building insured was destroyed by fire, and a compliance with the provisions of the policy on the part of the plaintiff. This count does not, except as above stated, allege any interest in the plaintiff, further than to state that by the destruction of the building insured, he was damaged and sustained loss, and the amount thereof, and that he made proof of such loss and damage satisfactory to the defendant.

The third count is for money had and received, lent and advanced, and paid, laid out and expended.

The defendant pleaded, first, the general issue; second, that the plaintiff was not the owner of the property insured *at the time of the loss;* third, that the plaintiff, for the purpose of procuring the policy of insurance, falsely and fraudulently represented that he was the owner of the property insured, and

that by means of such false and fraudulent representations the policy was procured; fourth, that the plaintiff was not the owner of the property insured *at the time of the execution and delivery of the policy.*

To the second, third and fourth pleas, the plaintiff replied *de injuria.*

A fifth plea appears in the record, and is unreplied to. This plea alleges that the plaintiff had no insurable interest in the property insured, at the time of the execution and delivery of the policy, and that the plaintiff fraudulently concealed that fact from the defendant.

On the trial, the plaintiff introduced the policy of insurance set forth in first count, and it appeared in evidence that the plaintiff, on the 23rd day of November, 1854, conveyed the west thirty feet of the east sixty feet of lot six, in block seventeen, in the original town of Chicago, to Timothy Wright and Ebenezer Peck, in trust, first to lease the same, and to collect, take and receive the rents, issues and profits thereof, and out of the same to keep the premises in good order and repair, and properly insured, and pay all taxes, assessments and charges that might be imposed thereon; second, to pay the residue of said rents, issues and income to Sarah L. Wright, wife of Edward Wright, upon her sole and separate receipt, to the intent that she may enjoy, possess and have the same, free from the control, interference and liabilities of her husband, during his and her natural life; third, to convey the premises, in fee simple absolute, to said Sarah L. Wright, her heirs and assigns, upon the death of Edward Wright, in case she should survive him, in lieu and instead of dower, but in case the said Sarah L. Wright should not survive the said Edward Wright, then the premises were to revert to him and his heirs and assigns.

It also appeared that the plaintiff had sold four feet off from one side of the lot mentioned in the above deed, and purchased two feet of the lot adjoining it on the other side, and that the building insured was upon and covered the unsold portion of the lot mentioned in the above deed, and the two feet of ground thus purchased, adjoining it.

It further appeared that the building insured was built in the year 1856, having been commenced in March, and completed in October, of that year. That it was built by the plaintiff, and paid for by him with his own money. That he made the contracts for the work and labor, and materials furnished, in his own name. That he employed the architect and workmen, and paid them. That the estimates were made out in his name, and that he took receipts in his own name for all moneys paid out in the construction of the building, amounting to $27,953.00.

That the building was built with the knowledge and consent of the trustees. When the building was completed, in October, 1856, the plaintiff rented it, and afterwards, until the building was destroyed by fire, received all the rents for his own use, and gave receipts therefor in his own name. That the trustees knew of the plaintiff's collecting the rents and appropriating them to his own use, and never interfered in any way, or expressed any dissent, and in fact were not consulted, and never had anything to do with the building, or with the rents thereof. That about the time the building was completed, the three policies of insurance mentioned in the policy of the defendant were effected in the names of E. Peck and T. Wright, but by whom they were effected did not appear; and when they expired, they were renewed by the plaintiff's agent, and the premiums paid with the plaintiff's money. That about October, 1856, the plaintiff and his wife went to Europe, where they remained until some time after the destruction of the building, during which time the plaintiff was represented in Chicago by Charles F. Peck, his duly authorized agent.

While in Europe, the plaintiff directed his agent, Charles F. Peck, to effect $5,000 more insurance upon the building, in some reliable company. The agent applied to Mr. A. H. Van Buren, the agent of the Providence Washington Insurance Company, and stated to him that he wished to effect an insurance for $5,000, gave him what information he could, and requested Mr. Van Buren to look at the premises and examine them for himself, and call on him if he wanted any further information. Mr. Van Buren examined the premises, and shortly after delivered to the plaintiff's agent a policy of the Providence Washington Company, upon the building, for a year, for $5,000, and the agent paid him the premium out of the plaintiff's money. At the time the agent effected this policy, he told Mr. Van Buren about the title to the property, and particularly told him that they called the store Mr. Wright's store, but that strictly speaking perhaps it was not so, as the property was held in trust for his wife. Mr. Van Buren replied that that made no difference, and that the policy was all right.

Some two or three months after this policy was effected, Mr. Van Buren called on the plaintiff's agent, and stated to him that he had too large a risk in that neighborhood, and asked him if he would change his policy, saying that he had three or four other good companies, mentioning, among others, that of the defendant. The plaintiff's agent consented to exchange the policy of the Providence Washington Company, which he then held, for one of the defendant's company. The plaintiff's agent at that time asked Mr. Van Buren if it was necessary for him

to take any further steps in the matter, in order to have it all right. Mr. Van Buren replied, no; that he was acquainted with the facts in the premises, and would fix it all himself, and hand the new policy to Mr. Peck, the plaintiff's agent, in a few days. Although the plaintiff's agent understood Mr. Van Buren as representing himself as the defendant's agent, yet it appears that he was not their regular agent. He was an insurance broker, and as such had had dealings with the defendant. Mr. Van Buren made out the diagram and application given in evidence, and sent it to the defendant, accompanied by a letter, dated March 17, 1857, in which Mr. Van Buren says: "I hand you a risk of $5,000, per diagram and survey, which I will thank you to send me a policy for, viz: Edward Wright, $5,000 1 year *a* $1_{\frac{5}{00}}$, $52.50. As other tenants go into the upper stories, an additional rate will be charged. I have received two policies from you through the Arctic Insurance Co., and as I am constantly obliged to send to your city for policies, I will be glad to correspond with you if agreeable. The writer had the pleasure of seeing you in New York, in 1853, when he lived in Cincinnati."

The plaintiff's agent never saw the diagram, application or letter, until the same were produced at the trial in the court below. Within a few days Mr. Van Buren received from the defendant, the policy in suit, and shortly after exchanged it with the plaintiff's agent for the policy of the Providence Washington Company. The premium was paid to Mr. Van Buren by the plaintiff's agent when he received the policy, and out of the plaintiff's money, and Mr. Van Buren refunded to him the premium for the unexpired term of the policy of the Providence Washington Company.

Nothing further transpired until after the destruction of the building by fire, on the 19th day of October, 1857.

On the same day the premises were destroyed, the plaintiff's agent gave written notice to Mr. Atwater, the agent of the defendant at Chicago, of their destruction; afterwards, on the 23rd day of October, 1857, the plaintiff's agent furnished to Mr. Atwater proofs of loss, which were produced and read on the trial. The witness, C. F. Peck, having stated that Mr. Atwater was the agent of the defendant, and that the proofs were furnished by the witness to him, and by him received as such agent, was asked "what did the agent, Atwater, say about the proofs at the time of the delivery of them?" This question was objected to, but the court overruled the objection, and the witness testified that he took the proofs to Mr. Atwater in his office, handed them to him and asked him to read them and see if they were sufficient; that the witness then went out of the

office for a moment, and when he returned he asked Mr. Atwater if he had read them, and if they were satisfactory. Mr. Atwater replied that he had read them and that they were satisfactory. The witness testifies that he then stated to Mr. Atwater that he wished to have the proof correct, and if it was not so, wished to know it, to which Mr. Atwater replied that it was correct.

Several days after the fire, Mr. Cocks, the president of the defendant, was at Chicago, and had an interview with the plaintiff's agent. Mr. Cocks then stated that the defendant had never received the premium, but that it would make no point on that, as it had been paid to Mr. Van Buren; that Mr. Van Buren was not their regular agent, but that he had acted as their agent in that matter, and written to them for the policy, and referred them to the Arctic Insurance Company, and that they made inquiries of that company, and became satisfied with regard to him. Mr. Cocks said the loss was not $20,000, and that the building could be rebuilt for $18,000 or $19,000. He was shown the vouchers for the expenditures, and also a list of them in a book. He picked up the vouchers, but did not examine them, and ran his eye over the list of them. He said he was satisfied the plaintiff below had acted in good faith; that his company had no fault to find with the proof, but he was not satisfied with the question about the trust deed, and was unwilling to pay anything until that matter was settled. It appears that one or two of the other companies having insurances upon the property, desired affidavits of some master builders in regard to the value of the property, and they were procured, and are incorporated into the record.

It also appeared that on the 23rd day of October, 1857, Ebenezer Peck, one of the trustees, made an affidavit for the purpose of making the preliminary proofs under the policies effected, in his and Timothy Wright's name before mentioned, which was read in evidence on the trial in the court below, the court overruling the plaintiff's objection thereto. In this affidavit E. Peck stated that he held the property with Timothy Wright, as trustees for Sarah L. Wright.

It further appeared, that the plaintiff received the $15,000 insured upon the building by the other insurance companies, and that the building was worth over $20,000 when destroyed.

On the 4th day of December, 1857, the defendant's secretary wrote to the plaintiff that the agent of the company, at Chicago, advised them of plaintiff's calling on him in relation to the late loss in that city. If desirable, the plaintiff might address them in New York.

On the 14th day of December, 1857, the plaintiff wrote in reply to the defendant's secretary, that he was anxious to have the loss, covered by their policy of insurance, adjusted as soon as possible. That the sixty days after notice and proof of loss would expire on the then 23rd inst., and therefore $5,000 would be due him on that day, and he would be glad to know in what manner the company would pay it.

On the 18th day of December, 1857, the defendant's secretary wrote in reply to the plaintiff, that they had received what purported to be proofs of loss on the property destroyed at Nos. 114 and 116 Lake street, but that the proofs so received were not made clearly, nor were they in accordance with the requirements of their policy. That they must ask a new set of proofs, made in accordance with article 9th of the conditions of insurance therewith inclosed for his guidance. That they also found the proofs of loss on the same building made to the London and Liverpool, Garden City and Ætna Companies, were made out different from theirs and to another party, and that these companies had settled their loss, not deeming (the defendant) held as co-insurers with them. That in the above remarks and requirements proposed to the plaintiff, they wished him to understand their object was to ascertain if their company had made a legitimate loss, and if so, to whom they were bound under the policy to pay that loss, and requested a reply by letter, and stated that they should be pleased to see the plaintiff in person in New York, relative to the matter.

On the 28th day of December, 1857, the plaintiff wrote in reply to the defendant's secretary, that he had no objection to make such proofs of loss on his policy as might be necessary, and as the facts would justify. That Mr. Cocks, when in Chicago, and Mr. Atwater, their agent, had both expressed themselves satisfied with the proof offered the company, which was, as the plaintiff was informed, as nearly similar to that which was accepted by the other companies as it was possible to make it. That he did not know what fact the company desired to have further elucidated, which he could supply, and that if he knew what the company wished, he would endeavor to comply with it. That Mr. Cocks was fully informed of everything connected with the insurance while he was in Chicago, and that the plaintiff was at a loss to know why the company delayed payment. That the insurance was made with the company under circumstances of which the company was fully advised, and in perfect good faith in every particular, and that the plaintiff could see no good reason for procrastinating the adjustment of his loss. These letters were in evidence on the trial.

The plaintiff's counsel asked for the following instructions, which were given:

1. If the jury shall believe, from the evidence, that the plaintiff, with the consent of the trustees, took possession of the land, and, for the purposes of trade, built and paid for the building with his own money, and upon its completion took possession of the building and leased the same in his own name, and thereafter received the rents to his own use, and that all of these acts were done with the previous and continued knowledge and consent of E. Peck and Timothy Wright, the trustees, and without objection or interference on their part, to the time the building was burned, they will be at liberty to find that the plaintiff was the owner of the building, unless they shall further believe that said building was erected with an intention that it should be for the benefit of the trust created by the deed of the plaintiff to E. Peck and Wright, for the benefit of Sarah L. Wright.

2. That in determining whether the building was erected with an intention that it should be the property of the trustees, or his own property, the jury may take into consideration evidence tending to show whether the building insured was built and paid for with his own money, and whether, upon its completion, he took possession of the building and leased the same in his own name, and received the rents to his own use, and whether, after the fire, he received the insurance money thereon, and all other evidence in the case, (if any), conflicting with these facts and tending to establish the contrary; and if, from the evidence, the jury shall believe that the plaintiff built the building with an intention that it should be his own property, and that the trustees knew of this intention, and consented to his taking possession of the land, and made no objections to the acts of the plaintiff, but consented thereto and approved thereof down to the time of the fire, they will find that the plaintiff was the owner of the building insured, and was seized of some interest in the land sufficient to enable him to assert his claim to the building as his property.

3. That if the jury shall believe, from the evidence, that the plaintiff furnished preliminary proofs of the loss, and that such preliminary proofs were acknowledged by the agent and president of the defendant to be satisfactory, it was the duty of defendant, if it desired further preliminary proofs, to request the plaintiff to make the same within a reasonable time, and to point out specifically the further proof required, and if the evidence shows a failure on the part of the defendant in this respect, the law precludes the defendant from making any objection to the sufficiency of such preliminary proofs.

On the trial the defendant asked the following instructions, which were refused:

6. That if the jury are satisfied, from the evidence, that the defendants, under the representations of the plaintiff or his agent acting in the matter for him, executed the policy in the declaration mentioned, insuring the property therein named as the sole, legal and absolute property of the plaintiff, and that in fact he was not the owner thereof, and that the plaintiff and his said agent, knowing that fact, concealed from the defendant that he owned but a small fraction of said property, or that he owned but a small part of said property, and the contingent interest or remainder, after the death of a third person, in the residue of said property, or that he held and owned but an equitable title to such remainder, and owned absolutely only a small portion of said property; or, if the jury believe that the plaintiff owned any interest less that an absolute or fee simple interest, and so as aforesaid, concealed that fact from the defendant, and the jury believe that such concealment was material to the risk of said defendants in said insurance, or that the knowledge of the want of such absolute property in the plaintiff would have enhanced the premium on said insurance, that then the plaintiff is not entitled in this suit to recover for his said losses on the said policy.

13. That if the jury believe, from the evidence, that the property mentioned as insured in the policy in the declaration set out, was consumed and lost by fire, as in said declaration is alleged, that then, unless they are further satisfied, by evidence, that the plaintiff gave notice in writing of such loss to the defendant, and delivered as particular an account of his loss and damage as the nature of the case would admit, signed by his own hand, and accompanied the same with his oath or affirmation, declaring said account to be true and just, the plaintiff cannot recover on the said policy in this suit for his alleged loss.

20. If the jury believe, from the evidence, that the three policies named in the policy in question, were insurances upon the building in question as the property of Timothy Wright and E. Peck, as trustees for Sarah L. Wright, *and not as the property of Edward* Wright, the plaintiff, as represented in the policy in question, then such representation was false, and vitiates the policy in question, and the plaintiff cannot recover.

21. If the jury believe, from the evidence, that Van Buren obtained the policy in question by or under an arrangement between him and plaintiff's agent, for Mr. Wright, and that Van Buren testified truly, he was not the agent of defendant, and this was the only policy he had personally obtained from the defendant, then he was not, in fact, defendant's agent, but was

agent of Wright, and his failure to pay over the money to defendant is Wright's failure.

23. That if the jury believe, from the evidence, that one A. H. Van Buren proposed to the agent of the plaintiff to get a policy for $5,000 of the defendant on the property, for the loss of which the plaintiff here seeks to recover, and that the agent of the plaintiff consented thereto, and authorized the said Van Buren to procure said policy, and that said Van Buren in consequence thereof, wrote on to the defendant, requesting him to forward to him such policy, and that defendant did accordingly forward to Van Buren the policy mentioned in the declaration; and if they further believe, from the evidence, that plaintiff accepted and received said policy, and gave the amount of the premium on said insurance to said Van Buren, to be paid to the defendant, and that this was all the connection of any kind the said Van Buren had ever had with the defendant, and that Van Buren has never paid the said premium to said defendant, and that no other payment, or offer of payment, has been made of said premium, that then such facts, and the delivery of the premium as aforesaid, to Van Buren, under the circumstances aforesaid, do not amount to a payment of the said premium to the said defendant, as is required by the second clause or section of the "Conditions of Insurance," annexed to the policy declared on here, and that by virtue of said "Conditions of Insurance," the said insurance is not binding until the said premium has been actually paid.

The defendant also asked the following instructions, which were given as amended — the amendments consisting of interlineations being in *italic*, and those of erasures being contained within brackets.

3. That if the jury were satisfied, from the evidence, *that the plaintiff was not the absolute owner of the building insured*, and that the plaintiff, or his agent acting for him, in their application for, and their representations in, procuring the defendants to execute the policy declared on in this suit, concealed from the defendants the true amount and character of his interest in the property insured in said policy, that then in this action on the policy declared on, the plaintiff cannot recover for his alleged losses.

5. That if the jury are satisfied, from the evidence, that the defendants executed the policy in the declaration mentioned, under the belief, derived from the representations of the plaintiff or his agent in the matter, that the plaintiff was the owner in absolute property of the *whole of said property* insured, *and that in fact he was not the owner thereof*, and that the plaintiff and his said agent knowing that fact, concealed from the defendant

the fact that he owned but a small portion, or but a contingent or reversionary interest, *if such shall be the evidence*, that then the plaintiff cannot recover for his alleged losses in this action upon said policy.

9. That if the jury are satisfied, from the evidence, that the premium on said insurance or policy mentioned in the declaration, has not been paid to the defendants, *or their authorized agent*, that then the plaintiff cannot recover under said policy in this action, for his alleged losses.

10. That in case of the loss of property insured, as set forth in the declaration, it was the duty of the plaintiff, by virtue of said policy, if he desired to recover for said loss of the defendant, to set forth in the preliminary proofs of such loss, the names of the respective owners of the said property insured by said plaintiff, together with their respective interests therein, and that unless the jury are satisfied, from the evidence, that the plaintiff did so set forth in the said preliminary proofs, he is not entitled to recover in this suit, *unless the jury shall find that the defendants were satisfied with the proofs furnished, or did object thereto within a reasonable time.*

15. If the jury believe, from the evidence, that the plaintiff in his preliminary proofs, made and sent to the defendants, did not set forth and show the plaintiff's interest in the property insured, and failed to make such proof when required by the defendant so to do, and did not so do before this suit was brought, then the plaintiff cannot recover in this action, and they ought to find for the defendant, unless the jury shall find that such proofs were waived, and that there was an unreasonable delay on the part of the defendant in requiring additional proofs.

16. If the jury find, from the evidence, that a full disclosure of the actual title of the plaintiff in the premises, as it existed at the time of the application, was material to and would have increased the premium, or prevented the defendant from giving him any policy thereon, [and that no other disclosure of the same was made than the one given in evidence] then there was a material concealment which avoids the policy declared on, and the plaintiff cannot recover.

18. If the jury believe, from the evidence, that the plaintiff, at the time the policy was made, had a less estate than the *absolute ownership* of the whole lot covered by the building in question, *and no separate, legal and absolute ownership in the building*, and the same was not disclosed in the application of the plaintiff to the defendant for insurance, they must find for the defendant.

There was a judgment for plaintiff below for $5,000 and costs, and the insurance company appealed.

B. S. Morris, and Scates, McAllister & Jewett, for Appellant.

Hosmer & Peck, and Beckwith, Merrick & Cassin, for Appellee.

Walker, J. The first assignment of error, questions the judgment of the court below, because appellant's fifth plea was unanswered. In that plea it is averred, that appellee had no insurable interest in the property, which fact was fraudulently concealed from them when the policy was granted. Whether it was error to proceed to trial without a replication to this plea, depends upon the character of the other issues in the case. There was in the first count of the declaration, an averment that appellee was the absolute owner of the property insured, and in the second count, an averment that the company "made insurance upon the five story, stone front, brick building of plaintiff." When appellee filed the general issue, every material averment in the declaration was, by it, put in issue. And to recover, it was necessary that each should be proved. And when proved, the appellant had a right to rebut the evidence, and defeat a recovery. Although the policy might *prima facie* prove these averments, the proof was subject to be rebutted by other competent evidence. It will be observed, that the same issue was presented by the declaration and plea of non-assumpsit, that would have been formed by traversing the averments of this plea. No right was lost to the appellant by proceeding to trial without its being answered, and none could have been gained by forming an issue, which already existed in the record. When the issue was formed by the general issue to the declaration, the same evidence was admissible under it that could have been given under an issue on the plea.

It may be true, that the verdict in this case is not in all respects strictly formal, but under our statute of Amendments and Jeofails, if it is substantially good, it will suffice. It finds the issue for the plaintiff and assesses his damages. Such has been repeatedly held to be substantially a good verdict, under the statute, and it was not error to render a judgment upon it.

It was urged as a ground for reversing this judgment, that the preliminary proofs do not disclose the names of the owners, and their interest in the property destroyed, as required by the printed specifications annexed to the policy. The evidence shows that when they were presented by appellee's agent, he

inquired of the agent of the company if they were sufficient, to which he replied, they were satisfactory and correct. And that the president of the company also stated that, "the company had no fault to find with the proofs, but he was not satisfied with the question about the trust deed." If there existed any informality in the preliminary proofs of loss, it was expressly waived by these admissions of the president, and general agent. This court, in the case of *The Peoria Fire and Marine Insurance Company* v. *Lewis et al.*, 18 Ill. R. 553, say that, "When notice is given and accounts and proofs are furnished of a loss —and the company make objection to making payment—all grounds of objection that might be taken, and are not, are considered as waived, and the company can afterwards insist, only upon the objections then taken. The authorities are abundant and conclusive to this point." In the case under consideration, there was an express, and not an implied waiver of objections to the proof, as there was in that case. That decision goes further than it is necessary to go in this, and it is conclusive as to all exceptions, which might have been urged against the sufficiency of the preliminary proofs of loss.

This then leaves for consideration, the question, of whether the failure of appellee's agent to give a written description of his interest in the property insured, avoids this policy. The requirement of the third condition, annexed to the policy, is this: "If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy, in writing, otherwise the insurance shall be void." The policy describes the property insured as appellee's "five story brick (stone front) building, occupied on the first floor as a retail dry goods store, and in the second story as a wholesale millinery store," etc. From the evidence contained in the bill of exceptions, it appears that the president of the company stated, that although Mr. Van Buren was not their general agent, he had acted as their agent in this matter, and as the premium had been paid to him, although he had not paid it to the company, they would not object to paying the loss on that ground. From this admission it appears that the company regarded Van Buren as their agent in effecting this insurance. And although he was not a general agent, there was no limitation of his powers, for all purposes, in effecting this insurance, as appears by the admission made by the president of the company. The admission did not limit his agency to the receipt of the premium, and delivery of the policy, to the insured. It is sufficiently comprehensive to embrace all the powers of a general agent, in procuring the insurance of this property, and this is

the import of the admission. If they regarded themselves bound by his receipt of the premium, because he was their agent, no reason is perceived why they should not be equally bound, by all of his acts, which a general agent might do, in effecting this insurance; such as making the survey, application, and representation of the ownership of the property, and the interest which the applicant had in it. That those acts may be performed by a general agent of the company cannot be questioned. And when he upon his own examination, and from his information, makes such survey, and description, there can be as little doubt, that the company are bound by it, whether correct or incorrect. This condition only has application to representations made by the assured, and not to cases where the company rely upon their own knowledge of facts, and dispense with information from the assured. When the application is prepared, signed and presented by the owner, the company have the right to rely upon its correctness, and if incorrect in any material part, it avoids the policy. But when the assured fully discloses to the company or its agent the necessary facts, or they are otherwise cognizant of them, and they dispense with any act on his part, they are estopped from denying the description they have adopted, in the policy. If from all the facts of the case, they erroneously determine that the insured has one kind of interest in the premises, when he has another; they cannot be heard, to say, that they were mistaken, and by that means escape the liability they have incurred.

The evidence in this case shows, that the agent of appellee, when he procured the policy in the Providence Washington Company, fully informed Van Buren of the title and ownership of this property. And when he proposed to have that risk transferred to this company, appellee's agent consented, and he inquired, if it was necessary for him to do anything to effect it, and was informed by Van Buren that it was unnecessary, as he was familiar with the facts, and would have the risk transferred. He made out the diagram and application and forwarded them to the company, and upon his application the policy was issued, and forwarded to him, and was by him delivered to appellee's agent. He determined from all the facts, that appellee was the owner of the house, and was not a lessee, but held an absolute interest in it. It is described in the policy as such, and not as a leasehold, or less interest. That he so regarded it, is manifest from the fact, that when he was informed of all the facts, at the time he granted the policy for the Providence Washington Company, he gave it in the name of appellee, and not of the trustees. When the agent of the company, undertook to make the survey, the application, and

representation of the interest, which the assured had in the property, and dispensed with any acts of the assured, and acted upon his own knowledge of the facts, the company ratified his acts by granting the policy. They are bound by his acts as their agent, and if he was mistaken in his representations to them of the ownership, they have no right to insist upon it as a defense to a recovery.

We perceive no error in this record for which the judgment of the court below should be reversed. It must therefore be affirmed.

Judgment affirmed.

JOHN FLEMING *et al.*, Plaintiffs in Error, *v.* ALBERT JENCKS *et al.*, Defendants in Error.

ERROR TO COMMON PLEAS OF CITY OF AURORA.

A court of law has power to order the opening of a judgment rendered upon a cognovit, where usury is alleged to constitute a part of the judgment, and hear the parties; and reduce the amount, or set the judgment aside.

THIS was a judgment by confession, on a note of hand for $1,370, dated Sept. 16th, 1857, payable sixty days after date, with interest at ten per cent., given by plaintiffs in error to defendants in error.

With the note was a warrant of attorney to any attorney of a court of record, to confess a judgment for amount due on note and costs, and $100, attorney's fee.

Judgment was confessed by an attorney for defendants, for $1,490, on the 10th November, 1857, in the Court of Common Pleas of Aurora, in the vacation after the October term of said court.

There was a motion to set aside the judgment, made by plaintiffs in error, on the 12th of October, 1858, at the October term of said court. The court ordered plaintiffs to indorse judgment and execution satisfied as to the sum of $100, the attorney's fee, on the ground that that amount was improperly included in the judgment, and that in all other things said judgment and execution stand confirmed.

The affidavit of plaintiffs in error states that a note was given by Fleming as principal and Dewey as security to defendants in error, on the 10th of April, 1857, for $730, due thirty days after date, with interest at ten per cent.

On the maturity of this note, to renew it, plaintiffs in error gave defendants in error a judgment note for $1,050, due thirty days after date, with 10 per cent. interest; that the difference in amount between the two notes, was made up of usurious interest.

On the maturity of the $1,050 note, another judgment note was given by same parties to same parties, for $1,159, due thirty days after date, with interest at 10 per cent. Note dated June 13th, 1857. Difference in amounts consisted of usurious interest.

On the maturity of the last mentioned note, another judgment note was given by the same parties to the same parties, for $1,192, due, with interest at 10 per cent., thirty days after date. Difference in amounts consisted of usurious interest.

On the maturity of the $1,192 note, another judgment note for $1,245, due thirty days after date, with interest at ten per cent., was given by same parties to same parties. Difference between notes consisted of usurious interest.

On maturity of $1,245 note, another judgment note, for $1,370, due sixty days after date, with interest at ten per cent., was given by same parties to same parties. Difference between notes consisted of usurious interest. Judgment confessed on this last note, under the power of attorney aforesaid, for $1,490, including the $100, attorney's fee.

There was a prayer to the court, that the judgment might be reduced the amount of the usurious interest, and ninety dollars of the attorney's fee.

Affidavit of Dewey, one of the plaintiffs in error, states that Bradley admitted to him that each of the notes was given to renew the previous one, and contains a prayer that execution may be stayed according to the statute, until further order of the court.

The defendants in error filed an affidavit in which they deny that the $730 note constituted any portion of the consideration, or was, in any way, connected with the note upon which the judgment was confessed; that the $730 note, after several renewals, was paid on the 18th September, 1857. They, however, make no denial in relation to the $1,050 note and the renewals, and the usury in relation to this and the notes subsequent to it, except by a general statement that there is not in the note on which the judgment was confessed, *such* usury and interest as is set forth in the affidavit of plaintiffs in error.

The bill of exceptions further states that the court so far sustained the motion, as to strike out of said judgment the attorney's fee, but overruled the motion as to the balance of said judgment for $1,490, and refused to reduce or set aside said

judgment to the extent of the usurious interest therein contained, or for any part thereof, or for any cause whatever; and the court also refused to open said judgment, so as to allow the defendants therein to plead to the declaration on any terms; to which opinion of the court, except as to striking out the attorney's fee, the defendants below excepted.

Errors assigned:

The court erred in not reducing the amount of the judgment to the amount actually due, exclusive of the usurious interest.

In not vacating the judgment, and in not allowing the defendants below to plead to the narr.

In not staying proceedings on the judgment till the defendants below could be heard in their defense to the suit.

Overruling motion of defendants below, in the part thereof which was overruled.

Leland & Leland, and Montoney & Searles, for Plaintiffs in Error.

G. Goodrich, and O. D. Day, for Defendants in Error.

Caton, C. J. An important question is now for the first time presented to this court, and that is, whether under any circumstances, we shall interfere with or examine the exercise of discretion by the court below in overruling a motion to set aside a judgment, entered by confession by an attorney, because usury entered into the consideration of the judgment. While the English courts have freely exercised this power of setting aside judgments thus entered, and for this cause, in some of the American courts, the application has been as uniformly refused, and the party turned over to the court of chancery. Where by the rules of law, as in England and New York, and some of the other States, the whole debt is forfeited if tainted with usury, we can see great propriety in the courts of law, when judgment is once fairly obtained, in turning a party over to a tribunal, by whose rules he could be compelled to do justice, by paying the amount actually due, with legal interest, and relieving only against the usury, although this consideration does not prevent the common law courts in England from interfering and setting aside the judgment; and as a general rule we may safely assume that these decisions are true expositions of the common law, by which our statute requires us to be governed.

Our statute of usury has to a great extent, adopted the rule of equity above referred to, differing only in this, that it compels the defendant only to pay the principal sum loaned, while the court of chancery would in general compel him to pay the

principal with legal interest. There is nothing in the rigor of our statute, although slightly differing from the rule of chancery courts, which would justify us in saying that the English decisions are not in conformity to the common law, and repudiate them, or which should even create a reluctance on the part of the common law courts, to exercise the same discretion in this as in other cases. Even if the English decisions were the other way, we might with great propriety say, that our statute is so much more lenient than that of England, that it would justify and even require the exercise of a more liberal discretion, in admitting the defense of usury, than where the whole debt is forfeited, when usury is established. We may however, in a court of law, exercise a further equitable power for the security of the creditor, by allowing the judgment to stand, till after the question of usury shall have been tried, and then if the verdict shall require it, reduce, or set it aside altogether. On motions of this kind, this power rests with a court of law. *Lake* v. *Cook*, 15 Ill. R. 353.

The order overruling the motion will be reversed and the cause remanded, with directions to allow the defendant to plead to the merits. In the meantime, the judgment will be continued in force, but further proceedings on it will be stayed till the final determination of the issue to be formed.

Judgment reversed.

Henry Keech, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO PEORIA.

Supervisors in the matter of opening a road, when they dismiss an appeal and adjourn, without any intention of further action, cannot resume the subject, unless notice of the time and place of a future meeting is served on the commissioners of highways, and on the three petitioners before served. Without these, the action of the supervisors is void.

When a road is located on a dividing line between townships, the commissioners of the towns must create road districts, and allot the expense, etc., of keeping up the road among the districts, as nearly equal as possible, giving each town an equal number of districts, each road district to be attached to the town in which it lies. Without such an allotment, the road cannot be opened; neither of the towns having power to act.

This was an indictment found by the grand jury of Peoria county, presenting that Henry Keech, on 7th of September,

1857, built a fence across a public road running north and south on the east line of township ten north, range seven east of fourth principal meridian, commencing at north-east corner of said township, and terminating in the Princeville and Mt. Hawley road; said fence being on south half of north-east quarter of section twelve, in said township, and south half of north-west quarter of section seven, in township ten north, range eight east of fourth principal meridian.

Also a second count, presenting that said Keech continued the said obstruction from the said 7th September until the finding of said indictment.

A plea of "not guilty" was entered. The cause was tried before POWELL, Judge, and a jury. Jury found a verdict of "guilty."

Defendant entered a motion for a new trial, which was overruled.

The court fined Keech one dollar and costs, and ordered road to be opened by sheriff.

The defendant gave in evidence an original order from the files of the clerk's office of the town of Medina, dated January 25th, 1853, and filed the 26th of January, 1853, signed by Wm. W. Church, supervisor of Jubilee, George J. Stringer, supervisor of Richwoods, and Charles Yocum, supervisor of Milbrook, dismissing the said appeal taken to them for informality in the same.

Defendant then produced *Charles Yocum*, who, being sworn, said, I am one of the persons to whom the said appeal was taken. Was present at meeting of supervisors on 25th of January, when appeal was dismissed. That dismissal was intended as a final termination of the appeal, and supervisors separated with no intention of meeting again. Three or four weeks afterward, Harvey Stillman requested us to meet at his house and take further action. We met and adjourned till the 11th of April, and that day, no one being present to object, laid the road. I was served with notice to attend at said last meeting. Do not know whether any steps were ever taken to open the road.

Phineas Couch, being sworn, said, I was town clerk in Medina in 1852; delivered all road papers to my successor. I own eighty acres on this road, in Medina, lying eighty rods on the road, one half mile south of its north end. My fences are on the town line; my east and west fences were built before the road was laid; north and south fence built since. I never had notice to remove my fence; never knew of any person in Medina being so notified. The road has never been open or traveled through; town of Medina has never taken any steps to open it, to my knowledge.

James Mooney said: I was highway commissioner of Medina in 1854. Never knew of any allotment of the road between Radnor and Medina. Never knew of the road being traveled through, or any attempt to open it on part of Medina.

Charles B. Pierce said: I was highway commissioner of Medina in 1852 and 1853, and signed the order refusing to lay this road. No steps were taken during said years, nor since, to my knowledge, to open said road, or allot the same between Radnor and Medina. There was when the road was made, and still is, two and a half or three miles of fence on said road in Medina. Has never been an open road, and never worked by authorities of Medina.

Walter Mooney said: I am town clerk of Medina; have with me all the records and papers in said clerk's office relating to the road in question. Witness was then required to produce all of said records and papers.

Phineas R. Wilkinson said: I am town clerk of Radnor; and further stated same as last witness, and produced the papers and records belonging in the clerk's office of Radnor.

The People then produced and gave in evidence from the clerk's office of Medina, an order signed by William W. Church, supervisor of Jubilee, and Charles Yocum, supervisor of Milbrook, dated April 11th, 1853, reciting a dismissal of the appeal aforesaid on the 25th of January, 1853, and that upon further deliberation they considered the reasons for said dismissal insufficient, and decided to take further action in the matter. To which evidence defendant objected.

People then produced and gave in evidence from the clerk's office of Radnor, an order dated the 25th of January, 1853, signed by Wm. W. Church, supervisor of Jubilee, George J. Stringer, supervisor of Richwoods, and Charles Yocum, supervisor of Milbrook, dismissing the beforementioned appeal, and also an order deciding to take further action in the matter of the appeal.

People then produced and gave in evidence from the clerk's office of Radnor, a notice dated March 21, 1853, notifying John Jackson and George Harlan, commissioners of highways of Radnor, of the aforesaid meeting of supervisors at the house of Harvey Stillman, on the 11th of April, 1853, to take further action in relation to said appeal, signed by said Stillman, and service accepted by said Jackson and Harlan.

On part of the people, *Harvey Stillman* said: I was present both when supervisors dismissed the appeal and laid the road. Highway commissioners of Radnor were present at the meeting, the 11th of April, 1853. Commissioners of Medina not present; one person from Medina, Mr. Yates, and several from

Radnor, were present. There were fences on the road when it was laid, and some of them are there yet.

Yates being sworn, said: I gave the notices for the meeting of supervisors at which the road was laid; gave notice to each of the commissioners of Medina, but to no other person.

George Harlan being sworn, said: I was highway commissioner of Radnor in 1853; had notice of the meeting of supervisors at which the road was laid; commissioners of Radnor were present; do not know that any person from Medina was present.

On part of the defendant, court refused to instruct the jury as follows:

2. Roads laid out on the line of two towns, must be divided into sections by the highway commissioners of the respective towns, and allotted to each of the towns respectively, by sections, and a record of such allotment filed in the town clerk's office of the said towns, as required by sections 238 and 239 of the township organization act. And when the road is so allotted, each town has the right to open and keep in repair the sections allotted to it, and no right to meddle with sections not allotted to it.

3. The allotment mentioned in the foregoing instruction should be made after the road is laid out and with reference to it, and be recorded as the statute provides.

4. The town of Radnor had no right to open or remove fences upon any part of the road in controversy, except such portion of the same as had been allotted to said town to open and keep in repair, according to the statute in such case provided.

Plaintiff assigns for error:

The court permitted improper evidence to go to the jury on the part of the People.

Court erred in refusing proper instructions for defendant.

The court erred in refusing to set aside said verdict.

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

The court erred in rendering judgment upon said verdict.

Said judgment should have been for the defendant instead of the plaintiff.

H. B. Hopkins, for Plaintiff in Error.

H. Grove, and W. Bushnell, States Attorney, for the People.

Walker, J. It is not denied, that the supervisors to whom the appeal was taken, had at their first meeting, jurisdiction to

hear and determine the appeal. But it is urged, that when they met at the proper time, and dismissed the appeal, and adjourned without day, their jurisdiction over the case was ended, and any subsequent action in the case was unauthorized and void. The 9th section, art. 24, chapter, "Counties," (Scates' Comp. 354), provides that every appeal from an order of the commissioners of highways, shall be in writing, addressed to the three supervisors, to whom the appeal is taken, and signed by the party appealing; that it shall state the grounds of the appeal; and that the appeal shall be left with one of the three supervisors, by the person appealing, and that such person shall also leave a notice of the appeal, with each of the other supervisors, to whom the appeal is taken. The tenth section imposes the duty upon the supervisors to whom the appeal is taken, as soon as may be convenient, after the expiration of thirty days from the time of filing the order in the office of the town clerk, to fix upon a time and place to consider the same. The eleventh section requires the person appealing to cause a notice in writing, of the time and place so agreed upon for the hearing of the appeal, to be served upon the commissioners of highways, from whose order the appeal is taken, and also upon at least three of the petitioners for the road, which is required to be served at least eight days before the time set for the hearing; and likewise provides for the manner of serving the notices. The twelfth section provides the mode of trying the appeal, and that they may adjourn from time to time, as it may become necessary. It would seem from these provisions, that the legislature had guarded the rights of the parties in interest with scrupulous care, so as to give them such a notice as would enable them to be heard, before their rights should be affected by the determination of the appeal. And this is so eminently just and reasonable, that it cannot be supposed the legislature could have intended otherwise. It is one of the great fundamental principles of all law, that a party whose rights are to be affected, by judicial determination, or by the action of special tribunals, shall have a notice of the proceeding and an opportunity of being heard. When the commissioners met to determine this appeal, their right to act, depended upon the observance of the preliminary requirements of the statute, one of which was, the service of the notices to the persons designated by the statute. When they made their order dismissing the appeal, and adjourned, without a further intention of again meeting for the consideration of the case, the proceeding was then at an end. They could not at a future time meet, and act on the appeal, unless the time and place of meeting were again agreed upon, and the notices were again served on the commissioners of highways,

and the same three petitioners who were before served. When they met and acted without the service of such notices, it was precisely as if they had, upon the filing of the appeal, proceeded without agreeing upon a time for the hearing, and without the service of the notices required by the law. At this second meeting, the persons having a right to such notice were not present, had not received a notice, and were deprived of all right to be heard, and for the want of such notices they were unauthorized to act, and the order then made was inoperative and void.

The twenty-first section of the same article provides, that when a road is located on the line dividing two towns, the commissioners of such towns shall divide it into two or more road districts, in a manner that shall make the labor and expense of opening, working and keeping it in repair through each of the districts, equal, as near as may be, and to allot an equal number of such districts to each town. The twenty-second section declares that each district shall be considered as wholly belonging to the town to which it shall be allotted, for the purpose of opening and improving the road, and keeping it in repair, and that the commissioners shall cause such highway, and the partition and allotment of the same, to be recorded in the office of the town clerks of each of their respective towns.

Under these provisions, neither of the commissioners of highways, for the town of Medina or Radnor, became invested with power to open or improve any portion of this road, until the allotment required by the statute was made. It is such allotment that gives the right to the commissioners to act. It is that division, which gives to each town a portion of the road, and, until that is done, the road, or any portion of it, is not within any district belonging to their town, and is not under their control. They can have no right to open roads in other towns, or roads not belonging to their own. No such allotment of this road was ever made, and the town of Radnor consequently had no right to give the notice requiring the opening of this road, nor was the plaintiff in error bound to obey it, nor did he subject himself to a prosecution for refusing to open a road having no existence, or for replacing his fence at the place the road was alleged to have been obstructed. The court below therefore erred in refusing to give the second, third and fourth instructions asked by defendant below.

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

Judgment reversed.

JOEL S. PAGE, Appellant, *v.* FRANCIS H. BENSON, WILLIAM P. MOSS, JOHN L. BEVERIDGE, EDMUND AIKEN, H. S. MUNROE, PHILO JUDSON, DAVID VAUGHAN, WILLIAM A. BILL, C. H. FARGO and A. W. KELLOGG, Appellees.

APPEAL FROM COOK CIRCUIT COURT.

A judgment creditor, who enters satisfaction of his judgment, or causes an execution to be returned satisfied, authorizes others to treat the property of the debtor as released from the lien, incident to the judgment.

THIS was a bill in chancery, filed by appellant in the Cook Circuit Court.

The bill in substance, states, that William A. Bill, Charles H. Fargo, and A. W. Kellogg, at the November term of said court, 1856, recovered judgment against David Vaughan, for $2,000 and costs; that on the 17th day of December, 1856, said Vaughan executed to said Bill, Fargo and Kellogg, a chattel mortgage upon a certain building in Chicago, to secure the payment of the amount of said judgment, which was acknowledged and recorded.

That on April 14th, 1857, Bill, Fargo and Kellogg, sued out a writ of *fi. fa.* on said judgment, and delivered the same to the sheriff.

That on June 12th, 1857, Vaughan had paid said judgment, except about $850; that on that day, Bill, Fargo and Kellogg applied to complainant to advance them the balance due on said judgment and mortgage, offering in consideration therefor, to assign said judgment and mortgage to complainant, and assuring him that the judgment and mortgage were perfectly good and secure. That complainant accepted this proposal, paid said balance due, and received an assignment of the same on the back of said mortgage.

That said judgment was not assigned on the judgment docket of said court, nor was the assignment of the mortgage recorded. That said Bill, Fargo and Kellogg, and their attorney, were former acquaintances of his in Massachusetts, and he relied on their intelligence and good faith, to make said transaction safe; of which reliance they were well aware. But on the 27th of June, 1857, the said Bill, Fargo and Kellogg, either through mistake or fraud, gave direction to the sheriff having said writ of *fi. fa.* to return the same satisfied; and that accordingly said writ was so returned on said day. But that neither said Bill, Fargo and Kellogg, nor this complainant, have received any payment or satisfaction of said judgment and mortgage, since said assignment; that said direction was given and said

satisfaction entered without the knowledge or assent, and against the will of complainant.

That the premises conveyed, consisted of three stores in the basement, with apartments in the upper stories suitable for families. That at the time of said assignment of said judgment and mortgage on said stores and apartments, he, the said Vaughan, was occupying one suit of apartments with his family. Complainant, from the time of said assignment, and after, was permitting said Vaughan, as a favor to him, and without his paying rent, and upon his promise to pay the balance of said judgment and mortgage in at least six months, to occupy said suit of apartments, and to receive the rents of stores and other apartments, as he well might permit, according to the provisions of said mortgage.

That on or about July 21st, 1857, one F. H. Benson, without the knowledge or consent of complainant, took possession of said premises, and took the rents until October 8th, 1857, when he made an assignment, to said Beveridge and Moss, for the benefit of his creditors; they took possession and collected the rents, till December 10th, 1857, when they sold or pretended to sell the premises to said Philo Judson, who ostensibly went into possession and is taking the rents.

That before said sale to Judson, and while said assignees were in possession, complainant moved the said court to have the return upon said writ of *fi. fa.* and the record amended according to the fact, and showing that the same was satisfied in part only; that said application was granted on affidavits filed, and the amendment made on the 28th of November, 1857, showing said writ to be satisfied in part only, to wit, to the amount of $1,203.90.

That said Benson, and Aiken, and the said assignees, and Judson, pretend that in March, 1857, said Vaughan executed to said Aiken a mortgage of the same property, conditioned to pay a promissory note of about $2,100, by the 17th day of July, 1857, with power of sale, in case of default; that default was made, and the property sold under said power of sale, to said Benson, for about $2,160.

That before said pretended sale, and before said Benson paid the purchase money, said Benson and Aiken, and one Munroe, as agent of both, had notice that said mortgage to Bill, Fargo and Kellogg, had been assigned to complainant, and was not satisfied. That said Vaughan was present at time of assignment and concurred therein, and informed said Benson, several days previous to said sale, of the assignment thereof to complainant, and that the amount due on complainant's mortgage and judgment, was about $850.

That about the time of said pretended sale, said Vaughan, in the presence of said Benson, and before any consideration had been paid by said Benson, proposed to go and inform the complainant in reference to the matter of said sale, with a view to make arrangements for raising some funds, and that thereupon said Benson requested said Vaughan not to go near complainant, until the papers were made out. That the arrangements for said sale were conducted secretly, and the parties thereto made no inquiries of complainant as to his interest, and purposely avoided him, with a view to gain an undue advantage; that the sale was made without the knowledge of complainant; that said Vaughan was and is insolvent, and was known to be so by said Benson at the time; that said stores and tenements, at that time, would rent for about $160 per month; that said Bill, Fargo and Kellogg, have gone out of business, are unable to pay their debts, and insolvent.

Prayer is, that said sale under the Aiken mortgage, and all subsequent sales, be set aside and annulled, and complainant be reinstated in his rights under his mortgage, and that said premises be sold, and proceeds applied in satisfaction of complainant's mortgage, and for general relief.

Bill taken as confessed, as against Bill, Fargo and Kellogg, and Vaughan, Munroe and Aiken.

Benson, Beveridge and Moss, answered as follows:

That they have no knowledge of the judgment of Bill, Fargo and Kellogg, against said Vaughan, nor of the said chattel mortgage of Vaughan to Bill, Fargo and Kellogg, nor of transfer of said judgment and mortgage to complainant.

Denies that Vaughan occupied any part of the premises with permission of complainant; denies that Benson took possession on the 25th of July, 1857.

States that said Aiken took possession on the 17th of July, 1857, when the indebtedness secured by a chattel mortgage made by Vaughan to him, became due, and so held possession under said mortgage, until July 28th, when the premises were sold by said Aiken, by his attorney and agent, said Munroe, to said Benson, at public auction, under said mortgage, according to its terms; that Benson took possession by virtue of said purchase at said sale, and held possession until his assignment to Beveridge and Moss, who held possession until December 2nd, 1857, when they sold the premises to said Judson, who took possession, and that Judson held possession until February 12th, 1858, when he sold the same to one John B. King, who is now the legal and equitable owner thereof.

That they had no knowledge of the pretended rights of the complainant; deny that he, or Bill, Fargo and Kellogg, had any

rights as against the mortgage of said Aiken and those claiming under him; deny all fraud or irregularity and illegality in making sale under the Aiken mortgage; states that Benson paid $2,213 for said premises.

Denies that said Benson had any knowledge or intimation that said complainant had any interest in said property before the sale in said Aiken mortgage.

They say that they had no intimation or suspicion that said judgment had been assigned to said complainant; that said Benson did not caution said Vaughan not to go to said complainant for any purpose, nor at any time, nor did he say or do anything to that effect.

States that Bill, Fargo and Kellogg, lost their lien, if any they had in said premises, by not taking possession when their indebtedness, secured thereby, became due; that said mortgage to Aiken was executed March 17th, 1857, and duly acknowledged and recorded on the 20th of same month; that, so far as defendants were informed, the records of Cook county showed no lien on said premises on the said 28th of July, the day of said sale.

States that Vaughan held possession of the lot on which said building was situated, by a lease from C. Beers, dated May 1st, 1855, and running five years; that said lease was sold by said Aiken, at the same time and place as the sale under the chattel mortgage, and for the same consideration; that such sale was necessary in order to convey a good title to said building.

That said Vaughan, to make a perfect transfer of all his interest therein, assigned a lease of part of said premises to said Aiken, said lease being given by Vaughan to Adler & Brother, dated April 25th, 1857. Also, a lease of another part, given by Vaughan to M. Tuck, dated May 1st, 1857; the first running to May 1st, 1858, the second to May 1st, 1859; that said Aiken held possession by his tenants, by virtue of last mentioned leases, until the sale, July 28th, 1857, when said leases were assigned to said Benson, and subsequently to Beveridge and Moss and Judson and King, who have respectively received rents, as landlords and owners; insists that said defendants' rights are perfect, as against the mortgage of Bill, Fargo and Kellogg, and especially since the return of satisfaction of said execution.

States that said Beveridge, Moss and Benson, for the purpose of barring any claims that might be set up, requested Vaughan to execute a writing certifying said sale to Benson, and that said Vaughan did execute and deliver to them such an instrument.

The answer of defendant Judson is essentially the same as that of the other defendants.

The court below dismissed the bill.

PAGE & HUGHES, and GOOKINS, THOMAS & ROBERTS, for Appellant.

G. SCOVILLE, for Appellees.

CATON, C. J. Chattel mortgage of a building on leasehold property, made to secure the amount of a judgment to be paid in two and four months from date of mortgage, and providing, also, that mortgagor might remain in possession for two years after the date of the mortgage, unless the mortgagee should sooner take possession, on condition broken. A part of the judgment was paid, and the mortgagees, after the four months had expired, assigned the mortgage and judgment to the complainant, who did not take possession, nor have any record made of the assignment. Afterwards the mortgagees caused an execution for the residue to be issued, and returned satisfied. Afterwards, and while the mortgagor was still in possession he executed another mortgage on the same property, under which the second mortgagee took possession, and assigned the mortgage and delivered possession to the assignee, who sold the property under the second mortgage. On the application of the assignee of the first mortgage and the judgment, the court set aside the entry of satisfaction of the judgment, as to the residue unpaid at the time of the assignment. The complainant filed his bill, to set aside the sale under the second mortgage, and to postpone it, till the first mortgage was paid, which bill the court below dismissed.

Two questions arise. First, was the neglect to take possession after the expiration of the four months, fraudulent *per se*, as to the second mortgagee. And second, did the entry of satisfaction by order of the judgment creditors, after the assignment which was not recorded, release the property from the first mortgage, as to the subsequent mortgagee?

Whatever may be said of the first proposition, of the last we have no doubt. The secret assignment of the judgment cannot be allowed to entrap innocent parties. All who were not chargeable with notice of the assignment of the judgment, were justified in assuming that the judgment creditors were still the equitable owners of the judgment and first mortgage. And when they entered satisfaction of the judgment or caused the execution to be returned satisfied, everybody ignorant of the assignment, had a right to buy or treat the property as released from the first mortgage, which was given to secure that judgment. Otherwise the grossest frauds might be practiced upon the innocent, not chargeable with laches. Suppose the judgment debtor had paid the judgment to the judgment creditor, while ignorant

of the assignment. Could the assignee come in and say, that the payment had been made without warrant of law, or that the judgment had been paid by property at a high price? If the judgment debtor was authorized to treat the judgment creditor as authorized to receive satisfaction of the judgment, all others had a right to presume that he was authorized to enter satisfaction of the judgment, and causing the execution to be returned satisfied was equivalent to entering satisfaction, so far as this case is affected.

We think the court below decreed properly in dismissing this bill, and the decree must be affirmed.

Decree affirmed.

Charles Parker, Appellant, *v.* William F. Palmer *et al.*, Appellees.

APPEAL FROM MARSHALL.

If an unanswered demurrer is on record, and the party filing it goes to trial by consent, it will not be cause for reversal of the judgment.

The opinion of the court gives all the material facts of the case.

H. M. Wead, and S. L. Richmond, for Appellant.

S. Ramsay, and H. Grove, for Appellees.

Caton, C. J. The declaration in this case, is in assumpsit. 1st and 2nd counts are upon promissory notes, made by the plaintiff in error to the defendants in error. The declaration also contains the common money counts.

On the 29th day of January, 1858, the plaintiff in error filed his plea of non assumpsit to the whole declaration, and he also filed, on the same day, a plea of usury to the 1st and 2nd counts of the declaration; and, on the same day, the defendants in error filed their general demurrer to the plea of usury, to which there was no joinder.

Afterwards, on the 12th day of February, 1858, the parties appeared in court, and waived a jury, and submitted the cause to the court for trial, and the court found the issues for the defendants in error, and thereupon rendered a judgment in favor

of the defendants in error, upon the notes mentioned in the declaration, for the sum of $392.40, damages and costs.

The defendant below now complains, that the court, by his own express consent, tried the cause without first disposing of this demurrer. Had there been a joinder in demurrer, we are sorry to say that the tenor of our decisions is such, that we should be obliged to reverse this judgment for that reason, although it may appear like trifling with the court and with justice for the party, after having expressly consented to a trial, to go behind it and raise this objection. We do not propose to go in this line of decisions, one particle beyond the point to which the decided cases lead us. Had the court decided this demurrer, we should presume a joinder was waived—as, however, the attention of the court was not called to the demurrer, and the defendant never answered it, we must presume that he waived his pleas, to which there was this answer on the files, to which he did not think it proper to reply—thus in fact confessing that the pleas were bad;—were obnoxious to the demurrer, which he could not or would not answer. Until there was an issue on the demurrer, there was nothing for the court to decide.

The judgment must be affirmed.

Judgment affirmed.

Lorenzo D. Hamilton, impleaded with Jefferson L. Dugger, Plaintiff in Error, *v.* Ed. M. Dewey, Defendant in Error.

ERROR TO COOK.

The second section of the "Practice Act" examined and construed.

A plea in abatement, which avers that a cause of action arose in Logan county, and was specifically made payable there, and that defendant was served, in Logan county, with a process issued from Cook county, and that a co-defendant who was served with process in Cook, also resides in Logan county, is not obnoxious to a demurrer.

The case of *Kenney* v. *Greer*, in 13 Ill. R., the case of *Semple* v. *Anderson*, in 2 Gilm. R., the case of *Haddock* v. *Waterman*, 11 Ill. R., and the case of *Linton* v. *Anglin*, 12 Ill. R., examined and approved.

This was an action of assumpsit, brought upon a promissory note, dated and made payable at Atlanta, Logan county, Illinois. The plaintiff resides in Cook county. Hamilton and Dugger were both made defendants.

A summons issued to sheriff of Cook county for both defendants. Also to sheriff of Logan county for both defendants.

Summons to Cook county returned, served on Dugger, in Cook county. Hamilton not found, October 22nd, 1858.

The writ to Logan county returned, served on Hamilton in Logan county, November 8th, 1858; also a copy of declaration in this case, served on him in Logan county, November 9th, 1858.

Defendant Hamilton files plea in abatement as follows:

And the said Lorenzo D. Hamilton, one of the defendants in the above entitled cause, comes and says, that this court ought not to have or take further cognizance of this action aforesaid, because he says that the said supposed causes of action, and each and every one of them, arose in the county of Logan, in the State of Illinois, and not within the county of Cook aforesaid, and were specifically made payable at Atlanta, in said Logan county, and not in the county of Cook aforesaid, and that he, the said Hamilton, resides in said Logan county, and not within said Cook county, and that process was served in this cause on him, the said Hamilton, in said county of Logan, and not in said county of Cook; and that said Jefferson L. Dugger is also a resident of said Logan county, and not of said Cook county, and that process in this cause was served on Dugger, in said Cook county, and not in Logan county aforesaid, where he resides, and this the said defendant Hamilton is ready to verify, wherefore he prays judgment, whether the court can or will take further cognizance of the action aforesaid.

Sworn to, etc.

Plaintiff demurred to this plea.

The court, Manierre, Judge, sustained demurrer, and ruled defendant Hamilton to plead over.

No further plea was filed, and judgment was rendered against both defendants.

And Hamilton, one of the defendants, assigns for error:

1st. That the court erred in sustaining the demurrer to defendant Hamilton's plea.

2nd. That the court erred in rendering judgment for the plaintiff against defendant Hamilton.

3rd. That the court erred in not rendering judgment for defendant Hamilton.

Scammon & Fuller, for Plaintiff in Error.

Smith & Dewey, for Defendant in Error.

Caton, C. J. In the case of *Kenney* v. *Greer*, 13 Ill. R. 432, this court overruled all its former decisions upon a question of practice, or rather pleading, and upon that question alone. It had always been previously held, that where the Circuit Court

issued its original process, beyond its own territorial jurisdiction, the jurisdictional facts authorizing the emanation of such process, must be stated in the declaration, upon which jurisdictional facts, the defendant could take issue, if they were not true. In Kenney's case, the rule was changed, and none of these facts were required to be stated in the declaration, but it was left to the defendant to show, by plea in abatement, that the facts as they existed, did not give the court jurisdiction, to send its process beyond its own county. The construction of the statute which states, when the court may send its original process beyond its county, and when not, was not disturbed in any way. That statute was permitted to stand, as it had been previously expounded by this court. In this case, the pleadings have conformed to this decision, and we have only to inquire whether the facts as stated in this plea, had they previous to that decision been stated in the declaration, would have authorized the sending of the summons from Cook, to Logan county. Upon this question, the case of *Semple* v. *Anderson*, 2 Gilm. R. 546, is directly in point. Or rather it is a stronger case than this, for there it was held, that unless it affirmatively appeared, that the defendant who was served with the process in the county where it was issued, was a resident of that county, the court had no jurisdiction, while here, it is affirmatively shown that he was not a resident of that county. This construction of the statute is expressly approved in *Haddock* v. *Waterman*, 11 Ill. R. 474, where an attempt was made to review the decisions which had been made on this statute, with some attention. In the case of *Linton* v. *Anglin*, 12 Ill. R. 284, the existing facts which authorized the Circuit Court of Clark county to issue its process to Coles county were, that the cause of action arose in Clark county, and that the plaintiff there resided. These two facts gave the court jurisdiction to issue its process to a foreign county, and we held that it might go to any county where the defendant might be found, else by giving to the word *resides* its strict meaning, a non-resident could not be served in any county in the State, under that clause. There is no such urgent necessity of interpolating the words *or may be found*, after the word *resides*, where it occurs in the portion of the statute now under consideration. We are inclined to adhere to the construction already given to this statute, as to the facts which must exist to authorize the court to send its process out of its county, and are of opinion, that the demurrer to the plea in abatement, should have been overruled.

The judgment will be reversed and the cause remanded.

Judgment reversed.

William C. Tiffany, Plaintiff in Error, *v.* Jonathan Spalding, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where a party by his pleading, brings himself within section two, of chapter eighty-three, of the Revised Statutes, whether it is technically to the writ or to the jurisdiction, the suit should be abated.

This was an action of assumpsit, commenced in Cook County Court of Common Pleas.

Summons issued to sheriff of Lake county, and returned served by said sheriff, on 19th December, 1857.

Defendant filed plea in abatement, in his own proper person, alleging, that the cause of action, if any accrued to the plaintiff, accrued to him in the county of Lake, etc., and not in the county of Cook—that the cause of action was specifically made payable in Lake—and that defendant is not a resident of Cook county. A demurrer to this plea was overruled. Defendant was defaulted, and a judgment was rendered against him for $245.60, and costs.

Ferry & Williams, and H. P. Smith, for Plaintiff in Error.

E. Anthony, for Defendant in Error.

Breese, J. The defendant, by his plea in this case, brought himself within sec. 2, chap. 83, R. S. 1845, (Scates' Comp. 241,) and the court should have abated the suit. It shows a state of facts which prevented the action of the court. It can be in practice, in cases like this under our peculiar statute, a matter of no moment whether such plea is technically to the writ or to the jurisdiction. The facts stated in it, show the court had not properly acquired jurisdiction of the case, the defendant neither residing in Cook, nor the cause of action specifically payable there, nor accruing there. Under the state of facts shown by the plea, the Common Pleas had no right to render judgment against the defendant. It should have overruled the demurrer to the plea and abated the suit, if the plaintiff did not wish to take issue on the part of the plea by replying to them. On failing to reply, the court should give judgment against the plaintiff, abating the suit. The judgment of the court below is reversed and the cause remanded, with instructions to proceed in conformity to this opinion.

Judgment reversed.

Cyrus P. Bradley, Appellant, *v.* Michael Geiselman, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where there is a conflict of testimony, and the jury choose to discredit a witness, under proper instructions, this court will not interfere.

In an action of trespass for seizing personal property, there is no objection to allowing interest on the value of the goods from the time they were taken from the possession of the plaintiff.

This was an action brought by Michael Geiselman, in the month of January, 1854, in the Cook County Court of Common Pleas, against Cyrus P. Bradley, for an alleged trespass in seizing certain personal property, on or about the 13th January, 1854.

The plaintiff claimed the property in the declaration mentioned, by a sale made to him on or about the thirtieth of December, A. D. 1853, by Elisha W. King and Henry A. Layton, doing business under the firm of H. A. Layton & Co. The defendant pleaded the general issue, and two special pleas.

1st. That three several executions had been issued upon the 24th day of October, 1853, upon three several judgments, one in favor of Harmon & Co., one in favor of Williams & Co., and one in favor of Walters & Co., against William J. King, which executions were severally placed in his hands, he then being sheriff of the county of Cook, on the 29th day of October, 1853, and that as such sheriff, and in obedience to the command of said executions, he did, on the 13th January, 1854, seize, take and carry away the goods and chattels in the declaration mentioned, and that William J. King owned and had an interest as partner, in the property in the declaration mentioned, and that the same was subject to said executions, and that the property was not in the plaintiff, etc.

2nd. That the property in the declaration mentioned, was seized under and by virtue of the executions above mentioned, and that on the 29th October, 1853, when the executions were delivered to him, it was the property of William J. King and Henry A. Layton, partners, doing business under the name of H. A. Layton & Co., and the interest of William J. King in said property, was, by the delivery of said executions to him on the said 29th October, 1853, made subject to the lien of said executions, and to sale thereunder, and the property was not in the plaintiff.

To these pleas, replications were filed, denying that Bradley was sheriff, and also denying that the property belonged to W. J. King.

The case was tried at the February term of the Cook County Court of Common Pleas, 1854, and the jury disagreed and were discharged. It was afterwards removed, upon the petition of the plaintiff (Geiselman), to Kane county, and was there tried before ISAAC G. WILSON, Judge, and a jury, at the May term, 1855, and a judgment rendered in favor of the plaintiff below, for nineteen hundred and twelve dollars and twenty-five cents, from which judgment defendant appealed to this court.

The case having been reversed and remanded, it was again tried before the same judge, at February term, 1859, and verdict rendered for $2,495. The plaintiff thereupon entered a *remittitur*, for the sum of two hundred and four dollars and fifty-seven cents, and a judgment was entered for the sum of $2,290.43, from which judgment the defendant now appeals.

The plaintiff asked the court to give to the jury the following instructions, which was done:

1st. If the jury believe, from the evidence, that the plaintiff, Geiselman, purchased the property in question from Henry A. Layton and Elisha W. King, in good faith, and paid them the full price and value thereof, and took possession of the same; and that at the time of the sale they sold the same as their own property, and Geiselman purchased said property from them as their property; and that afterwards, whilst said property was yet remaining in Geiselman's possession, the defendant took the same from him upon an execution against William J. King, then the burden of proof is with defendant to show that said property was the property of William J. King, and not the property of Henry A. Layton and Elisha W. King, and in order to prove this, the defendant must show by competent proof, property in William J. King; and if the jury believe that the defendant has failed in his proof of ownership in this particular, then the law is for the plaintiff, and the jury must find for him, and assess his damages at what the property was worth, at the time the same was so taken from the plaintiff, and interest on the same from the time of taking, until the time of the finding by the jury for him.

2nd. If you believe, from the evidence in this cause, that the witness William White has intentionally sworn false as to any material fact in this cause, you are at liberty to disregard his evidence.

If the jury believe, from the facts and circumstances given in evidence in this cause, that the positive statements sworn to by White are false, you are not bound to believe said statements; and in deciding the issue in this cause, the jury have the right to take into consideration the conduct of said White, in his connection with the transaction of the sale from Layton & Co.,

to the plaintiff, in determining the credit you give to his evidence.

3rd. If the jury shall believe, from the evidence, that the plaintiff acquired a good and valid title to the property in dispute, by purchase from Layton and Elisha W. King, and that the same was taken by the defendant as charged, then the plaintiff is entitled to recover the full value of the property, at the time the defendant levied thereon, with interest from the date of said levy.

4th. If the jury believe, from the evidence, that William J. King was the agent of Elisha W. King, to conduct for said Elisha W. King the saloon business in the city of Chicago, and that the said William J. King, as such agent, formed a copartnership between said Elisha W. King and Henry A. Layton, under the name and style of Henry A. Layton & Co., and as such were openly and publicly carrying on said business, then the law is, that the said firm had a lawful right to sell and dispose of their partnership property, and if the jury are satisfied, from the evidence, that Geiselman, the plaintiff, purchased for good consideration the partnership property of said firm of Henry A. Layton & Co., and took possession of the same, he thereby acquired a good title, and was the owner of the same, and the jury should find for him, and assess his damages.

That fraud is never to be presumed against a party, but must be proven by the person alleging the same, or by some sufficient proof in the case.

The defendant asked the court to give the jury the following instructions:

1st. If the jury shall believe, from the evidence, that after the delivery of the executions to the sheriff on the 29th day of October, 1853, William J. King had or owned any interest in the property levied on by the sheriff, either as a partner with Layton or in any other way, then the interest of said King was subject to the lien of the executions from the date of their delivery to the sheriff, and the defendant had a right to take possession of the property, and to sell the interest of said King in the same, under said executions, and no sale by King to the plaintiff could defeat the right of the sheriff to levy and sell, and the plaintiff cannot recover for said property.

2nd. That the question before the jury in this case is the ownership of the property at the time the executions were placed in the hands of the sheriff of Cook county, and if William J. King owned the property levied on, or had an interest therein as a partner, at the time of the delivery of the execution to the sheriff, such interest was subject to the lien of said

executions, and to a sale under the same, and the plaintiff cannot recover.

3rd. If the jury shall believe, from the evidence, that Elisha W. King was not a partner in the firm of H. A. Layton & Co., at the formation thereof, and that the capital stock of said firm was paid in by William J. King, or by him and Layton, and the purchases of goods made by William J. King in his own name, or in the name of H. A. Layton & Co., or with his own, or with his and Layton's money, or upon his or their credit, then the interest of said William J. King in said property could not have become vested in Elisha W. King, if any such man ever existed, except by the voluntary conveyance by William J. King to him, or by the operation of law, and no power of attorney executed by Elisha W. King after the investment of such capital stock, or the purchase of the goods by William J. King, or by him and Layton, could have affected in any manner the interest of William J. King previously acquired in the property.

4th. If the jury shall believe, from the evidence, that Layton and William J. King entered into a partnership and purchased property and did business together as partners, in the month of September, 1853, and continued in business as such partners up to the 13th day of October, 1853, then the interest of said partners in said property could not be affected or altered by any power of attorney given by Elisha W. King to William J. King, on the said 13th day of October, 1853.

5th. If the jury shall believe, from the evidence, that the only authority William J. King had, to act for Elisha W. King, was in the event of the said Elisha W. King's entering and engaging in the business of keeping an eating and drinking saloon, in Chicago, subsequent to the 13th day of October, 1853, and that before the said 13th day of October, H. A. Layton and W. J. King had established and were keeping an eating and drinking saloon in Chicago, such power of attorney did not give any authority to William J. King to act for Elisha W. King, in regard to the business of the saloon owned and kept by H. A. Layton and William J. King, previous to that date.

Which were severally given by the court.

Williams, Woodbridge & Grant, for Appellant.

T. L. Dickey, for Appellee.

Walker, J. It is insisted that this judgment should be reversed, because the finding of the jury is manifestly against

the weight of evidence. While the evidence is perhaps, not of that positive and clear character, which would relieve the case of doubt, and entirely satisfy us of the correctness of the conclusions at which the jury have arrived, there is not such a want of evidence to support the verdict, as to render it manifest, that it is wrong. Defendant in error was found in the possession of the goods when the levy was made, and that was *prima facie* evidence of ownership. He purchased of Layton and Elisha King, as appears by the bill of sale, and this should have been rebutted by the plaintiff in error, to entitle him to defeat a recovery. The only evidence tending to do so, was that of White, and the instruction of the court, left it to the jury to determine, whether he had testified falsely to any material fact in the case, and if they so found, directed them that they would be at liberty to disregard his entire evidence. And that in determining what weight his evidence was entitled to, they might take into consideration his acts, in effecting the sale of this property to defendant in error. These instructions fairly presented the law, and the jury were unquestionably the judges of his credibility, and if they have found him unworthy of belief, it was clearly within their province, and we have no right to give to his evidence more weight than they have done. And if this evidence was not believed by them, to be worthy of credit, they could not have found otherwise than they did. Leave his evidence out of consideration, and there was an abundance of testimony, to warrant their finding that the property belonged to defendant in error. This seems to have been the result on the trial of this case before two different juries, and we are unable to say that it would probably be changed by submitting it to a third.

The jury by their verdict seem to have given the plaintiff below the invoice price of the goods, with interest. But there was two hundred dollars of that sum, which he reserved to meet the increased rent on the house, which does not appear to have been paid by him, and should not have been allowed. But this was corrected, by the remittiter of that sum by plaintiff below, before judgment was rendered. And if interest was calculated upon the sum of $1,800, which he paid, from the time of the seizure of the goods until the trial, it will be found to exceed the amount of the judgment. There is no objection to allowing interest on the value of the goods from the time they were taken from his possession. And in the conflict of the evidence as to their value, it was for the jury to determine it, and having done so it should not be disturbed.

The instructions asked and given, for each party, presented

the law plainly, and the finding of the jury is not in conflict with them, and is supported by the evidence in the case.

The judgment of the court below is affirmed.

Judgment affirmed.

John A. McNall, Appellant, *v.* Abraham Vehon, Appellee.

APPEAL FROM COOK.

In an action of trespass, a plea which alleges that the defendant, as agent of the plaintiffs in execution, directed the marshal to levy on goods in the hands of another than the defendant, because they had been fraudulently sold to him by the defendant, is good, and not obnoxious to a demurrer.

This was an action of trespass brought to the Cook county Circuit Court, by said Abraham Vehon against the above named John A. McNall.

The declaration contains three counts.

First count for breaking and entering the plaintiff's messuage and house on the 10th day of September, 1857, and taking and carrying away certain goods and chattels which are therein described, and consist of a stock of cabinet ware.

The second and third counts of said declaration were as follows, viz.:

And also for that the said defendant on the day and year aforesaid, with force and arms, to wit, at the county aforesaid, seized, took and carried away, certain goods and chattels, to wit, one wagon, the property of the said plaintiff, of great value, to wit, of the value of five hundred dollars, then found and being in the possession of the said plaintiff, and converted and disposed of the same to his own use, etc.

And also for that the said defendant, on the day and year aforesaid, with force and arms, etc., to wit, at the county aforesaid, seized, took and carried away divers goods and chattels of the said plaintiff, of the like number, quantity, quality, description and value, as the said goods and chattels in the first count of the said declaration mentioned, then and there being found and being, and converted and disposed of the same to his own use, and other wrongs to the said plaintiff then and there did, against the peace and to the damage of the said plaintiff, of three thousand dollars, etc.

To the said counts last aforesaid, the defendant pleaded not guilty, and the special plea, which is set out in the opinion of the court.

To this plea the plaintiff demurred, and for cause of demurrer alleged that said plea amounted to the general issue.

The court sustained the said demurrer, and defendant elected to stand by his plea.

Judgment was rendered for plaintiff against defendant, for twelve hundred and eighteen dollars and thirty-five cents, and defendant appealed to this court.

The decision of the Circuit Court in sustaining the demurrer and in giving the judgment, are assigned for error.

Scates, McAllister & Jewett, for Appellant.

Gookins, Thomas & Roberts, for Appellee.

Caton, C. J. To a declaration in trespass, *de bonis asportatis*, the defendant filed a special plea, as follows:

"And for a further plea in this behalf, as to the second and third counts in said declaration, the said defendant says *actio non*, because he says that before the time of the committing of the supposed trespasses in the said declaration mentioned, to wit, in the July term, in the year of our Lord one thousand eight hundred and fifty-seven, in the Circuit Court of the United States of America, in and for the Northern District of Illinois, before the judges thereof, in the city of Chicago, in said district, one Michael Gaffney and Patrick Gaffney, by the consideration and judgment of the said court, recovered against one Wolf Vehon the sum of thirteen hundred and forty-two dollars and fifty-five cents, which in and by the said court were then and there adjudged to the said Michael and Patrick Gaffney, for their damages which they had sustained by reason of the non-performance by the said Wolf Vehon of certain promises and undertakings then lately made by the said Wolf Vehon to the said Michael and Patrick Gaffney, besides the sum of thirty-three dollars and forty-five cents, for their costs and charges in the said suit, whereof the said defendant in the said suit was convicted, as by the record and proceedings thereof, remaining in the said court before the judges thereof, at Chicago aforesaid, more fully appears.

"And the said defendant further says, that the said judgment being in full force, and the said damages remaining unpaid and unsatisfied, the said Michael and Patrick Gaffney, on, to wit, the 9th day of September, A. D. 1857, at Chicago, sued out and prosecuted out of said Circuit Court of the United States of

America, a certain writ of *fieri facias* directed to the marshal of the said Northern District of Illinois, by which said writ the said marshal was commanded that of the goods, chattels, lands and tenements of the said Wolf Vehon, he should cause to be levied the damages and costs aforesaid, and that he should have that money before the said judges at Chicago aforesaid, in ninety days after the date thereof, to render to the said plaintiffs for their damages and costs aforesaid, and that the said marshal should have then and there the said writ, which said writ, afterwards and before the return day thereof, and before the said time when, etc., to wit, on the same day and year aforesaid, at the city of Chicago aforesaid, was delivered to the said marshal, to be executed in due form of law. And the said defendant further avers, that at the time of the issuing of the aforesaid writ of *fieri facias*, as aforesaid, and the levying of the same as hereinafter mentioned, he was the agent of the said Michael and Patrick Gaffney, in respect to the enforcement and collection of the said judgment so recovered as aforesaid by them against the said Wolf Vehon, and as such was authorized and commanded to direct the levy of the said *fieri facias* upon the property of him the said Wolf Vehon.

"And the said defendant further avers, that afterwards and before the return day of the said writ of *fieri facias*, to wit, on the ninth day of September, A. D. 1857, the said goods and chattels in the said counts in the said declaration mentioned, being the property of the said Wolf Vehon, and in the possession of the said plaintiff, to wit, at the city of Joliet, in the county of Will, in the said district, and as the property of the said Wolf Vehon, being then and there liable to be seized and taken in virtue of the said writ of *fieri facias*, the said defendant, as such agent of the said Michael and Patrick Gaffney, as aforesaid, then and there directed the said marshal to levy upon the said goods and chattels, in the said counts mentioned, so as aforesaid in the possession of the said plaintiff, and which had before then been fraudulently sold to him by said Wolf Vehon to keep the same from said Gaffney's judgment and execution aforesaid, and being so kept and possessed, and the said marshal then and there having the said writ of *fieri facias*, so issued and delivered to him as aforesaid, and before the return day thereof, did, on, to wit, the day and year in the said declaration mentioned, by virtue of the said writ, and the directions of the said defendant, as such agent as aforesaid, seize and take the said goods and chattels in the said counts mentioned, as he lawfully might, which are the said several supposed trespasses whereof the said plaintiff hath above thereof complained against him

the said defendant, and this he is ready to verify. Wherefore," etc.

To this plea the plaintiff demurred, and for cause of demurrer alleged that said plea amounted to the general issue. The court sustained the said demurrer, and defendant elected to stand by his plea.

The plea, we think, was good. It admitted a color of right in the plaintiff. It admitted that the title was in him as against the defendant in the execution, and even as to all the world, except creditors of Wolf Vehon. In order to defeat the title which the plaintiff had acquired by his purchase, it was necessary to show that the defendant was an agent of a creditor, and clothed with his authority, as to whom the sale was fraudulent and void, he had directed the goods to be seized. It was the right of the plaintiff to have these facts set forth in a special plea. Had the defendant allowed him to go to trial on the general issue, without apprising him of the special facts, by which alone his title could be defeated, he might well have supposed, that he had only to show a good title generally, and he need not have prepared himself to sustain the *bona fides* of his purchase, as to creditors. The plea was good, and the demurrer should have been overruled.

The judgment must be reversed and cause remanded, and the plaintiff permitted to reply.

Judgment reversed.

Mary Doyle *et al.*, and Thomas Lewis, Administrator of the estate of Maurice Doyle, deceased, Plaintiffs in Error, *v.* Patrick Murphy and Wife, Defendants in Error.

ERROR TO WILL.

Courts of equity will not assume jurisdiction to establish a trust in every case where confidence has been reposed or a credit given.

Money delivered to a person to pay debts, which he converts to his own use, does not enable the heirs of the party who reposed confidence, to convert it into a trust fund.

If a party abstracts securities not entrusted to him, and substitutes forged securities in their place, this does not create the relation of trustee, and *cestui que* trust.

Where a testator bequeaths a debt due him, to a legatee, the legatee cannot resort to a court of equity for its recovery.

Bills for the marshaling of assets are only entertained in cases where various creditors claim equitable liens, in priority of others. As where one creditor may resort to two funds, and another to but one.

THIS bill of complaint sets forth: That Honora Teresa Murphy, wife of said Patrick, is the daughter of one Catherine Byrne (deceased), late of the town of Borris, in the county of Carlow, in Ireland; that Patrick and Honora were married in Ireland, in November, 1850, and shortly after removed to the United States, where they arrived in the fall of 1851; that the said Catherine Byrne died in 1849, leaving a will, which after her death was duly proved and admitted to record in the proper court in Ireland, in and by which will Honora was made executrix and sole legatee of the entire property, freehold, chattel, personal or real, and of every other description whatsoever, of which Catherine died seized or possessed, subject to the payment of the debts of Catherine and of fifty pounds, sterling, to Patrick Byrne, brother of Honora Teresa. That some time in the year 1831, Catherine Byrne placed in a safe belonging to her, and which she put into the possession of Maurice Doyle, who was then living in Dublin, certain bank debentures, the property of said Catherine, and which were of the value of one thousand pounds, sterling—that the safe and bank debentures therein, were placed in the care and possession of said Maurice, at Dublin, for safe keeping; that Catherine locked the safe and kept the key thereof in her own possession; that the safe, with the said bank debentures, remained in the possession of the said Maurice until some time in the latter part of the year 1834, when Maurice, by means of false keys, abstracted and took from said safe said bank debentures and sold the same, and converted the proceeds thereof to his own use, and placed in said safe, false and forged bank debentures, of like tenor, date and amount with said real bank debentures, with the intention and design of cheating said Catherine out of the value thereof, and that they were then of the value of four thousand eight hundred and forty dollars. That from the year 1831 to the year 1834, Catherine was engaged in the mercantile business, in the said town of Borris, and was accustomed to purchase goods, mostly in the city of Dublin, and that she was accustomed to place money in the hands of Maurice Doyle, at different times, amounting, in all, to the sum of six hundred and forty or fifty pounds, sterling, for the purpose of paying for goods which she had bought of divers persons in Dublin; and that when she placed said moneys in his hands, she also placed in his hands the different invoices of goods she had purchased in Dublin, and for the payment of which she placed the moneys in his hands; that said Maurice forged receipts to the said several invoices or bills of goods, to the full amount of the moneys placed in his hands, and sent the said invoices, with the receipts forged thereon, to said Catherine, showing, apparently, that the same

had been paid, and converted to his own use said moneys, amounting, in the currency of the United States, to the sum of $3,097.60, or $3,146, which he never afterwards paid to Catherine. That in the month of December, 1834, Maurice Doyle absconded, and left Ireland for parts unknown, taking with him the money of said Catherine, and that neither said Patrick, nor Honora, knew of the whereabouts of said Maurice, until some time after their arrival in the United States, they learned that he had, for a number of years, been residing at Springfield, in Illinois, and had for a number of years been engaged in business at that place. That some time in the month of June, 1851, Maurice Doyle, while returning from Europe to America, died, intestate, leaving a large amount of property at Springfield aforesaid, and leaving the said Mary Doyle his widow, and the said Henry Doyle, Ambrose Charles Doyle, Frederick Doyle and Margaret Helen Doyle, his children and heirs at law. That some time after the death of said Maurice, Thomas Lewis was appointed by the County Court of Sangamon county, administrator of the estate of said Maurice, and took upon himself the administration of said estate, and that he has a large amount of assets of said estate in his hands.

And prayed that said Thomas Lewis, and above named widow and heirs at law of Maurice Doyle, be made defendants, the answer of each of them under oath being waived; and that said Thomas Lewis be required to answer specifically, whether or not, he has been appointed administrator of said estate, and taken upon himself the administration of said estate; and that he be required to file a copy of his letters of administration, in this suit; and that he answer and set forth particularly and specifically, all and singular, the goods, chattels, lands, tenements, moneys, credits, and other things of value which have come to his hands and possession or control, or which have come to his knowledge, belonging to said estate, and the value thereof, and what has been done with the same, and how much he has in his hands and control, and what it consists of, and that he be decreed to pay to complainants the full amount of the value and proceeds of said bank debentures, and the amount of the moneys received by said Maurice, to pay said invoices, or bills of goods, together with interest thereon to the time of making said decree, or in case said assets are not sufficient, then that he pay the whole of said assets to complainants; and that the other of the defendants be decreed to be barred and precluded from recovering anything belonging to said estate, until the claim of complainants shall be fully paid and satisfied.

Bill sworn to by Honora Teresa Murphy.

There was a demurrer to the bill, to which there was a joinder, both of which were withdrawn.

Thomas Lewis, administrator, filed his answer; and says that the several allegations contained in the bill of complaint, respecting the said bank debentures, and the conversion thereof by Maurice Doyle, may be true, but he will neither admit nor deny the same, and calls for proof. Admits the decease of Doyle, and the issuing of the letters of administration to himself, as charged in the bill, and that he has, as assets belonging to the estate of said Doyle, in money, $7,036.10, notes and claims in favor of said estate, $4,498.45—in all, amounting to $11,534.55.

Replication to answer of Lewis was filed.

The bill was taken as confessed by all of the defendants, except defendant Lewis.

Proof of publication of notice, as to defendant Doyle, was filed.

The deposition of Honora Teresa Murphy, said defendant, Lewis, by his counsel, consenting thereto, was taken, touching the truth of the allegations contained in the bill of complaint, by a master, who was ordered to compute and report as to the amount, if anything, due and owing to said complainants, in manner and form alleged in said bill of complaint, and that he make such report in the premises with all convenient speed.

The master's report finds as follows:

That it appears from the deposition taken before me in this cause, that one Catherine Byrne, in her lifetime, and some time in the year 1832, deposited for safe keeping, an iron safe, containing bank debentures to the amount of £1,000, English sterling, with one Maurice Doyle, he then living and doing business in Dublin, Ireland, but since deceased; that the said Doyle continued to have possession of said safe until the fall of 1834. That said Catherine Byrne was then residing and engaged in the mercantile business, at Borris, in the county of Carlow, Ireland, about fifty-two miles from Dublin; and that she continued to reside there up to the time of her death. It further appears, that the said Catherine was in the habit of sending to said Doyle sums of money, up to as late as the latter part of the year 1834, to pay her merchants and creditors in Dublin; and it further appears, that said Maurice Doyle extracted said debentures from said safe, by means of a false key, and that he sold and appropriated the proceeds to his own use; and that he placed in said safe, instead of said debentures, forged ones, purporting to be of an equal amount and similar in every respect to the genuine ones. And further, that he appropriated several sums of money to his own use, so sent to him by said Catherine to pay her debts, as aforesaid, and that he forged receipts, and vouchers, and re-

turned them to her as having faithfully paid said sums according to her directions. That the several sums proved thus to have been obtained, amounted to the sum of £605 10*s.* sterling, English currency; and that some time in the year 1834, she loaned said Doyle £40, same currency; and further, that in December, 1834, said Doyle left Ireland, without the knowledge of said Catherine, until after he had gone, and without refunding any of said funds to said Catherine.

That the aggregate of all the sums of money which the said Maurice Doyle, in his lifetime, obtained from the said Catherine Byrne, in the manner aforesaid, was £1,645 10*s.* sterling, English currency; that the value thereof in United States currency was $7,964.22; that the interest thereon since the 15th day of November, 1834, to the present time, at six per cent. per annum, amounts to $9,318.26; that the whole sum now due from the estate of Maurice Doyle, deceased, to the complainants, in the manner above set forth, is the sum of $17,282.48. It further appears, from the answer of Thomas Lewis, administrator of the estate of Maurice Doyle, deceased, that there is now in the hands of said administrator, as assets of the estate of Maurice Doyle, deceased, the sum of seven thousand and thirty-six and ten one-hundredths dollars, after deducting the amount of all the claims heretofore allowed and proved up against the said estate; that the amount of assets, including claims and demands, belonging to said estate in the hands of said administrator, is eleven thousand four hundred and thirty-four and fifty-five one-hundredths dollars.

There was an order confirming said report, and a decree: That complainants have judgment against said Thomas Lewis, as administrator of said estate, for the sum of seventeen thousand two hundred and eighty-two dollars and forty-eight cents, and that said defendant pay the same in due course of administration; and that the other of the defendants, and each of them, be foreclosed and barred from having or recovering any of the assets belonging to said estate, until such time as said sum of seventeen thousand two hundred and eighty-two dollars and forty-eight cents, and the costs of suit in this cause, be fully paid and satisfied to said complainants.

The following errors were assigned:

1st. It appears from said bill of complaint that the defendants therein, Mary Doyle, Henry Doyle, Ambrose Charles Doyle, Frederick Doyle and Margaret Helen Doyle, were not, at the time of the commencement of said suit, nor were either or any of them, residents in, or citizens of the State of Illinois; but that they, each and all of them, resided in Ireland, in the Kingdom of Great Britain and Ireland; and the other and

remaining defendant, the said Thomas Lewis, resided, at the time of the commencement of said suit, in the county of Sangamon, in the State of Illinois, and not in the county of Will; and said suit should have been instituted in the county of Sangamon, as required by the statute in such cases, and the said Circuit Court of Will county had no jurisdiction thereof.

2nd. That it does not appear from the bill of complaint filed in said cause, nor from the record and proceedings therein, that any letters testamentary or of administration to administer upon the estate of the said Catherine Byrne, deceased, were ever issued by any court of this State, or even by any court of any foreign State or jurisdiction, to the said Honora Teresa Murphy, or to the said Patrick Murphy.

3rd. The said complainants have not by their said bill of complaint, made such a case as entitles them, in a court of equity, to any discovery from the defendants therein, or any of them, or any relief against them. Nor does the said bill of complaint contain any matter of equity whereon said Will county Circuit Court could ground any decree, or give said complainants any relief or assistance as against said defendants.

4th. The said Circuit Court of Will county, erred in entering the order aforesaid in said cause, that said bill of complaint be taken as confessed by the said defendants, Mary Doyle, Ambrose Charles Doyle, Henry Doyle, Frederick Doyle, and Margaret Helen Doyle.

5th. The said court erred, in directing the order aforesaid, that the deposition of said Honora Teresa Murphy, one of the complainants, be taken in said cause, and receiving the deposition of said Honora Teresa when taken, as evidence in said cause.

6th. The said court also erred in approving and confirming the report of the master in chancery, made in said cause, and by its judgment and decree thereon, awarding and giving judgment in favor of said complainants, and against said defendant, Thomas Lewis, as administrator of said estate of said Maurice Doyle, for the sum of seventeen thousand two hundred and eighty two dollars and forty-eight cents, and costs of suit, and directing the same to be paid in due course of administration of the affairs of said estate, and adjudging and decreeing that said defendants, the said Mary Doyle, Ambrose Charles Doyle, Henry Doyle, Frederick Doyle and Margaret Helen Doyle, be barred and foreclosed from having and receiving any portion of the moneys, goods, chattels, rights and credits, belonging to the estate of said Maurice Doyle, deceased, until said sum and costs of suit should be fully paid and satisfied; whereas said court should have decreed that said bill of complaint be dismissed.

Hoyne, Miller & Lewis, and M. A. Rorke, for Plaintiffs in Error.

W. B. Scates, and U. Osgood, for Defendants in Error.

Walker, J. It is urged, in connection with other grounds, for the reversal of the decree of the court below, that the court had no jurisdiction of the subject matter. While by the defendants in error, it is insisted that Maurice Doyle was a trustee, and being such, a court of equity has undoubted jurisdiction over the trust fund. That the court has such a jurisdiction in cases of strict trust, there is no doubt. But it does not therefore follow, that the court will assume jurisdiction in every case where a mere confidence has been reposed, or a credit given. The various affairs of life in almost every act between individuals in trade and commerce, involve the reposing of confidence or trust in each other, and yet it never has been supposed that because such a confidence or trust in the integrity of another has been extended and abused, that therefore, a court of equity would in all such cases assume jurisdiction. When one person sells property on credit, or loans money to another, confidence is reposed and a trust is entertained that the money will be paid by the debtor, and yet no case has gone so far as to hold, that it was such a trust, as gave to a court of equity jurisdiction under the head of trusts. If this were so, there would be no case where property or money was obtained on a credit, in which the court would not have jurisdiction. But on the other hand, when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust is thereby created, as authorizes the court of equity to entertain jurisdiction, to compel its application to the purposes of the trust. And the property may be pursued into the hands of all persons who have obtained it with notice of the trust, or where it has been converted into money, the money may be recovered, or where the money arising from the sale of trust property or funds, has been invested in other property, a court of equity will compel the trustee to account for the property thus acquired, and treat it in every respect as if it were the original trust property. In this case the bill alleges and one of the complainants swears, that money was delivered to Maurice Doyle to pay certain debts of Catherine Byrne, which he failed to so apply. If he failed to pay this money, there was such a breach of contract, as would have authorized Catherine Byrne to maintain an action for money had and received, and probably the creditors to whom the money should have been paid might have maintained the action. But according to no rule or

adjudged case that we are aware of, was it a trust fund, authorizing Mrs. Byrne or her representatives to recover as a trust fund. If it was a trust fund, it was such for the benefit of her creditors, and they would alone have had the right to pursue it in equity, and her representatives have no better or greater right than she held.

Again it was insisted that when the debentures were left in the safe which was left with Maurice Doyle, that he thereby became a trustee, and that they became a trust fund. This complainant swears that the debentures were placed by Mrs. Byrne in an iron safe, locked by her, and the keys kept in her possession, and the safe thus locked was left with him, and that he by false keys opened the safe, and abstracted the debentures, and placed in their stead false and forged debentures, for a similar amount. This evidence, if it is to be credited, shows the want of all confidence and trust in Maurice Doyle, as the safe containing these choses in action, was locked against him, and the keys retained from him. The debentures were not placed in his possession as such, but they were locked against him. She gave him no power over them, but manifestly intended that he should have none. And if he ever acquired the possession of them, it was by larceny, or at the least by a trespass, when he committed a forgery. And the acquisition of property by either larceny or trespass, it is believed, has never been held to create the relation of trustee, and *cestui que trust*. And this is what the charge in the bill, and the evidence in its support, if it were believed, amounts to, and nothing more. If such facts were held to create a trust, the court would have jurisdiction in every case of larceny, and trespass *de bonis asportatis*. We think if the evidence might be regarded as true, this was not a trust fund, nor was the money placed in his hands for the creditors, such a fund.

It was likewise insisted, that the court had jurisdiction because this money was bequeathed by Catherine Byrne, to Honora Teresa Murphy. It is undoubtedly true, that in cases of a bequest by a testator to a legatee, until the executor assents to the bequest, the only means of recovering it by the legatee, is by a resort to equity. In such a case, the legal title vests in the executor, for the purpose of first discharging the debts, and if not required for that purpose, then for the legatee, and the legatee by the will takes the equitable title to the bequest, subject to the debts against the estate. It is only in cases where the executor and legatee take under the same will, that the court has jurisdiction to decree the delivery or payment of the bequest. We have not been referred to any case, nor is it believed that any such exists, where it has been held, that where a tes-

tator bequeaths a debt due him to a legatee, that he may resort to a court of equity for its recovery. If Maurice Doyle had by his will bequeathed this money to this complainant, then she might have resorted to her bill against these defendants. By virtue of this bequest from her mother, she did not acquire the relation, to the administrator of Maurice Doyle, of a *cestui que trust.* She by that will became the executor if she obtained letters testamentary, and thereby became a creditor of Maurice Doyle's estate.

It was moreover urged, that this bill might be treated as a proceeding for the marshaling of the assets of Doyle's estate. Such bills are only entertained in cases where various creditors claim equitable liens, some in priority of others. Where some of the creditors have liens on the common fund and upon another fund, upon which the others have no lien; as where there exists two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund for satisfaction, but the others can only look to one of them; courts of equity exercise the authority to marshal the funds, and by this means enable the parties, whose remedy at law is confined to one fund only, to receive due satisfaction, on the principle of the maxim, "*sic utere tuo ut alienum non lædas*,"—use your own in such manner as not to injure another. In this case there are no facts or circumstances which can give the court any jurisdiction to marshal assets. There are not creditors or others having liens on different funds, requiring the interposition of the court. The facts only show the complainants to be creditors of this estate, and entitled to file and prove up their account, in the same manner as any other creditor. The remedy at law became adequate and complete, if Doyle ever appropriated the money and debentures to his use, and they must be left to seek their remedy in that form.

If a court of equity was to entertain jurisdiction in this case, upon either of the grounds upon which it is urged, it is believed that few if any cases could occur, where an estate was indebted, that it might not do so with equal propriety to enforce payment of such debts. And it would tend to destroy the effect of the 115th section of the statute of Wills, which has divided debts owing by estates of deceased persons, into classes. To treat such creditors as *cestuis que trust*, and a sufficient amount of the estate to discharge their claims, as trust funds for their discharge, would place all debts in the same class. Such we have no hesitation in saying is not the law.

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

Decree reversed.

In the matter of the settlement of the Estate of Seth S. Whitman, deceased.

APPEAL FROM BOONE.

Where a will directs that the debts of the testator shall be paid out of the avails of personal property unless other arrangements can be made; that a house shall be built; that certain legacies shall be paid his children at their majority, and for that purpose his executors may dispose of real estate; that his wife should have the control of all his property, until the youngest child shall become of lawful age, for the support, education and maintenance of the children; and directs how the property shall be divided: Held, That after the payment of the debts, and the reservation of sufficient estate to satisfy the specific legacies, the residuum should be under the control of the wife, until the event should occur, when, under the will, the remainder was to be distributed, and that the wife received not in fee, but as trustee.

The wife has not even a life estate in the remainder, but only had the power to control in the interim, before distribution was required, within the limit directed by the will.

Should the wife attempt to abuse the trust, a court of equity would restrain her, and compel a proper application of the estate.

Under such a will, the wife is not to account to the Probate Court, until the time fixed by the will for the distribution of the estate.

Money received on the sale of land, after payment of the debts, and the specific legacies due, after reserving enough for the other legacies, should be paid to the widow.

This was originally an appeal from the Boone County Court in probate, heard before I. G. Wilson, Circuit Judge, at February term, A. D. 1858, of the Boone Circuit Court. The finding of the County Court was affirmed, and an appeal was taken to this court.

Matilda Whitman, executrix of Seth S. Whitman, deceased, Samuel Bennett, executor of said Seth S. Whitman, Clarinda, Whitman, administratrix of Hiram Whitman, now deceased, Benjamin F. Lawrence, James B. Crosby and Asher E. Jenner, securities in the official bond of said Matilda Whitman, Hiram Whitman and Samuel Bennett, as executrix and executors of said Seth S. Whitman, appeared. The minor heirs of said Seth S. Whitman, namely, Julia Whitman and Charles N. Whitman, appeared by R. S. Molony, their guardian *ad litem*.

And thereupon the accounts presented before the said County Court for its action in this matter, being before this court for its action thereon, which said accounts are of record in this court, and were filed in the court below.

And thereupon the appellants in this proceeding, said James B. Crosby, Benjamin F. Lawrence and Asher E. Jenner, Samuel Bennett and Clarinda Whitman, by their attorneys, present to the court now here, a stipulation, in the words and figures following, to wit:

In the matter of the estate of Seth S. Whitman.

IN THE MATTER OF ACCOUNTING OF THE EX'RS OF S. S. WHITMAN, DECEASED. } Boone Circuit Court, February Term, 1858.

Appeal from the County Judge of Boone county.

It is stipulated in this cause that the accounts passed upon in the court below, shall stand as if the same had been proven and allowed in this court, so far as relates to the amounts found, both of debt and of credit, of said accounts.

It is further stipulated, that the will of Seth S. Whitman, the decree in the Circuit Court of Boone county, and all evidences of title and of conveyances, whether of record or not, and the copies of proceedings, receipts, etc., under the order of the court of Rock county, Wisconsin, which have heretofore been read and received in evidence in the court below, as well as all matters of written evidence heretofore presented and received in evidence in the court below, be received and read without objection to their competency, but reserving all questions as to the legal weight of said evidence. And that all the facts found in said County Court are to remain, and be considered the same in this court as in said County Court. It being hereby intended that this court is only to try and determine whatever questions of law arise in said cause.

Which, by consent of all parties, is received and read herein as evidence, subject to exceptions as to relevancy and materiality upon the taking and settling the accounts in this matter of each and every fact thereby found.

Thereupon there is read to the court, subject as aforesaid, the report and finding of the judge of the said County Court, and which is included in the record in this cause.

REPORT OF A. C. FULLER.

And now this day, to wit, August 17th, 1857, being the third Monday of August, and being a special term of the Probate Court in and for said county, comes on to be heard the report of Matilda Whitman and Samuel Bennett, surviving executors of said S. S. Whitman.

The consideration of said report, examination of vouchers for disbursements made by said executors, and hearing of testimony in relation thereto, coming on to be heard for determination, and it appearing to the court from inspection of the records of this court, that during the years A. D. 1852 and 1853, and prior to December 20, 1853, there was received by said Bennett, executor as aforesaid, in money due to the said estate, the sum of four thousand five hundred and thirty dollars and ninety-eight cents.

And it further appearing from an examination of said records, that there has been received by Hiram Whitman, as executor as

aforesaid, prior to December 20, 1853, the sum of seventy-three dollars and eight cents of money as aforesaid. And it further appearing from said records that Matilda Whitman, executrix, as aforesaid, had received, prior to December 20, 1853, money as aforesaid, the sum of nine hundred and fifty-nine dollars and three cents, exclusive of one hundred and sixty-two dollars and forty-one cents, which last sum is included in her report, as received from John H. Herbut, but which sum by agreement of parties is included in receipts by S. Bennett, and was received by her from said Bennett, and exclusive of the sum of seventeen hundred and fifty-seven dollars and fifty cents, paid by said Bennett to said Matilda Whitman, and included in her report filed December 20, 1853.

And it further appearing from the report of the said Matilda Whitman, of May 12th and June 18th, 1857, and from the testimony of witness, and agreement of parties, that since said 20th December, 1853, said Matilda Whitman, as executrix as aforesaid, has received the additional sum of two thousand six hundred and sixty-one dollars and eighty-four cents of personalty, belonging to said estate, making the total amount received from the personal estate of said testator, as will be seen from said records, eight thousand two hundred and twenty-four dollars and ninety-three cents.

And it further appearing to the court from the evidence, that at the special term of the Boone Circuit Court, A. D. 1853, in chancery sitting, such proceedings were had, that said executors, by a decree of said court, and in pursuance of the powers contained in the last will and testament of said S. S. Whitman, were authorized among other things to sell and convey certain real estate, mentioned and described in said decree, of which said S. S. Whitman died seized, and out of the proceeds of such sales, to pay the debts of said estate, and apply what might be necessary for the support and maintenance of the said Matilda Whitman, and the support, maintenance and education of the children of the said S. S. Whitman.

And it further appearing that in pursuance of such powers, contained in said will and testament, and of such decree, the said executors have from time to time sold and conveyed a part or the whole of said lands, and said Matilda Whitman has realized from such sales the sum of five thousand one hundred and fifty-three dollars and fifty cents.

It further appearing to the court that said S. S. Whitman, at the time of his death, held a bond for conveyance to him of valuable real estate, in the county of Rock and State of Wisconsin, upon which bond there was due, or became due after the death of said Whitman, several hundred dollars, which sum was

paid to the person or persons entitled thereto, by said executors, out of money belonging to said estate, and has been credited to them in their executor's account in this court. That subsequent to said Whitman's death, a conveyance was made, and the title to said lands was taken in the name of the said Matilda Whitman, and the whole or a portion thereof conveyed by her, soon after, to the minor children of said Seth S. Whitman. That in the year 1853, an application was made on behalf of said children, by their next friend, to the Circuit Court of said Rock county, in equity, for the sale of the interest of said children in said lands, and that such proceedings were thereupon had in said court, that by a decree of said court, the interest aforesaid to a portion of said lands, was sold, and the proceeds thereof directed to be paid over to said Matilda Whitman, as general guardian of said children, under appointment made in this court previous thereto.

That at said sale, R. S. Molony became the purchaser of a portion of said lands, and paid therefor the sum of twenty-four hundred and fifty dollars. One thousand eight hundred and thirty-seven dollars and fifty cents of which sum was, June 24, 1854, receipted by said Matilda Whitman as general guardian of said children as aforesaid, to John R. Pease, who was by said court appointed special guardian of said infants, and directed to pay the same over to her as aforesaid. That there was not, in fact, any money paid by said Molony to said special guardian for said land, but a conveyance made by said Molony to said Matilda Whitman of one hundred acres of land in this county, at two thousand dollars, and the remaining sum of four hundred and fifty dollars paid to her by said Molony in railroad stock. That another portion of land was purchased by Nathaniel Crosby, for the sum of sixteen hundred dollars. And that on account thereof, said Matilda Whitman, as general guardian as aforesaid, on the 12th of January, 1854, receipted to said Pease as aforesaid, the sum of twelve hundred and fifteen dollars and thirty-three cents. That there was not, in fact, any money paid by said Crosby for said land, but that said Crosby, on the 20th December, 1853, in consideration thereof, and of the further sum of two hundred dollars paid him by Matilda Whitman, conveyed to her certain lands in Boone county, subject, however, to a mortgage thereon, held by John Saxton, of four hundred dollars. That other portions of lands in Rock county, have been sold to different persons under said decree, and that said Pease, special guardian as aforesaid, has paid over to Matilda Whitman under said decree, $264.38, on account of sale to J. D. Cole; $40.12, on account of sale to O. J. Dearlow, and $20.62, on account of sale to J. W. Willard, making the

total amount paid by said persons, on account of said sales, $4,375.12, of which sum, $3,377.95 was receipted by Matilda Whitman aforesaid.

It further appears to the court that said Matilda Whitman has purchased other real estate in Boone county, taking the title in her own name, and incumbered a part of the same, as also a part of the land thus conveyed to her by Nathaniel Crosby as aforesaid, by judgments and mortgages to the amount of several thousand dollars, and on the 16th of January, 1857, conveyed such portions thereof as she had not previously sold, to Julia and Charles Whitman, minor children as aforesaid, and that the incumbrances by mortgage aforesaid, as appears by her report of June 18, 1857, are as follows: One to L. W. Pray, of principal, $1,000; one to Mr. Fox, $300, and one to Tompkins, of $600.

And it further appearing to the court that said Matilda Whitman has received on account of sales made of portions of lands thus purchased of said Crosby, the sum of two thousand seven hundred and ten dollars and seventeen cents, and the sum of seven hundred and thirteen dollars from sales of wood cut from lands thus purchased of R. S. Molony and Nathaniel Crosby.

And it further appearing to the court that neither Samuel Bennett nor Hiram Whitman, nor Matilda Whitman, in her character as executrix, were parties to the suit or proceeding in the Circuit Court of Rock county aforesaid, and that neither of them as executors had executed any conveyance of said lands in Rock county to the purchasers thereof.

And it further appearing to the court from the records aforesaid, that on the 18th day of February, 1853, there was allowed by this court to Samuel Bennett the sum of $192.17, for services and disbursements as such executor; and on the 14th day of December, 1853, the further sum of two hundred and seventy-eight dollars and ninety-four cents. And that on the 20th December, 1853, there was allowed by this court to Hiram Whitman, for services and disbursements as executor, the sum of ninety-eight dollars and sixty-three cents. And that on the 20th December, 1853, there was allowed by this court to Matilda Whitman, as executrix, on account of debts paid by her against said estate, and specific legacies ordered to be paid, and by her paid, the sum of sixteen hundred and thirteen dollars and forty-six cents; and on the 12th and 13th May, 1857, the further sum of fifteen hundred and forty-four dollars and eighty-four cents, on account of debts and legacies as aforesaid by her paid; and on the 18th June, 1857, the further sum of six hundred and fifty dollars and ninety-eight cents, on account of debts as aforesaid by her paid.

And it further appearing to the court now here, from vouchers produced and testimony taken, that the said Matilda Whitman has expended the further sum of five hundred and twelve dollars and sixty-four cents on account of debts due against said estate, which sum is hereby allowed against said estate.

And it further appearing from vouchers produced and evidence introduced, that said Samuel Bennett has expended the further sum of twenty-five hundred dollars and two cents on account of debts paid by him against said estate, which sum is hereby allowed against said estate.

And it further appearing to the court, from the evidence, that there has been expended by said executors in the support, maintenance and education of the children of said S. S. Whitman, and the support and maintenance of Matilda Whitman, since the death of said S. S. Whitman, out of the personal estate and the proceeds of the sales of real estate made under the decree of the Boone Circuit Court as aforesaid, the sum of four thousand one hundred and ninety-six dollars and ninety-eight cents, it is ordered and adjudged that the same be and is hereby allowed against said estate. And, as it appears from the evidence that the proceeds of such sales last above mentioned were in fact received by said Matilda Whitman, and the said sum of $4,196.98 was expended by her in the support of said family, the said sum of $5.153.50 is placed to her debit, and said sum of $4,196.98 is placed to her credit. It is further ordered and adjudged that the proceeds of sales of lands in Boone county, amounting to $2,710.17, appearing in said Matilda Whitman's report of June 18, 1857, be and the same is hereby rejected. Also, the proceeds of sales of lands in Rock county, Wisconsin, in said report. The proceeds of sales of wood, amounting to $713, contained in said report, and $1,900, borrowed. Pray and Tompkins, mentioned in her said report, are hereby rejected from executor's account. It is further ordered and adjudged, that the item of one hundred and twenty dollars, charged in said report of Matilda Whitman, of June, 1857, as paid to John Saxton, as interest on mortgage, be and the same is hereby rejected.

The last will and testament of said Seth S. Whitman, is as follows:

I, Seth S. Whitman, of the town of Madison, county of Dane, and State of Wisconsin, being of sound mind and memory, viewing the uncertainty of life, and being desirous of arranging my secular concerns preparatory to my coming dissolution, do ordain and declare this my last will and testament:

1st. That I will my soul to God, who gave it, and that my body be decently interred.

2nd. That my debts be by my executors paid, out of the avails of my personal property, unless there can be some other arrangements made.

3rd. That after my just and legal debts are paid, that there be built on my real estate, at Monteray's addition to Janesville, or land laying south of it, a residence, and other suitable buildings convenient, for a residence for my family.

4th. That my beloved son, Ogden H. Whitman, be paid, out of the avails of my property, five hundred dollars, when he shall arrive at the lawful age of twenty-one years, it being willed to him by his grandmother, Anna Nicholas, and now remaining in my possession.

5th. That my beloved son, C. Colden Whitman, and daughter, Julia H. Whitman, and Charles N. Whitman, be severally paid the sum of five hundred dollars each, when they shall severally arrive at the age of twenty-one years.

6th. That my executors shall, as my children at lawful age, dispose of, if necessary, any of my real estate for the payment of the several sums willed to them.

7th. That my beloved wife, Matilda Whitman, shall have the control of all my property until my youngest surviving child shall become of lawful age, for their support, education and maintenance.

8th. That my executors pay to the following named benevolent societies, the following sums, (viz:) Three hundred dollars to the American and Foreign Bible Society; three hundred dollars to the Baptist Home Missionary Society; and three hundred dollars to the Baptist Missionary Union, to be paid as soon as my debts are settled, and a house and other convenient buildings are made for the accommodation and convenience of my family.

9th. I will and bequeath to my beloved niece, Eliza A. Brown, one village lot, in the addition of Monteray to Janesville, to be selected by my executors, valued at seventy-five dollars.

10th. That after my youngest surviving child becomes of lawful age, the residue of all my property at that time, be divided as follows, (viz:) To my beloved wife, Matilda Whitman, I will and bequeath one-third of my property, for her support and maintenance during her natural life, at her decease to be divided between my surviving children, or given for missionary purposes, at her discretion; and the other two-thirds of my property to be equally divided between my son, C. Colden Whitman, Julia H. Whitman, and Charles N. Whitman, provided at the discretion of my executors it shall be proper, it may be equally divided between Ogden H. Whitman, C. Colden Whitman, Julia H. Whitman, and Charles N. Whitman.

11. I do hereby constitute and appoint Samuel Bennett and Matilda Whitman, executors of this my last will and testament.

In witness whereof, I have hereunto set my hand and seal, at Madison, this 19th day of December, in the year of our Lord 1851.

SETH S. WHITMAN. [SEAL.]

In presence of CHARLES LORD,
JOSEPH GRAY.

CODICIL.

I do hereby, of my own free will, and being of sound mind, make this further addition to the above will: I give and bequeath that portion of my property which would fall to my wife in the event of its division before her death, to the above named Baptist Benevolent and Missionary Societies, in case of her death before such division; provided always that if my executors think the sum alluded to in this codicil should be needed by the children, then I give the same to them, at their discretion. And I also hereby appoint my brother, Hiram Whitman, executor, in addition to the executors above named.

In testimony whereof, I have hereunto set my hand and seal, on this 29th day of December, in the year of our Lord eighteen hundred and fifty-one.

SETH S. WHITMAN. [SEAL.]

Subscribed in presence of
CHAS. LORD,
CORA WILSON.

W. T. BURGESS, for Appellants.

B. C. COOK, and S. WILCOX, for Appellees.

WALKER, J. The testator, Seth Whitman, died after having made his will, leaving a large amount of real and personal estate. By his will, Matilda Whitman his widow, Samuel Bennett, and Hiram Whitman, were appointed executors, and qualified as such. They presented an application to the Circuit Court of Boone county, for authority to sell real estate, for the payment of debts, the support, education and maintenance of the family, and to obtain a construction of the will, and be discharged from the erection of a dwelling-house for the use of the family, as was required by the provisions of the will. The court, on the hearing, authorized the sale of all or so much of the real estate, as might be required for the purposes specified. Under this decree, sales were made to an amount between five and six thousand dollars. This proceeding was instituted in the Probate Court of Boone county, for an account of the proceeds

of the sale of the real estate, as well as of the personalty of the estate. And upon the adjustment in the Probate Court, there was found to be in Matilda Whitman's hands, seventeen hundred and eighty-seven dollars and seventy-seven cents, for which the court refused to allow her a credit. From this proceeding, an appeal was prosecuted to the Boone Circuit Court, and upon a trial in that court, the finding of the Probate Court was affirmed, and the court found that the money in her hands, was liable to be accounted for, and paid over under the order of the Probate Court, for its distribution. From the judgment of the Circuit Court, Bennett and Matilda Whitman bring the cause to this court, by appeal.

And for a reversal of the judgment of the Circuit Court, they insist that under the provisions of the will, the widow was not liable to account for the residue of the estate, after the payment of the debts and specific legacies, until the youngest child attained its majority. To determine this question, it may be proper to give a construction to a portion of the will, under which they have been acting, and by the provisions of which, their duties and rights must be governed. The questions presented by the record, arise on the following provisions of the will:

"2nd. That my debts be by my executors paid, out of the avails of my personal property, unless there can be some other arrangements made.

"3rd. That after my just and legal debts are paid, that there be built on my real estate, at Monteray's addition to Janesville, or land laying south of it, a residence, and other suitable buildings, convenient for a residence for my family.

"4th. That my beloved son, Ogden H. Whitman, be paid, out of the avails of my property, five hundred dollars, when he shall arrive at the lawful age of twenty-one years, it being willed to him by his grandmother, Anna Nicholas, and now remaining in my possession.

"5th. That my beloved son, C. Colden Whitman, and daughter, Julia H. Whitman, and Charles N. Whitman, be severally paid the sum of five hundred dollars each, when they shall severally arrive at the age of twenty-one years.

"6th. That my executors shall, as my children at lawful age, dispose of, if necessary, any of my real estate, for the payment of the several sums willed to them.

"7th. That my beloved wife, Matilda Whitman, shall have the control of all my property until my youngest surviving child shall become of lawful age, for their support, education and maintenance.

"10th. That after my youngest surviving child becomes of lawful age, the residue of all my property at that time, be divided as follows, (viz:) To my beloved wife, Matilda Whitman, I will and bequeath one-third of my property, for her support and maintenance during her natural life, at her decease to be divided between my surviving children, or given for missionary purposes, at her discretion; and the other two-thirds of my property to be equally divided between my son, C. Colden Whitman, Julia H. Whitman, and Charles N. Whitman, provided at the discretion of my executors it shall be proper, it may be equally divided between Ogden H. Whitman, C. Colden Whitman, Julia H. Whitman, and Charles N. Whitman."

It will be perceived, that the second clause of the will requires that his executors should pay his debts, out of the avails of his personal property, unless some other arrangement could be made. But what that arrangement should be, we deem it unnecessary to determine in this case. By the third clause, he requires that they should erect a dwelling-house for the use of his family, as a residence, after the payment of his debts. This would of necessity have to be done with the estate in the hands of his executors, and he thereby gave them power to apply the necessary amount of the funds of his estate for that purpose. By the fourth and fifth clauses, he gives specific legacies to his children, and by the sixth, empowers his executors, if it shall be necessary, when they become entitled to receive these legacies, to sell any portion of his real estate for the purpose of satisfying them. The duty of paying his debts, and these legacies are imposed upon the executors. And for that purpose they should at all events retain undisposed of, a sufficient amount of the testator's real or personal estate, to pay and discharge them.

By the seventh, he directs that his wife shall have the control of all his property, until his youngest child shall become of lawful age, for their support, education and maintenance. By this provision he could not have intended to place in her hands the whole of his estate, because he had already directed his executors to apply so much of it, as should be required in the payment of his debts, and to discharge the specific legacies previously bequeathed. The amount necessary for those purposes, had already been specifically appropriated, and from the language employed, he could not have intended to revoke those provisions. And if by this latter clause, all of his property was placed under her control until the majority of the youngest child, it would be an attempt to delay the payment of his debts, and would postpone the payment of these specific legacies, until that time. The only reasonable construction that it can receive,

is that after the payment of the debts, and the reservation of enough of his estate to discharge the specific legacies, the residuum of his estate should then be under the control of his wife, until the event should occur, when the remaining portion should be distributed, as directed by the will. And when she received it under the will, it was not in fee, but only as a trustee for the uses specified. She did not by the will, take even a life estate in this remainder of the property, but only the power to control it, for the purposes named, during the term or period that should intervene, before the distribution is required. But when she became invested with this remaining portion of the estate, it was with the power to control it for the purpose of supporting, educating, and maintaining the children, until they should respectively become of age. There is no intention manifested by the provisions of the will, to give her the absolute unconditional control of the property, but on the contrary the power to control it, is limited to the objects specified, and she is not authorized to go beyond those purposes, but within the limit prescribed, she may exercise her discretion. The manner or extent of the support, education and maintenance is not prescribed; but if she were squandering and misapplying the fund, a court of equity would restrain her, and compel its application to the purposes of the trust declared in the will. The testator has not required her to account to the probate court for the application of the fund, but by the will it is removed from the control of that court, and placed within hers, and the probate court has no power to require her to account for this fund, before the time arrives by the provisions of the will, for its distribution. Then when this money was received on the sale of the land, it formed a portion of the estate, and after the payment of the debts, and specific legacies that might then be due, the executors should have paid the remainder, after reserving enough to pay the remaining legacies, over to the widow, and her receipt of the remainder would discharge them to that extent. The court below erred in the judgment rendered, holding that the widow was liable to pay this money on an order of distribution, as the fund is not liable to such an order until the period arrives for a final distribution of this residuum, as required by the will.

The judgment is reversed.

Judgment reversed.

Rollin G. Parks, Appellant, *v.* Homer Holmes, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

A plea of failure of consideration to an action upon a note, should state particularly in what the failure consisted. If for mason-work imperfectly done, the character and kind of imperfection must be set forth. General allegations are not sufficient.

A defendant who has the benefit of a question under one plea, that he would have had under another, to which a demurrer has been sustained, cannot complain.

A party has not the right to continue to present the same defense by different pleas; when this is done, all but one may be struck from the files.

This was an action of assumpsit, brought upon a promissory note, by Holmes against Parks, in the La Salle County Court. The declaration contained two counts.

The first count alleges that the defendant on, to wit, the 28th day of October, 1857, made his note in writing, by the name of R. G. Parks, pr. M. Burns, and delivered the same to William Hochshied and Joseph Schmahl, and then and there promised the said William Hochshied and Joseph Schmahl, by the name of Hochshied & Schmahl, the sum of $200, for value received, ninety days after date; and that said William Hochshied and Joseph Schmahl, by the name of Hochshied & Schmahl, indorsed the note to plaintiff.

2nd. The common counts.

The defendant filed three pleas to this declaration:

1st. The general issue to the whole declaration.

2nd. Plea of total failure of consideration.

3rd. A plea to the first count—that the consideration of the note in said first count has wholly failed in this, to wit: That the sole and only consideration of said promissory note was the work and labor of said Hochshied and Schmahl, before that time done and performed by them for said defendant, in and about certain masonry which said Hochshied and Schmahl had contracted and agreed to do for the defendant, and that said work was done in so unskillful and unworkmanlike a manner that the same became and was wholly useless and of no value to the defendant; and he avers that the said note was assigned and transferred by said Hochshied and Schmahl to the said plaintiff after the same became, by the terms thereof, due and payable; and concluded with a verification.

The plaintiff filed a similiter to the general issue.

Also a general demurrer to the second and third pleas of the defendant, assigning for cause, that the defendant, in pleading failure of consideration, in said second and third pleas, of the note declared on in plaintiff's declaration, has not set forth with

the certainty required, the consideration for which said notes were given, and that said second and third pleas are vague and uncertain.

The defendant joined in demurrer.

After the argument the court overruled the demurrer as to the second plea and sustained it to the third plea.

The defendant abided by the demurrer.

On same day the plaintiff filed two replications to the second plea:

1st. That the note was not assigned after it became due.

2nd. That the consideration had not failed in manner and form as defendant, etc., had alleged.

The cause was tried by the court, and judgment rendered for plaintiff.

Chumasero & Eldredge, for Appellant.

C. Blanchard, for Appellee.

Walker, J. The assignment of errors questions the correctness of the decision of the court below, in sustaining a demurrer to appellant's third plea. It was to the first count, and was intended as a plea of failure of consideration. It alleged that the sole and only consideration of the promissory note declared on, was work and labor performed by Hochshied and Schmahl before the giving of the note, for the defendant, in and about certain masonry which they had contracted to do for the defendant, and that the work was performed in so unskillful and unworkmanlike a manner that the same became and was wholly useless and of no value to the defendant; and that the note was assigned and transferred by Hochshied and Schmahl, the payees, to the plaintiff, after the same became, by the terms thereof, due and payable. A plea that the whole consideration of a note has failed must show wherein it has failed, or it will be insufficient. It, like all other pleas which set up affirmative matter, to be sufficient must be certain to a common intent. It should be direct and positive in the averment of facts, and not state mere conclusions. The very object of a special plea being to apprise the plaintiff of the grounds of defense, it should state all the material facts constituting that defense clearly and distinctly, so as to inform the opposite party of what he has to meet on the trial. This degree of certainty has always been required by the practice of the courts of this State, and the decisions of this court have been uniform in requiring the plea to particularly disclose the manner in which the consideration has

failed; and that a mere averment that it had failed, or that it was for property or labor which was insufficient as a consideration, is not sufficiently certain.

The plea under consideration is defective in not disclosing wherein the consideration had failed. It alleges that the note was given in consideration of masonry work which "was done in so unskillful and unworkmanlike a manner that the same became and was wholly useless and of no value to defendant." It does not state in what the unskillfulness consisted, whether from defective materials used, unskillfulness in putting them together, or the performance of the labor at an improper time. But it leaves it to conjecture whether one or another of these, or other facts, would be relied upon to establish the defense.

It was urged that as the demurrer was joint to both pleas, that the court erred in sustaining it to the one and overruling it to the other. The second plea presented to the whole declaration the same defense that the third did to the first count, and was equally defective, and the demurrer should likewise have been sustained to it. But the defect in the second plea was waived by filing replications and going to trial.

The appellant, by his second plea, obtained all that he could have done under his third plea. By the second plea he was permitted to introduce all matters of defense which he could have done under the third. And even if the third plea had been sufficient, having under the other plea received all the benefit he could have had by his third plea, he would have no right to complain. A defendant has no right to continue to present the same defense by different pleas. The whole object of pleading is answered when a particular defense is set up by one plea, and nothing beneficial can be attained by its repetition in the same record. And where two or more pleas, presenting in all respects the same defense, are interposed, all but one should be stricken from the files, as they only uselessly encumber the record.

The judgment of the court below is affirmed.

Judgment affirmed.

Charles O. Boynton and George Walrodt, impleaded with Hiram E. Whitney, Appellants, *v.* Albert G. Robb *et al.*, Appellees.

APPEAL FROM DE KALB.

If the complainant to a bill upon which an injunction has been granted is corruptly induced to dismiss his bill, so that the sureties in the injunction bond may become liable, an action against them on the bond will not be sustained.

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

W. T. Burgess, for Appellants.

S. A. Hurlbut, for Appellees.

Caton, C. J. This was an action upon a bond given to obtain an injunction, in the usual form. The declaration avers, that the injunction had, by order of the court, been dissolved, and that the judgment enjoined had not been paid. To this declaration, Waldrodt and Boynton, the securities in the injunction bond, filed eight pleas; the two last of which are as follows:

"And for a further plea in this behalf the said defendants say *actio non*, because they say that on the 11th day of June, A. D. 1857, at Sycamore, in the county of De Kalb, the said Whitney, having good ground for setting aside the judgments and restraining the collection thereof, under executions issued thereon, which are in said declaration set forth, and being then and there a wholly irresponsible person, the said plaintiffs fraudulently combined and confederated with the said Whitney to defraud and injure these defendants in the premises, by procuring him to consent to a dismissal of said suit in chancery and dissolution of said injunction, thereby to render these defendants liable, upon said bonds, for the payment of said judgments, and to that end it was corruptly agreed between them, without the knowledge or consent of these defendants, that if the said Whitney would consent to dismiss his said bill, and allow said injunction to be dissolved, they would, among other things, forbear and extend for the space of one year, to the father of the said Whitney, the time of payment of a large debt due from the old man Whitney, father of Hiram E. Whitney, to the said plaintiffs, to wit, the sum of fifteen hundred dollars, to secure which the old man Whitney had conveyed, by deed in trust, a certain eighty acre lot, situated in the town of

Pampas, in said De Kalb county, in which said conveyance the said plaintiffs were the *cestuis que* trust, and that accordingly and in pursuance of said corrupt agreement, the said plaintiffs did forbear, or cause to be forborne, and day of payment given to the said old man Whitney for the space of one year, upon the debt and liability aforesaid, due from said Whitney to the said plaintiffs, and said Hiram E. Whitney did dismiss said bill and allow said injunction to be dissolved, and so these defendants say that the said order of the said Circuit Court, dismissing said bill and dissolving said injunction, was obtained by fraud by the said plaintiffs, and is void and of no effect by reason thereof, as to these defendants, and this they are ready to verify; wherefore they pray judgment," etc.

"And for a further plea in this behalf, the defendants say *actio non*, because they say that on the 11th day of June, A. D. 1857, at Sycamore aforesaid, the said Whitney having good grounds for setting aside the judgment and restraining the collection thereof under executions issued thereon, which are in said declaration set forth, and being then and there a wholly irresponsible person, the said George A. Wood, the person for whose use and benefit this suit is brought, and in whom the equitable interest is, and then and there was, fraudulently combined and confederated with the said Whitney to defraud and injure these defendants in the premises, by procuring him to consent to a dismissal of said suit in chancery and dissolution of said injunction, thereby to render these defendants liable upon said bond for the payment of said judgments, and to that end, it was corruptly agreed between them without the knowledge or consent of these defendants, that if he, the said Whitney, would consent to dismiss his said bill and allow said injunction to be dissolved, that they would, among other things, forbear and extend the time of payment for one year after the same should become due and payable, to one William, father of the said Hiram E. Whitney, a certain debt due from the said William Whitney, the equitable or legal interest to which was then and there in the said George A. Wood; said debt was for the sum of $1,500, and which had fallen due on the 2nd day of June, A. D. 1857, and to secure the payment of which debt the said William Whitney had conveyed, in trust, to one William B. Hovey, the following described land and premises, situate in the county of De Kalb, and State of Illinois aforesaid, to wit: north half of the north-east quarter of section twenty-eight, in township forty north, range five east; also the north-east quarter of the north-west quarter of section twenty-three, in the same range; and that accordingly and in pursuance of said corrupt agreement, the said Wood did forbear, or cause to be

forborne, and day of payment given to said William Whitney, upon said debt and liability due from him as aforesaid, and said Hiram E. Whitney did dismiss said bill and allow said injunction to be dissolved, and so these defendants say that the said order of the said Circuit Court, dismissing said bill, was obtained by fraud, by the said Wood, and is void and of none effect by reason thereof, as to these defendants, and this they are ready to verify; wherefore they pray judgment," etc.

A demurrer was sustained to these pleas.

The law cannot allow parties to recover a judgment, who have become apparently entitled to it by the perpetration of such a fraud as is here confessed. It is the fraud of the plaintiffs below and not the fraud of the principal in the bond, of which the sureties have a right to complain. No matter from what motive the complainant in the injunction suit may have dismissed it, so as it was not brought about by improper inducements by the defendants in that suit, the sureties could have no cause to complain. The sureties took the risk that the complainant had good cause for the injunction, and that he would conduct it in good faith, but they did not undertake that the other parties would not corrupt and bribe him to dismiss a good cause of complaint. The complainant was himself irresponsible, so that a dissolution of the injunction could not hurt him very materially, while it would enable the judgment creditors to collect the amount of the judgment of the sureties. In this state of things they bribe the judgment debtor to dismiss his bill, to enable them to fix the liability upon the sureties. To allow such a fraud and conspiracy as this to triumph, shocks the moral sense of every upright mind, and would be a reproach to the law. Suppose the defendants in the injunction suit had bribed the complainant's attorney to dismiss the bill; suppose a party should conspire with and bribe an agent or partner of another, to do an act for his benefit, would not a court of law crush the attempt of the party to reap the benefit of his corrupt practices? If it would not, we confess to an ignorance of its principles and its spirit. The old and oft repeated principle, that a party shall not take advantage of his own wrong, applies here, or there never was a case for its proper application. We are satisfied the court below, in the hurry of the circuit business, did not fully understand the extent of the averments of these pleas. The judgment must be reversed and the cause remanded.

Judgment reversed.

Breese, J. I do not concur in this opinion. The defendants, in neither of the pleas, allege any damage to them by reason of the agreement to dissolve the injunction, even if it were a corrupt

agreement. And although a good cause for an injunction might once have existed, it does not follow, nor is it so alleged in the pleas, that it did exist at the time of the agreement to dismiss the bill. If the defendants were not damaged by the dismissal, and they do not aver they were, they should not be permitted to evade their just responsibility.

Thomas Speer, Appellant, *v.* Silas B. Cobb, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The payment of a part of a sum of money which is due, does not create an equity in favor of the payor, to entitle him to an indefinite delay, for the payment of the balance.

On October 9th, 1855, Harrison P. Heacox mortgaged a lot of ground in Chicago, to Silas B. Cobb, for $13,380, payable in installments: One for $3,880, payable in one year; another for $2,640, payable in two years; another for $2,480, payable in three years; another for $2,320, payable in four years; and the last for $2,160, payable in five years from the date of said mortgage respectively. The first note was paid. After the second note became due, Isaac Speer paid $1,500 to the said mortgagee, upon said second installment. After the execution of said mortgage, Isaac Speer became the owner of the property in question, and afterwards assigned the property in question, for the benefit of his creditors, to Thomas Speer, the complainant below and plaintiff in error here. The bill was filed to enjoin the sale of the property in question, for residue of the second installment. An injunction was granted, but upon the hearing the bill was dismissed.

Thomas Speer appealed.

The question presented by this record is, whether or not the payment of $1,500 upon the second installment, is a waiver of the forfeiture and power of sale, vested by the terms of the conditions aforesaid in the appellee.

R. S. Blackwell, for Appellant.

S. B. Perry, for Appellee.

Caton, C. J. The second note, for $2,640, fell due in October, 1857. A few days after its maturity, the complainant paid the defendant $1,500 on that note, and as he avers, Cobb agreed to postpone the balance of that note indefinitely. In the succeeding April, after six months delay on the balance of the note, Cobb published a notice that he would sell the premises in pursuance of a power of sale contained in the mortgage, to satisfy the balance due on that note, and also the amount due on the three other notes secured by the mortgage, which by its terms, were to mature upon the failure to pay any of the notes or the interest thereon, at the respective times when they should mature. And this bill was filed to enjoin this sale, on the pretence of equity, arising on the fact of the payment of $1,500 on the second note, and the indefinite promise of forbearance of the balance due on that note. We confess ourselves unable to see any particular equity arising from either of these causes. There was nothing so extraordinarily meritorious in paying $1,500 on the 13th of October, when it was his duty to have paid $2,640 on the 9th of October. In ordinary dealings among ordinary men, the general conclusion would be that he had come far short of his moral, as well as legal duty, instead of having gone so far beyond his duty as to entitle him to particular consideration in a court of equity. Nay more, at the time he paid the $1,500, it was his duty to have paid not only the whole of the second, but also the three subsequent notes, which, by the terms of the contract, became due and payable on the failure to pay the second note when it matured. Thus far we cannot discover the extraordinary merit on which this equity is supposed to arise. Then is there anything in the promise alleged to have been made by Cobb, at the time he received the $1,500, that he would postpone the balance? This is the language of the bill. It alleges that the complainant "paid to the said Silas B. Cobb, upon said second note above recited, the sum of one thousand five hundred dollars, which said sum of money was then and there accepted and received by said Silas B. Cobb, in part satisfaction of the said last mentioned promissory note, and the said Silas B. Cobb, then and there, in consideration of said payment, and of the promises of the said Thomas Speer, to pay the residue of the said last mentioned note, the said Silas B. Cobb extended indefinitely the time of payment of said residue of said principal and interest." What then was the purport of this promise, waiving the question of consideration, and admitting it to be binding? He promised to extend it without defining the period to which he would extend it. It was equivalent to saying that he would extend it some time, but would reserve the right to himself to determine how long he would extend it. While he agreed to give some indul-

gence, he bound himself to no particular time. He certainly did not mean to say that he would extend the time forever. And if the time of extension was ever to terminate, he reserved the right to fix that time. It is like the case of *Doyle* v. *Teas*, 4 Scam. R. 202, where we held that a promise to pay "a certain sum" was fulfilled by paying a nominal amount. It was equivalent to *some money*. So here. The most that can be made of this promise, was that he promised to give some time on the balance. He did so. He waited six months, and then having received no further payments, he commenced proceedings to foreclose his mortgage, and the delinquent debtor now insists that he has a right to have the proceedings stayed by a court of equity. The court below dissolved the injunction, and we think very properly.

The decree must be affirmed.

Decree affirmed.

Strong H. Earll, for the use of Charles G. Patten, Plaintiff in Error, *v.* James Mitchell *et al.*, Defendants in Error.

ERROR TO STEPHENSON.

The question of fairness in the purchase of bills of exchange, as to whether the transaction was one of fair business, or designed as a cloak for usury, having been left to the jury, under proper instructions, their finding will not be interfered with.

This was an action for money had and received, brought by the plaintiff in error against the defendants in error, to recover back excess of usurious interest over the legal rate, alleged to have been taken by the defendants, of the plaintiff, during the years 1854, 1855 and 1856, and was tried by a jury, before Sheldon, Judge, at December term of Stephenson Circuit Court, A. D. 1858.

The plaintiff declared on the common counts, for money had and received by the defendants to plaintiff's use. Defendants pleaded general issue—payment and set-off.

It appeared that during a period of time extending from the 12th day of January, A. D. 1854, to the 29th day of March, A. D. 1856, Strong H. Earll was engaged in the business of buying and forwarding produce from Freeport, in Stephenson county, to Chicago, and during the same period, at the same place, the defendants were brokers, and were engaged in the

business of loaning money, buying and selling exchange, and receiving deposits. That during the time the plaintiff was engaged in the said business, he obtained all his money accommodations of the defendants in error, the whole amounting during that period, to some three hundred thousand dollars. That these accommodations were obtained by Earll of the defendants, by drawing, at frequent and short intervals, his bills of exchange in favor of the defendants, on one A. R. Williams, of Chicago. That the number of these bills so drawn were some two hundred and sixty, and in amounts ranging from five hundred to two thousand dollars. That a few of the bills were drawn at sight, and the remainder ranging from five to thirty days.

The defendants, at the time the drafts were drawn, placed to the credit of Earll, on their books, and on the pass-book of Earll, the amount of the drafts, less one-fourth of one per cent. on sight drafts; on five day drafts, less one-half per cent.; ten days, three-fourths of one per cent.; fifteen days, one per cent.; twenty days, one and one-half per cent., and thirty days, two per cent.; and that the amount thus placed to his credit was what the defendants gave for the drafts.

The drafts were all taken up, and fully paid to defendants at maturity.

This action was brought to recover the excess over the legal rate of interest, which the defendants in error had received on the payment of said drafts—the plaintiff in error claiming that the transaction was a borrowing and loaning of money, and the defendants claiming,

1st. That they purchased the drafts, and if not a purchase, then,

2nd. That they, by the custom of trade, had a right to charge the excess over and above the legal rate of interest as commission.

When Earll wanted money he would apply to the defendants to see if they could accommodate him. If they could, a draft on A. R. Williams was made out in the office of the defendants, payable to the defendants, and when delivered to them the defendants credited him with the avails of the drafts on their own books, and likewise on the pass-book furnished by the defendants to the plaintiff. The avails of the drafts were the amount placed to Earll's credit on the books. The amount placed to his credit on the drafts was the face of the drafts, less the discount.

The rate of exchange on Chicago, during the period of time covered by these transactions, varied from par to one-half per cent. premium.

MEACHAM & BAILEY, for Plaintiff in Error.

J. MARSH, and F. C. INGALLS, for Defendants in Error.

CATON, C. J. The question which we shall consider in this case, is whether this was a loan of money or the purchase of bills of exchange. We do not consider it at this time a question open to dispute, that a party may purchase a sight or time bill of exchange on another place, even within the same State, of either the drawer or indorser of the bill, and pay therefor any price, which the parties may agree upon. But such a transaction is always open to inquiry, as to whether the pretended purchase of the bill of exchange was merely colorable and really designed to cover up a usurious loan of money or not. And when such is found to be the case, it is the duty of the courts to strip it of its false coloring and treat it according to its real character, as an usurious transaction. Here the plaintiff claims there was a loaning of money, and a reservation of more than lawful interest, and that the bills of exchange were taken as security for the loans, while the defendants insist, that they purchased the bills of exchange on Chicago in good faith, and that they paid therefor, by passing to the credit of the plaintiff on their books, the face of the bills, less the usual and ordinary exchange on such bills. On its face the transaction was a sale and purchase of the bills, and the proof shows that the rate of exchange charged and discounted, or deducted from the face of the bills, was no more than the usual and ordinary rates for such bills, at the time and place of the transactions. At the trial below, the court admitted all the evidence offered by either party, tending to elucidate the true character of the transaction, and fully instructed the jury as to the difference between a loan of money and a purchase of the bills, and left it to them to determine whether here was an usurious loan of money, covered up by an appearance of a purchase of bills of exchange, or whether it was a *bona fide* purchase of the bills, and the jury found the latter to be the true character of the transaction, and we entirely concur with them in this conclusion; and therefore affirm the judgment without expressing any opinion on the question, whether a party who pays more than the rate of interest allowed to be recovered by the law of 1849, can recover back the excess, in an action for money had and received. The judgment must be affirmed.

Judgment affirmed.

Cyrus P. Allbee *et al.*, Appellants, *v.* The People, Appellees.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A party who has executed a bond as surety, declaring that the principal in it, who was coroner, had succeeded to the office of sheriff, cannot gainsay the fact, so as to release himself from liability.

The facts are, that on the first Tuesday next after the first Monday of November, 1854, James Andrew was elected sheriff, and James S. Beach, coroner of the county of Cook, and State of Illinois. That on the 27th of February, 1856, the sheriff died. The clerk of the County Court of Cook county notified the Governor of the vacancy. The Governor neglected to issue a writ of election to fill said vacancy. On March 25th, 1856, the said Beach, with Carrolton Drake, Joseph H. Gray, Martin O. Walker, and the said Cyrus P. Allbee, entered into a bond which was approved by the Circuit Court of said Cook county, in the penal sum of $10,000, and payable to the People of the State of Illinois, conditioned as follows: "That, whereas, the above bounden James S. Beach, coroner in and for the county of Cook, and State of Illinois, has by the decease of James Andrew, late sheriff of said Cook county, succeeded to the rights, duties, office, etc., of sheriff of said county, by virtue of his said office of coroner, now if the said James S. Beach shall faithfully and truly perform and discharge all the duties required or to be required of him by law, as acting sheriff of said county of Cook, then the above obligation to be void; otherwise to be and remain in full force and effect."

The People, for the use of John Copeland, sued the bond aforesaid in the Common Pleas Court of Cook county aforesaid. The writ of summons was served upon the said Beach and Allbee alone. On September 16, 1858, a judgment by default was entered against the said Beach and Allbee, for $10,000, the penalty aforesaid, and the damages were assessed in favor of the said Copeland, to the amount of $321.65. An execution issued upon said judgment for the damages aforesaid against the said Beach and Allbee. On September 16, 1858, Daniel T. Olney suggested a further breach of said bond, and recovered, on September 25, 1858, upon an assessment, damages for such further breach to the amount of $389.92. On November 12, 1858, a *sci. fa.* was issued on the original judgment aforesaid, to make Walker, Drake and Gray, parties thereto. This writ was served upon Walker and Gray. Drake not found. To this *scire facias* Gray demurred, and Walker plead in substance the

facts aforesaid. The plaintiff demurred to the said several pleas. Judgment was rendered upon the demurrer, making Gray and Walker parties to the said original judgment.

The errors assigned are that,

The court erred in rendering the original judgment aforesaid.

The court erred in assessing damages in favor of the said Copeland.

The court erred in assessing damages in favor of the said Olney.

The court erred in making the said Gray and Walker parties to the said original judgment.

R. S. Blackwell, for Appellant.

W. T. Burgess, for Appellees.

Caton, C. J. The recitals of this bond declare, that the principal had succeeded to the office of sheriff, by reason of the death of the sheriff, and the obligees in the bond are estopped to deny, that he did thereby become the sheriff, and it is quite unnecessary for us to determine, whether this statement was true or not. This question has been fully settled by this court in the case of *Green et al.* v. *Wardwell et al.*, 17 Ill. R. 278. We there held, that the sureties in the bond of a justice of the peace should not be permitted to deny, that he was in law and in fact, a justice of the peace. See also *Shaw et al.* v. *Havekluft et al.*, 21 Ill. R. 127. They vouched to the public, that he was authorized to act in that capacity, and undertook that he should act faithfully, and when called upon to respond for a want of fidelity, they could not turn round, and say that he was not such officer. So here these sureties declared in this bond, that Beach became sheriff by virtue of his office of coroner, upon the death of a former sheriff, and they obligated themselves that he should perform the duties of that office faithfully, and now when sued upon that bond, because he did not do so, they must be concluded by this declaration. But admitting that they may deny that he succeeded to the office of sheriff, there can be no question that he succeeded to all the duties of the office of sheriff, which fact is also recited in this bond, and the obligation that he should faithfully perform these duties, is beyond all question strictly within the provisions of the statute, and that affords precisely the same remedy upon a coroner's bond, that it does upon a sheriff's bond, so that it seems to us quite immaterial, whether it be deemed a sheriff's bond or a coroner's bond. The form is the same, and the remedy is the same in the one case as the other. At any rate

they have certified to all persons who might entrust their business to his hands, that he was sheriff, and invited them to entrust such business to him, and placed this bond drawn in the forms of the law, upon the records of the court, as a security to such suitors.

The judgment is affirmed.

Judgment affirmed.

Philander Eddy, Appellant, *v.* Chas. Peterson, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

In an action by an indorsee against the indorser of a note, the drawer is a competent witness to prove protest and notice. Any evidence which will satisfy the jury of that fact, is sufficient.

This was an action of assumpsit, brought by appellee as indorsee, against the appellant, as indorser of a bill of exchange, drawn in this State, and addressed to the drawee, at Albany, in the State of New York.

The declaration contains two special counts upon the bill, and also the common counts for money lent and advanced, etc., for money paid, laid out and expended, etc., for money had and received, etc., for goods, wares and merchandise, etc., for labor, care and diligence, etc., and on an account stated, etc.

There was a demurrer to the first special count, which was sustained by the court, and the plea of non assumpsit, with affidavit of merits, to the remainder of the declaration—and issue thereon. A jury was waived by agreement. The cause was tried by the court, which refused to admit the bill of exchange in evidence under the special count, but admitted it under the other counts of the declaration, and found a verdict for the plaintiff for $1,627.93. The defendant moved for a new trial, among other reasons, because the damages assessed were excessive; the court consented to allow the motion unless the plaintiff would remit the sum of $75 of such damages, which he accordingly did, and the court then overruled the defendant's motion for a new trial, and rendered judgment for the sum of $1,552.93, and costs, against the defendant—to which decision of the court, and the various rulings of the court in the progress of the trial, the defendant excepted. An appeal was allowed him.

The evidence of protest was by Pratt, who says he had notice of the protest, and he informed the defendant, who replied,

"We must pay it," and that the defendant told the witness to get the money that witness had received for the bill, out of Hinckley's bank, where the witness had deposited the same, and pay the bill. Pratt was the drawer of the bill.

J. W. Chickering, and Shumway, Waite & Towne, for Appellant.

Hooper, Causin & Sherman, for Appellee.

Caton, C. J. This was an action by the indorsee against the indorser of a bill of exchange. And the court properly held that in such an action the drawer was a competent witness to prove protest and notice to the indorser. No particular form of proof is indispensable to establish the fact of presentation and non-acceptance or non-payment of a bill of exchange and notice thereof to the indorser or other party to the bill whose liability may be fixed by such notice. Any evidence which convinces the court or jury of the existence of those facts, is sufficient to create the liability. The very fact that a formal protest by a notary is always introduced to prove these facts, except possibly in one case in ten thousand, has created a notion or impression, in well informed circles, and even to some extent among the profession, that such is the only proof admissible to establish these facts, or if other proof is resorted to, it must be of the most positive and undisputable character. It is hardly necessary to say that such notions are not founded in any principle of the commercial law of evidence. These facts should be satisfactorily proved, as any other necessary fact to make out a case, and like any other essential fact, they may be even proved by circumstantial evidence alone, if the circumstances create the conviction that the facts exist. We think the proof in this case sufficient, and the judgment must be affirmed.

Judgment affirmed.

Martin O. Walker, impleaded with James Moore, Appellant, *v.* Granville Kimball, Appellee.

APPEAL FROM COOK.

The Same, Appellant, *v.* The Same, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where a note is given, payable within three years from date, with interest annually, at ten per cent., the payee may sue for and recover the interest, at the expiration of each year.

The first of the above cases was assumpsit, upon an agreement for the purchase, of Kimball, of his interest in the staging business in Missouri and Kansas.

The first count is special on the agreement, setting it forth in *hæc verba*. The second is a general count on the account stated by Mr. Vernon under said agreement. The third and fourth are the common counts.

The agreement contains, among other things, the following provisions, viz.: "And the said Walker and Moore agree to pay to said Kimball the sum of five thousand dollars, within four months from the date hereof, with ten per cent. from the date hereof, and said Walker and Moore agree to pay, within three years from this date, to said Kimball, the sum of thirteen thousand one hundred and sixty-six dollars, with interest annually at ten per cent., said last mentioned sum to be lessened or increased, according to the result of the settlement to be made by said William Vernon as aforesaid."

Mr. Vernon stated the account pursuant to the agreement, and found a balance due Kimball, under said agreement, of $8,778.30.

This suit was instituted to recover $877.83, claimed to be due under the agreement as annual interest at ten per cent. upon the balance of account found by Mr. Vernon.

The agreement and award or statement of account, by Mr. Vernon, were read in evidence, without objection, which was all the evidence.

The court found for defendant the sum of $877.83, and refused to set aside the assessment for that sum, and to grant a new inquest.

The second of the foregoing cases was in the Common Pleas, and was another suit for the annual interest claimed to be due in 1858. The pleadings and proofs are the same; the only difference being that a plea was put in in this last case. The judgment was for the same amount as that in the Circuit Court.

The controversy was upon the true construction of the agreement, as to the payment of interest—whether it was due annually, as contended for by defendant, or whether it was due with the principal sum at the end of the three years.

The same errors are assigned on each of the records, viz.:

1st. The court found for the appellee.

2nd. The court rendered judgment for the appellee, when, by the laws of the land, judgment should have been rendered for the appellant.

3rd. The court misconstrued the contract or agreement between the parties.

Scates, McAllister & Jewett, for Appellant.

E. A. and J. Van Buren, for Appellee.

Caton, C. J. These actions are to recover several installments of interest on the same agreement, which contains this clause: "Said Walker and Moore agree to pay, within three years from this date, to said Kimball, the sum of thirteen thousand one hundred and sixty-six dollars, with interest annually at ten per cent." And the question presented is, whether the interest is payable annually, or not till the principal becomes due. None of the cases referred to by either side are precisely in point. Those referred to by the appellee, would be directly like these, if the rate of interest were not expressed in the agreement. Then it would be very clear that the word annually could have been inserted for no other purpose than that of fixing the time when the interest should be paid. Here, the rate of interest stipulated is ten per cent., while the rate fixed by the statute, in the absence of any stipulation on the subject, is six per cent. per annum, and it is insisted that the word annually was inserted for the purpose of determining the rate of interest, and not for the purpose of fixing the time when the interest should be payable. An agreement to pay a certain sum in a specified period, either longer or shorter than one year, with interest at ten per cent., if literally construed, would mean ten per cent., no more and no less, for the whole time during which the payment was forborne by the terms of the agreement, whether that time was more or less than one year; yet the courts will always imply the words annually, or per annum, for the purpose of fixing the rate of interest. The rate of interest is, therefore, the same, whether the word *annually* be inserted or not; yet it is, undoubtedly, the right of the parties to insert that word, and for the sole purpose of fixing the rate of interest. But it does not necessarily follow, that that word was used for

that purpose only. That word may well be used, and indeed it is the proper word to use, for the purpose of fixing the time when the interest shall be paid, and we are inclined to think that such is its proper office here. Admitting that it is not free from doubt as to what the parties did really intend, that doubt must be solved by the well settled rule of law, that in case of doubtful construction, we must treat the language used, as the language of the party who executes the instrument, and construe it most strongly against him, rather than against the other party, who is not presumed to have selected the ambiguous expression. We agree with the construction adopted by the Common Pleas, and affirm its judgment.

Judgment affirmed.

Edmund S. Holbrook *et al.*, Appellants, *v.* The Trustees of Schools of Township 33 North, of Range One East, of the County of La Salle, Appellees.

APPEAL FROM LA SALLE.

The appointment of a treasurer by school trustees, is a removal of the prior officer.

The approval of the bond of a treasurer of a school district, is evidenced by an official indorsement of the members of the board.

A school trustee is a competent witness to prove the loss of a treasurer's bond, although he may be a party to the suit.

A notice should be given a party to produce a paper, if it is supposed to be, or ought to be, in his possession, as a foundation for other proof in relation to it.

This was an action of debt, commenced by appellees against appellants, on bond given by Holbrook, as school treasurer, with Higgins and Paul as security.

The declaration is in these words:

"For that whereas the said defendants heretofore, to wit, on the 3rd day of April, A. D. 1850, executed and delivered to said plaintiffs their writing obligatory, which writing obligatory is in substance as follows:

STATE OF ILLINOIS, }
LA SALLE COUNTY. }

Know all Men by these Presents, That we, Edmund S. Holbrook, Ebenezer Higgins and William Paul, are held and firmly bound, jointly and severally, unto the trustees of schools of township thirty-three north, of range one east, of said county, in the penal sum of two thousand dollars, for the payment of which we bind ourselves, our heirs, executors and administra-

tors, firmly by these presents. In witness whereof, we have hereunto set our hands and seals this 3rd day of April, A. D. 1850.

The condition of the above obligation is such that if the above bounden Edmund S. Holbrook, township treasurer of township thirty-three north, range one east of the third P. M., in the county aforesaid, shall faithfully discharge all the duties of said office according to the laws which now are or may hereafter be in force, and shall deliver to his successor in office all moneys, books, papers, securities and property in his hands as such township treasurer, then this obligation to be void, otherwise to remain in full force and virtue.

EDMUND S. HOLBROOK. [SEAL.]
WILLIAM PAUL. [SEAL.]
E. HIGGINS. [SEAL.]

Approved and accepted by us,

THERON D. BREWSTER, }
G. A. LINDLEY, } Trustees of Schools.

And the plaintiffs aver that said Edmund S. Holbrook continued to hold said office of township treasurer until the appointment of David L. Hough as his successor, as hereafter mentioned, and that as such township treasurer said Holbrook did receive a large sum of money, to wit, the sum of two thousand dollars, which sum came to and was in the hands of said Holbrook, as such township treasurer; and that afterwards, to wit, on the first day of April, A. D. 1856, David L. Hough was duly appointed treasurer of said township, and accepted said appointment, and gave the bond required by law, and was duly qualified to act as such township treasurer, and then and there became the successor of said Edmund S. Holbrook as township treasurer of said township, of all which the said Holbrook had notice. And said Holbrook then and there had in his hands as such township treasurer, the sum of money aforesaid; and afterwards, to wit, on the same day, the said David L. Hough demanded said sum of money of said Holbrook, who then and there refused and neglected to pay said sum of money to David L. Hough, though often requested to do so, nor have the said defendants, or either of them, ever paid the said sum of money to said Hough," etc.; with the usual conclusion.

Defendants filed a general demurrer, which was overruled by the court. Paul abided by the demurrer. Holbrook and Higgins filed pleas:

That Hough did not become the successor of Holbrook as alleged.

That Holbrook did not neglect and refuse to pay, etc., in manner and form, etc., to his successor in office.

The third plea was as follows:

"That the said Holbrook was appointed to the said office of township treasurer, by Theron D. Brewster, Giles A. Lindley and John L. McCormick, which is the same appointment men-

tioned in said declaration, who were then the trustees of said township; that it was to said board of trustees, represented by said Brewster, Lindley and McCormick, that said bond in said declaration mentioned was given; that afterwards, A. D. 1855, to wit, on the day appointed by law for the election of school trustees, Alexander Hitchcock, William C. Smith and Samuel N. Maze were duly elected trustees of schools of said township, and entered upon said office and became the successors of said Brewster, Lindley and McCormick, whose term of office then expired; and afterwards, to wit, on the 15th day of January, A. D. 1855, the said Hitchcock, Smith and Maze, as the board of trustees, re-appointed said Holbrook as treasurer of said board; that said Holbrook thereupon gave to said board the bond required by law, that is to say, a penal bond, signed by said Holbrook and two freeholders, who were not members of said board, so appointing him, conditioned that said Holbrook should faithfully perform all the duties of treasurer of said township according to law; which was duly received and approved by a majority of said trustees last aforesaid; whereby the said Holbrook, thus duly re-appointed and qualified, became as the treasurer of said board represented by said Hitchcock, Smith and Maze, the successor of himself as the treasurer of the said board of trustees represented by Brewster, Lindley and McCormick. And said defendants aver that said Holbrook, while acting as treasurer as first aforesaid, under the trustees first aforesaid, did not, before said re-appointment and the execution of said bond last aforesaid, receive any of the moneys in said declaration mentioned," (with verification.)

To which plaintiffs filed replications.

1st. That said Holbrook was not re-appointed and qualified in manner and form, etc.

2nd. That he did not give such second bond, etc.

3rd. The said moneys were received by Holbrook before his said re-appointment; and issue joined.

The fourth plea was much like the third, adding the names of the freeholders who signed the bond and the penalty of the bond, and alleging "that Holbrook, under said second appointment as successor of himself under said first appointment, received all the moneys which said Holbrook had in his hands at the expiration of his said term of office, as township treasurer, under said first appointment."

The first replication to this plea was that Holbrook was not re-appointed and did not file bond, etc.

2nd. That Holbrook did not file such a bond under a re-appointment, etc.

3rd. That the moneys sued for were received by Holbrook prior to his re-appointment; and issues thereon.

On the trial before a jury, the plaintiffs read in evidence from the records of the trustees of schools, the entries, showing the election of Holbrook as treasurer, also the following proceedings:

"Board met at office of E. S. Holbrook, at the call of the president.

Present—A. B. Hitchcock, James Armour and Samuel N. Maze, and E. S. Holbrook, treasurer.

It was moved by James Armour that we go into an election of a new treasurer. Carried. James Armour voting aye, and Samuel N. Maze voting no.

The treasurer, E. S. Holbrook, protested against the proceeding.

Voted that the vote be had *viva voce*.

David L. Hough was elected treasurer, and required to give bond in the sum of ten thousand dollars, to be approved by the board.

Voted that the president be requested to notify D. L. Hough of his election.

A. B. HITCHCOCK, Pres."

To the reading of which defendants objected, on the ground that it did not appear that the office of said Holbrook as treasurer expired at that time by limitation of law—or that it was a proper time for such an election, or that there was any vacancy in the office of treasurer at that time.

On this point defendants then read from said records the following entries:

"Board Room, Jan. 15, 1855.

The board of trustees met, consisting of the newly elected members, A. B. Hitchcock, Samuel N. Maze and William C. Smith, and E. S. Holbrook, treasurer.

The board organized, and on motion voted that E. S. Holbrook be re-appointed treasurer of the board, and that he give the bond required by law."

Also the following:

Nov. 3rd, 1855.

Board of trustees met at the office of E. S. Holbrook.

Present, A. B. Hitchcock and S. N. Maze.

E. S. Holbrook, treasurer and clerk of the board.

On motion voted that treasurer call an election of trustee, to fill the vacancy occasioned by the removal of Wm. C. Smith from the township."

Several other entries were read, showing that Holbrook acted as treasurer till the meeting of March 19, 1856.

Also the following:

"Peru, Feb. 12th, 1856.

The board of trustees met at the office of E. S. Holbrook.

Present, A. B. Hitchcock, Samuel N. Maze, James Armour.

On motion, the board adjourned to meet on the 10th of March next."

The court then permitted said entry of the 19th to be read, to which defendants excepted.

Plaintiffs then offered to read in evidence a bond given by said Hough to the board of education of said township, on which was written:

"Approved by
A. B. Hitchcock,
James Armour,
Sam'l N. Maze,
} Directors of the Board of Education."

To the reading of which defendants objected, on the ground that it did not appear that said bond was properly approved by the board of education.

D. L. Hough was then called as a witness, by plaintiffs, who testified that he was the school treasurer referred to in said bond; that he did not know that any record was made by the board of trustees of the approval of said bond; that he gave said bond to Hitchcock; don't know whether said trustees, when they wrote their approval on the bond, were together or not, or whether they ever acted together concerning the approval of it. Defendants admitted that said Armour and Maze were the acting trustees at the date of said bond, and that those names were in their handwriting severally.

On this proof the court permitted said bond to be read in evidence, to which defendants excepted.

Plaintiffs made proof of demand on said Holbrook, by Hough, on the 7th of April, A. D. 1856, for the township moneys on hand, which, with interest from that time, amounted to $1,693.39.

Defendants called *Samuel N. Maze* as a witness, who said that he was elected school trustee in January, A. D. 1855, and continued to act till 1857; that said Holbrook, on his re-appointment as township treasurer, in January, 1855, gave a bond to said board of trustees; that Hitchcock, one of the trustees, took such bond to send to the school commissioner by mail.

Defendants then offered to prove by Maze, that soon after said Holbrook's re-appointment in January, 1855, the then trustees were together and had a paper before them, which they treated as a proper bond, given by said Holbrook on his said re-appointment as treasurer; and that they wholly approved of the same as such bond.

Plaintiffs objected. The court sustained the objection, and defendants excepted.

Verdict was found for the plaintiffs.

Motion for new trial was made by Holbrook and Higgins, which was overruled by the court, and defendants excepted.

Motion in arrest of judgment was then made by all the defendants, which was overruled, and defendants excepted.

Chumasero & Eldredge, and E. S. Holbrook, for Appellants.

B. C. Cook, for Appellees.

Caton, C. J. We shall first consider the sufficiency of the declaration. We think the answer to the objection that it does not show that there was a vacancy in the office of treasurer at the time of Hough's appointment, is a good one. The statute gave to the trustees the power to remove the treasurer at pleasure. Possessing such a power, the appointment of another in the place of Holbrook was of itself, a removal of him from that office. It did not require a separate antecedent order of removal. Had the law required them to spread upon their records, the reason for the removal, or even authorized them to remove only for good cause, the rule might be different. The declaration avers that Hough was duly appointed and qualified, and it is objected that it should have shown the *quo modo* of his qualification to the office. We think the averment sufficient. The fact of qualification is the natural fact of the case, and it was not necessary to plead the evidence which would be adduced in support of that fact. Even where a justice of the peace is justifying in an action of trespass for having issued an execution, which has been levied on the plaintiff's property, it is only necessary for him to aver that he was a justice of the peace, duly elected and qualified as such, without stating the mode of the election or qualification.

It is objected that the bond of Hough, the successor of Holbrook, was not approved by the board of education, as required by the school law. The approval was evidenced by the members of the board indorsing an approval on the bond, and signing it with their proper hands and official designation. In this the board followed the precise form pointed out by section 52 of the school law, which would seem to be a sufficient answer to the objection.

The only remaining question to be considered, is whether the court was right in refusing to allow the defendants to prove by parol, the contents of an alleged lost bond, said to have been given by Holbrook on his second appointment to the office of

treasurer. The witness swore that Holbrook executed a second bond which was delivered to Hitchcock, to be by him sent to the school commissioner. Hitchcock was at that time, and also at the time of the commencement of this action, one of the school trustees, and consequently a member of the corporation in whose name this action was brought. Jones, who was at the time school commissioner, could not find the bond in his office, when subsequent inquiries were made for it. By the defendants, it was urged that Hitchcock was to be treated as a proper plaintiff and a party to the action, and the bond having been last seen in his hands, it was to be considered as in the hands of the plaintiff, and it must be presumed to be still there. The action is by a public corporation as plaintiff, and not by Hitchcock and other individuals, who might at the time happen to be trustees. They might all vacate their office and be succeeded by others, and yet there would be no change of plaintiff either in form or substance. But admitting the defendant's position to its fullest extent, and that we must assume that the bond was in the hands of the opposite party; it was not such a paper as the plaintiff was bound to know the defendants would require to use on the trial, and hence they should have served a notice on the plaintiff to produce the paper, or else they would give parol evidence of its contents and indorsements. We see no evidence that any such notice was served, and without such notice, the plaintiff was not bound to have it present in court. The evidence was entirely insufficient to prove the loss or destruction of the paper so as to entitle the defendants to give the parol proof for that reason. At least it was necessary to have sworn Hitchcock as to what had become of it. In his hands it was last seen, and he might be able to produce it, or account for it. Admitting that he was a party to the action and still he was a competent witness, and if called upon, obliged to testify upon that collateral question. To prove the loss or destruction of papers, all parties are competent witnesses. We think that the proper foundation was not laid for the testimony of Maze, and that the court properly ruled it out. The judgment must be affirmed.

Judgment affirmed.

* Archibald E. Constant, Appellant, *v.* Joel A. Matteson *et al.*, Appellees.

ERROR TO SANGAMON.

To give a creditor the right to be substituted, in the place of the surety of his debtor, the relation of debtor and creditor must exist between the creditor and the surety. The claim on the surety must be valid, binding, and capable of being immediately enforced.

If the relation of creditor and debtor has never existed between a creditor and the surety, or having existed, has ceased, there cannot be any substitution to the rights of a surety.

If a surety is liable for the immediate payment of a debt, owing by his principal, he may pay it and resort at once to any funds of the principal, he holds as an indemnity, without waiting for the money to be collected by a resort to an action at law.

In chancery, if the creditor applies to be subrogated to the rights of a surety, the fund pledged to indemnify the surety, will be directly appropriated to the payment of the debt for which the surety is liable, if the surety has the immediate right to satisfy the debt and resort to the indemnity in his hands.

If property is conveyed to a trustee for the payment of a debt, if the trustee fails so to apply it, a court will compel its application to that purpose.

Where a debtor gives his surety a mortgage to indemnify him against loss, the property mortgaged can only be applied, when the surety has either paid the debt or has become immediately liable for its payment, and until then, a court of equity will not interfere.

Possession of mortgaged chattels, by the mortgagor, is fraudulent as to creditors and purchasers, unless such possession is provided for by the mortgage. After the time for possession by the debtor has passed, if he keeps the property, it is equally fraudulent, and subsequent liens or purchasers will be preferred to such prior mortgagee.

If there are several mortgages, all over due, and the mortgagor holds the property contrary to the conditions of them, any mortgagee who first takes possession of the property, acquires a preference over the others, without regard to the date of the mortgage.

Upon the forfeiture of the condition of the mortgage, the legal title vests in the mortgagee, and becomes complete in time, if he takes possession.

A trustee, without a stipulation to that effect, cannot claim compensation for his services, but may claim for necessary expenditures in preservation or management of the trust property.

A solicitor's fee cannot be taxed as costs in a case. The discretion of a court of chancery in awarding costs, must be confined to statutory allowances.

About the month of July, 1857, Miller and Scott, doing business as partners, in St. Louis, Missouri, filed two bills in the Circuit Court of Sangamon county. One against Thomas D. Wickersham and Joel A. Matteson, and the other against Thomas D. Wickersham and Archibald E. Constant, respectively alleging in each: That on or about the 29th day of October, 1856, they sold to Thomas D. Wickersham, a bill of goods, wares and merchandise, for the purpose of furnishing and fitting up a hotel, in the city

* This cause was argued at January Term, 1859, in the 2nd Grand Division.

of Springfield, known as the St. Nicholas Hotel. The bill amounted to $1,505.26. That Wickersham being unknown to them, they required security for the same; that thereupon, said Wickersham procured the indorsement of his note by Joel A. Matteson, for $752.63, being for one-half the bill, and executed another note for the same amount, to which the signature of Archibald E. Constant was obtained as surety for the other half of said bill. The notes were dated December 1st, 1856, and payable in six months after date. Bill further alleges that Matteson and Constant, respectively took mortgages on all the stock, furniture, etc., of the St. Nicholas House, for their indemnity against this liability as well as other liabilities they had incurred for said Wickersham.

These mortgages were separate to each.

Bills further allege, that about two months after the above transaction, said Wickersham desiring additional goods of complainants, purchased another bill amounting to three or four hundred dollars, with the understanding, that he was also to give security for this additional bill, and that new securities should be given, including both bills. That confiding in this understanding, said complainants cancelled the notes for the first bill of goods and delivered them up to Wickersham, with the understanding that he was to send them new securities for the whole bill. That subsequently, Wickersham sent to complainants, bills drawn upon Matteson and Constant respectively, for one-half of the whole bill, amounting to $925.73 each, which were afterwards severally protested for non-acceptance on the part of Constant and Matteson. Complainants offer to file or deliver up said drafts. Bills pray that either Constant and Matteson may be decreed to execute new notes to complainants for the amount of their original notes, or that complainants may be substituted or subrogated to the place and rights of Matteson and Constant respectively under their mortgages on Wickersham, and for general relief.

The answers of Constant and Matteson severally, to the bills so filed against them, set forth and admit: That they did execute or indorse notes for Wickersham to complainants as described in complainants' bills; set forth that they are informed and believe complainants refused to receive and accept the said notes when they were sent to them, and that they cancelled and returned them to Wickersham; admit the execution of a mortgage to them respectively, for their indemnity against these and other liabilities they had assumed as securities for said Wickersham; that they knew nothing of any subsequent purchase of goods from complainants by Wickersham; were not parties nor consenting to any arrangement then made; admit that subsequently

drafts were presented to them for accceptance, to Messrs Miller and Scott, for larger amounts than the amount of their original notes, which they refused to accept or pay; that after learning of the cancellation and delivering up to Wickersham of their original notes, (being only sureties thereon,) they supposed themselves released and absolved from all further liability thereon, and still so insist.

Constant in his answer sets out the additional fact, that supposing himself released from liability upon his said note to complainants, he had advanced further sums for said Wickersham, and had taken a further chattel mortgage upon the same property covered by the original mortgages to himself and Matteson, which he would not have done had he supposed the property liable for complainants' debt.

Replications were thereto filed by complainants.

Wickersham did not answer.

On the 18th of August, 1857, Joel A. Matteson filed his cross-bill in the cause in which he and Wickersham were defendants, alleging the same facts substantially, set forth in his answer in regard to the making of the notes by Wickersham and himself, and Constant and Wickersham to the complainants, and the taking of the mortgages before referred to, setting forth the surrender and cancellation of the notes by the complainants, and also setting forth the additional facts, that the mortgages referred to as executed to himself and said Constant respectively, were for their indemnity against two other claims, upon which they were either securities or indorsers for said Wickersham, said debts being of equal amounts in each mortgage—one being $1,303.50 and the other for the sum of $1,044.50, making the amounts secured by each mortgage $2,248, and the sum of both $4,496, besides the claim of said complainants. The mortgages to said Matteson and said Constant are described as having been executed at the same time and upon the same property (the goods and furniture of the St. Nicholas Hotel), and the debts to indemnify against which they were taken, matured at the same time, under each mortgage.

Reference is made in the cross-bill to the mortgages executed by Wickersham to himself (Matteson) and to Constant, which are made exhibits.

The condition in Matteson's mortgage is as follows:

"Provided, nevertheless, that whereas on the 12th day of December, 1856, I, the said Thomas D. Wickersham, executed to the said Joel A. Matteson, my certain promissory note for the sum of $1,203.50, payable five months after date, and also on the 1st day of December, 1856, I executed to said Joel A. Matteson, my other note of that date for the sum of $752.63,

due six months after its date, and also on the said first day of December, 1856, I executed to said Joel A. Matteson, my other note of that date for one thousand and four and twelve hundredths dollars, due four months after date. Now, should I pay said notes, and each of them, according to their tenor and effect, then this mortgage is void, otherwise to remain in full force and effect."

Mortgage further provides, that until default, Wickersham is to retain possession, etc. The note described as $752.63, was the same indorsed by Matteson to Miller and Scott, and the other two were indorsed by him to other creditors of said Wickersham.

The mortgage referred to as executed to Constant provides, and was conditioned for the payment of three several notes, corresponding in amounts and dates, and payable at the same time as the debts specified in Matteson's mortgage. One of the notes described being the note to Miller and Scott, for $752.63, executed by Wickersham and Constant.

Cross-bill further states, that on the 23d day of February, 1857, said Wickersham executed a mortgage to Richard V. Dodge, on a portion of the property of the St. Nicholas House not included or covered in the two mortgages before described. This mortgage was to secure Dodge from liability as surety for Wickersham on a note for $1,000, due on 1st July, 1857. Same conditions as the other mortgages in regard to retaining possession until default.

Cross-bill further states, that on the 9th day of March, 1857, Wickersham executed a further mortgage on the same property covered by the former mortgages, to McCabe and Vanness, to secure payment to them of a note due sixty days after date, for $1,100. Conditions as to retaining possession, same as the others.

Cross-bill further states, that on the 6th day of June, 1857, said Wickersham executed to Archibald E. Constant, another mortgage on the same property, to secure the sum of $1,700, as therein provided, with the same conditions as the former as to retaining possession.

Further recites, that on the 27th day of June, 1857, said Wickersham executed a further mortgage on said property, covered by the former mortgages, to Russel and Parsons, to secure a note for $600, due six months after the date of said mortgage. Conditions as to retaining possession the same as the others.

Cross-bill further states, that an execution is in the hands of the sheriff of Sangamon on a judgment of the Cook county Circuit Court, for $1,600, in favor of Charles Dunn, against said

Wickersham; also, that Matteson, Constant and Dodge have executions in the hands of said sheriff for the amount of their respective claims on Wickersham.

All the mortgages aforesaid contained the provisions (amongst others), that upon default, or whenever the respective mortgagees deemed the further possession of the property hazardous by said Wickersham, they should have the right to take possession.

The cross-bill further sets forth, that Wickersham having failed to pay the several sums for which said Matteson and said Constant were respectively liable for him, and to save them harmless therefrom, as provided in their first two mortgages, and having failed to pay the debt for the security of which the mortgage to R. V. Dodge was executed, in pursuance of the powers reserved in their respective mortgages, the said Matteson, the said Constant and the said Dodge, by agreement amongst themselves, took possession of said mortgaged property under their said mortgages—that said property was advertised for sale under said mortgages, and was sold at public auction, the said Matteson becoming the purchaser, with the understanding, as alleged, that he should bid off said property in his own name for the mutual benefit of said Dodge, said Constant and himself.

Cross-bill further states, that he (Matteson) is unable to set forth the exact liability of said Wickersham to him under said mortgage, as he is indebted to said Wickersham for board, which will to some extent diminish Wickersham's liability to him.

Cross-bill further sets forth, that after paying himself, (Matteson,) said Constant and said Dodge, out of said fund realized from said sale, there will be a balance for distribution—that there are conflicting claims thereto, and asks the assistance of the court in the premises. States that he is willing, and offers to bring the fund into court, etc., and prays the direction of the court as to its distribution. Constant, Dodge, McCabe and Vanness, Russel and Parsons, Dunn and Wickersham, are made parties to the cross-bill, and are required to answer.

Constant filed his answer to the cross-bill, admitting the allegations of the cross-bill as to the groundless and invalid character of the claim set up by Miller and Scott, and denying that said Miller and Scott have any claim on the mortgaged property, admits the allegations of the cross-bill as to the executions of the mortgages to himself, said Matteson, Dodge, McCabe and Vanness, and Russel and Parsons.

Admits allegations of the cross-bill, of acting in conjunction with Matteson and Dodge in taking possession of and selling the mortgaged property, alleging that default had been made by

said Wickersham under his first mortgage, and that his second mortgage was a subsisting *lien* upon the property. The condition of the second mortgage referred to, was as follows:

"Whereas, the said Constant has this day paid the Banking House of N. H. Ridgely, the sum of seven hundred dollars to discharge a note made by said Wickersham, with one Freeman as security, and to repay the said Constant for the money so advanced, the said Wickersham has executed to the said Constant his seven promissory notes of even date herewith, each for the sum of one hundred dollars, payable to said Constant, and due in one, two, three, four, five, six and seven months, with interest at ten per cent. per annum. Also, one other note, executed by said Wickersham to said Constant, for the sum of one thousand and sixty-one dollars and ninety-five cents, payable on demand with interest from date until paid, at ten per cent. per annum." Provision for retaining possession until default, as in former mortgages.

Dodge, McCabe and Vanness, and Russel and Parsons answer, setting up their respective claims under their mortgages. Dunn answers, setting forth his judgment and execution against Wickersham, and states that his execution had been levied upon the interest of Wickersham in a lease of the St. Nicholas Hotel.

On the 27th of May, 1858, Matteson amended his cross-bill, setting forth that he bid off the property in pursuance of an understanding between himself and Dodge and Constant, that he bid off the property in his own name for their mutual benefit, and that he afterwards sold the same property to one Fenner Aldrich, and had received therefor, the notes of said Aldrich for $7,489.70, payable with ten per cent. interest, as follows: $2,000 payable in fifteen months, and three notes for $1,829.90, each payable 1st days of July, 1858, '59 and '60, of date, 1st September, 1857. Notes secured by mortgage. Further sets up, that he expended a large sum in taking care of the mortgaged property, and other sums in discharging prior *liens* upon it, and prays that an account be taken of the same.

On the 17th of November, 1858, said Matteson further amended his bill, charging that he had been at great expense in selling said property and great risks had been incurred, and asks compensation therefor, also prays that the notes received by him for the property should be received by the defendants.

Constant filed his answer to the amended cross-bill of Matteson, denying the allegations of the amended bill. Sets forth that Matteson sold the property after it was bid off by him to Aldrich without consulting the other parties interested, and without their consent, and charges that Matteson should account for the proceeds in cash.

Replications having been filed to the answers, the cause was referred to the master for a report of the evidence, and for stating the accounts and demands of the parties.

At the August term of the court, 1858, the master filed his report, and therein finds due to Matteson, after allowing to him all expenses incurred by him on account of taking charge of the property and selling the same at auction, and also for all money expended in relieving the property from prior liens, the sum of $2,283.70.

Finds due to Constant under his first mortgage, the sum of $2,460.56, and the further sum of $1,915.50 under his second mortgage. Finds due to Russel and Parsons, under their mortgage, $631.98. Finds the amount of Miller and Scott's claim at $1,637.14. Finds due to McCabe and Vanness, $1,107.91. Finds due on the mortgage of R. V. Dodge, assigned to Joel A. Matteson, the sum of four hundred and fifty-six dollars and forty-four cents.

The master further reports the testimony of witnesses examined by him. *Lotus Niles* swears he was present when Constant and Matteson were talking about taking possession of the property mortgaged, under their mortgages. Wickersham, (the mortgagee) then agreed to give possession to C. R. Post, as the agent of Matteson, Constant and R. V. Dodge, they claiming under their mortgages. Wickersham did give possession, in pursuance of the agreement. The conversation took place and the possession was given on the 7th day of July, 1857. C. R. Post took possession of the property, at the time stated, as the agent of Constant and Matteson. The understanding between Constant, Matteson and himself was, that witness should take charge of the property, including the house and furniture, until the sale of the property.

The property was sold under the mortgages, the 20th of July, 1857. Matteson, being about to leave town, said to witness, he wished he would stay at the hotel and keep charge of the property, as he had done, until said Matteson returned. Matteson returned about the first of August, and after his return he requested witness to remain until a sale was made of the property, which he did. Witness met Constant on the street one day, during the absence of Matteson, and after the sale, and told him the expenses of the hotel were greater than the receipts, and asked what should be done in regard to it. Constant replied to do the best he could with it. He asked witness to keep the goods together, and take care of them and keep the affairs straight.

Fenner Aldrich testified, that about the 1st of September, 1857, he purchased of Joel A. Matteson, the property bid off

by him at the auction sale under the mortgages. Witness gave $7,489.71, the amount of the former sale bill, in four notes, payable in installments, (the same heretofore described in the answer of Matteson.) Witness has paid $2,200 on the notes. Constant had nothing to do with the sale to witness.

The deposition of *Thomas D. Wickersham*, in answer to an interrogatory to state what he knew in relation to the notes given by Constant and Matteson to Miller and Scott, states:

The notes were given by Archibald E. Constant and Joel A. Matteson, two separate notes for the sum of $752 each, at ten per cent., to Miller and Scott. I think my brother, B. P. Wickersham, took the notes to Miller and Scott, and they or their agents erased the names of Matteson and Constant, saying they were not bankable, and returned them to me by my brother. Says in answer to a cross-interrogatory, that the notes were not re-signed or returned.

B. P. Wickersham testifies, that he took the notes above referred to, to Miller and Scott, in St. Louis, and delivered them to them in person, and they handed them, or one of them, back to me, and remarked they were not drawn up in form, and I think one of the notes was cancelled in my presence, and perhaps both of them. I took them back to T. D. Wickersham, at their request, and delivered them to him. States further, that Miller and Scott, about the time of the return of said notes, sent up two blank checks for Matteson and Constant to fill up. Thinks the checks were for the amount of $752 each, and also for the amount of a bill of goods, purchased about the time of the delivery of the notes. Says it was Miller and Scott who talked to him about the cancellation of the notes. Thinks it was the object of Miller and Scott to get security for the additional bill of goods.

H. H. Hukil testifies, that he was a clerk for Miller and Scott, and knew T. D. Wickersham. Wickersham purchased goods of Miller and Scott, at two or three different times, amounting altogether to $1,700 or $1,800. Wickersham had a letter from Matteson. A note was sent by Wickersham to Miller and Scott for one-half of the first bill, which note was about $752. Another note was subsequently sent for same amount. One of the notes was signed by Wickersham and Matteson, and the other by Wickersham and Constant. The first note that was sent was not half of the whole bill. Wickersham sent a letter to Miller and Scott to know whether a note for one-half the amount executed by Constant would do. At that time, and in that letter, they received one of the notes. Miller and Scott objected to the note because of the manner in which it was drawn, and the amount. Scott told witness to draw up two notes, dividing the

amount equally, which witness did in the form of drafts, and told witness to write and return the note, and request Wickersham to have the drafts signed and returned.

When the second note was received, witness was directed to make out another draft, which witness did, and returned the note to Wickersham, with the names erased, together with the draft. The amount of the drafts were larger than the notes by about $150.

Virgil Hickox, who was examined upon this hearing, testified that the labor and care of Joel A. Matteson, in buying and selling the property embraced in the mortgages, would be five per cent., and that it would be worth five per cent. per annum to advance cash in place of notes at ten per cent. per annum.

Court below decreed that the defendants, Joel A. Matteson and Archibald E. Constant, after the payment of costs, have a prior lien on the proceeds of the property in the pleadings mentioned, for reimbursement to them for advances made by them, and that said Joel A. Matteson, as assignee of R. V. Dodge, has next valid lien on the proceeds of the sale of the cutlery and silver-ware, secured by mortgage to R. V. Dodge, dated February 23rd, 1857, but to the extent only of the proceeds of said cutlery and silver-ware, and that Archibald E. Constant has the next valid lien by virtue of his second mortgage, dated the 6th day of June, 1857, to the extent of his whole claim under said mortgage, on the entire proceeds of said sale, in the hands of said Matteson. And that David A. Russel and Jacob Parsons, have the next valid lien, by virtue of their mortgage, dated the 27th day of June, 1857, to the extent of their whole claim under said mortgage, on the entire proceeds of sale as aforesaid, and that to the extent of $752, and interest thereon at the rate of six per cent. per annum. Said Miller and Scott have the next valid lien, together with Joel A. Matteson and Archibald E. Constant, to the extent of their entire claim under the first mortgage executed to said Archibald E. Constant, dated December 31, 1856, and the mortgage to Joel A. Matteson, dated December 27th, 1856, the said Miller and Scott together to the extent of seven hundred and fifty-two dollars, and interest thereon, and the said Joel A. Matteson and Archibald E. Constant, to the extent of their entire claim under said last mentioned mortgages, sharing *pro rata* in the proceeds thereof in the hands of said Matteson—*and that out of said Archibald E. Constant's said pro rata as last aforesaid from the proceeds of the said first mortgage to him, dated* 31*st December*, 1856, *said Miller and Scott are entitled to be paid the residue of their claim, to wit: the sum of* $752 *and interest.*

And that said Archibald E. Constant has the next valid claim

on the said proceeds, for the payment of his claim under and by virtue of his first mortgage as aforesaid, dated December 31st, 1856. And that William McCabe and John Q. Vanness have the next valid lien on said proceeds under and by virtue of their mortgage, dated the 9th of March, 1857. And it further appearing to the court that there is due Joel A. Matteson, in the order of priority, as aforesaid, the sum of $1,075.30, for advances made by him, and that there is due from Matteson for board, which is a proper set-off against the same, the sum of $1,250.77, and to A. E. Constant, $121.30, for advances made by him. And to said Joel A. Matteson, as assignee of R. V. Dodge, the sum of $274.25, in the order next of priority, and to Archibald E. Constant the sum of $1,915.50, in the order next of priority. And to Russel and Parsons the sum of six hundred and thirty-one dollars and ninety-eight cents, in the order next of priority. And to Miller and Scott, the sum of $818.57. To Joel A. Matteson $2,283.70, and Archibald E. Constant $2,460.56, to be paid *pro rata* out of A. E. Constant's first mortgage, and Joel A. Matteson's first mortgage. And to Miller and Scott the sum of $818.57, in the order next of priority, to be paid out of Constant's *pro rata* in his first mortgage. And to Archibald E. Constant the sum of $2,460, in the order next of priority. And to McCabe and Vanness the sum of $1,210.35, in the order next of priority. It is therefore ordered, adjudged and decreed by the court that said Joel A. Matteson, Archibald E. Constant and Charles Dunn, nothing take by their judgments and executions, and that out of the proceeds aforesaid, there be paid first the costs of this suit, including a fee to master of $50, and $100 to Joel A. Matteson, both to be taxed as part of the costs. Next to that, $121.30, the advances made by Constant, be paid to him, and that the residue of said claims be paid in priority as herein set forth.

It further appearing to the court that the entire proceeds of the property amounted, on the first of September, 1857, to the sum of $7,489.71, that the sale was made by Joel A. Matteson, and that he is properly chargeable with the proceeds thereof, it is therefore ordered, adjudged and decreed, that said Joel A. Matteson pay out of said proceeds, first, the costs as aforesaid, and the residue of said claims to the extent of the residue of said sum and interest—that he now pay the sum of $3,408.63, and on the 1st day of July, 1859, the sum of $2,165.27, and on the 1st of July, 1860, the sum of $2,348.26, and that executions issue therefor when said sums are respectively due.

That said Joel A. Matteson be allowed to retain out of said funds such portion thereof as is due him by virtue of the provisions of this decree, in installments as provided for by the same.

Archibald E. Constant appeals, and assigns for error:

1st. That the court erred in decreeing payment to Miller and Scott, out of the proceeds of the mortgaged property.

2nd. That the court erred in giving to the claim of Miller and Scott, or to any portion thereof, priority of payment over the first mortgage of appellant, and in decreeing that a portion of said claim should be paid out of the proceeds to which appellant was entitled under his first mortgage, and in not substituting said appellant to the benefit of a *pro rata* distribution, on that portion of Miller and Scott's claim ordered to be paid out of Constant's money.

3rd. That the court erred in postponing execution of any portion of the decree against Matteson.

4th. That the court erred in decreeing costs out of the fund.

Logan & Hay, for Appellant.

Stuart & Edwards, and Lincoln & Herndon, for Appellees.

Walker, J. This is a contest amongst the creditors of Wickersham, for priority in the distribution of a fund produced by sale of chattels, upon which they claim to have liens. It is insisted that Miller and Scott have a lien upon this fund, to the extent of their claim against Wickersham, by reason of a mortgage given by him, on this property, on the 12th day of December, 1856, to Matteson and Constant, to secure them against liabilities they had incurred for him, and to indemnify them against the payment of Miller and Scott's claim, which they then proposed to secure to Miller and Scott by indorsing for Wickersham. It is urged that the lien of complainants is by substitution to the rights of Matteson and Constant, to the extent of their claim on Wickersham. To give the creditor the right to be substituted to the place of the surety of his debtor, the relation of debtor and creditor must exist between the creditor and the surety. The claim on the surety must be valid, binding and capable of being enforced immediately against him. If the relation of creditor and debtor has never existed between them, or having existed, and been terminated by release, or payment, or in any other mode, there can be no substitution. When the surety is liable for the immediate payment of the debt, he may pay it, and resort to the fund he holds, as an indemnity, to reimburse the money he has legally paid for his principal. He is not required to wait until the money is collected by an action, nor will chancery even require it to be paid, if the creditor applies to be substituted to the surety's right to resort to the fund pledged for his indemnity, but will

require the fund to be appropriated directly to the payment of the debt. But unless the surety has the immediate right to pay the debt, and resort to the indemnity, he has no right to which the creditor can be subrogated. When a debtor conveys property to a trustee for the payment of his debt, it is different, for he then appropriates the property to that specific purpose. And if the trustee fails or refuses to so apply it, a court will compel him to appropriate it to the purpose designed. But in a case where the debtor gives a mortgage to indemnify his surety against loss, he only appropriates the property, to be applied to the satisfaction of the debt, when his surety has become immediately liable for, or has paid the debt under such liability. And until such liability or payment takes place, a court of equity cannot interfere.

In this case, Wickersham purchased goods of Miller and Scott on time, with an agreement to give security for payment of the price. But the nature of the security, or the kind of paper to be given does not appear. The bill alleges that he was to give security, but what kind of security, or the person who was to indorse, is not stated. And the answer and proofs equally fail to throw any light on the transaction. The bill nowhere alleges that Matteson and Constant at any time before the purchase was made, agreed to be liable in any event. And if it were true that they had made such an agreement, it is strange that it was not so alleged in the bill, and they required to answer to its truth. Such a fact would be highly important to fix their liability to Miller and Scott, and we presume if it had existed it would have been alleged.

The complainants took the deposition of their book-keeper who states, "That Wickersham came into the store, with a letter, and after he left, Miller informed witness that Wickersham wanted to purchase a bill of goods, and that Gov. Matteson was to accept for the amount of the bill. The letter spoken of was not kept by complainants because, as Miller told witness, Wickersham said he wanted to show it to other parties." This is not evidence to establish any fact. It is the mere declarations of one of the complainants in his own favor, in the absence of the other parties, and called for and proven by himself. The book-keeper does not state that he knew that the letter was from Matteson, that he knew the contents or purport of it, or that he even read or even saw the letter. What it related to, he does not pretend to state. To impose a liability upon Matteson for the payment of the debt of Wickersham upon these statements, would be to violate all the principles of justice, and the rules governing evidence. If there was such a letter, why not produce it, and if that could not be done, then why not

have laid the proper foundation, and proved its contents, or compelled Matteson to make discovery? No such attempt was made, and it must have been for the reason, that if the letter had been produced, it would not have shown any liability on his part. Nor can we presume from the fact that Matteson and Constant chose to indorse those notes as they did, that it was in consequence of any former liability they were under to Miller and Scott. The bill does not so allege nor does it appear in any part of the record.

When Matteson and Constant indorsed these notes, the complainants had it in their power, to bind them for the payment of Wickersham's debt, by accepting the notes. But they rejected, cancelled and returned the notes to Wickersham. And they by so doing, clearly manifested a design not to rely on these notes for any purpose. And this is made more manifest, from the fact, that they required a different kind of paper. If Wickersham had agreed to give them paper of a different kind, and they were unwilling to modify that agreement, by receiving these notes when offered, they must look to him, for a performance of that agreement. They have no claim on Matteson and Constant, nor does the relation of debtor and creditor exist between them, and consequently they have no right to be substituted to a participation in the fund produced from the sale of property under Matteson and Constant's first mortgage.

The question arises, as to the priority of the liens of the various mortgagees on the property, out of which this fund arises. And to determine this, it may be proper to advert to some of the rules governing chattel mortgages. The law deems possession of mortgaged chattels, by the mortgagor, as to *bona fide* creditors and purchasers, to be fraudulent, unless such possession is provided for in the mortgage. And in that case, if the possession continues with the debtor, after the expiration of the time stipulated for it to so remain, it is equally fraudulent. And persons purchasing or acquiring subsequent liens on the property, do so to the exclusion or postponement of prior incumbrances. Where there are several mortgages to different persons on the same property, and they are all over due, and the debtor is holding possession contrary to the terms of the mortgages, any one of the mortgagees may take possession of the property by virtue of his mortgage, and by so doing he acquires a preference over the other mortgagees, similarly situated, without reference to the date of his mortgage. Such creditors are in the situation of several purchasers of a chattel without receiving the possession, where the purchaser who first acquires possession, is preferred. And it is upon the principle that where different equities are equal, the person who unites to his equity the

possession, is preferred. "*Qui prior est tempore potior est jure.*" He who is first in time, is more powerful in law. Upon the forfeiture of the condition in the mortgage, the legal title vests in the mortgagee, and becomes complete upon his obtaining possession. But in some cases, even after a breach of the condition, and possession taken, equity will permit the debtor or his creditors to redeem. Then when the mortgagees in this case obtained possession of the chattels under their mortgages, even if they were over due and fraudulent as to creditors and purchasers, they acquired a preference over all others similarly situated with themselves.

It is urged that when Matteson sold this property on time, he became liable at once to pay the other creditors the money. And that he had no right as a trustee, to sell on a credit. The evidence shows that he took possession of the property, and afterwards purchased it in at the sale, by agreement with, and for the protection of Constant, Dodge and himself, under their mortgages. There is no evidence, which in terms, shows that there was any particular disposition to be made of the property. But when it was purchased for their mutual benefit, under their several mortgages, and no specific agreement as to the mode of its future disposition was made, it will be supposed that it was the design of the parties that it should be sold in the mode best suited to protect their several claims. In selling it in the mode adopted by Matteson, this object might be better promoted than by retaining it, or forcing it on the market for cash. There was no evidence adduced, showing that it could have been sold, either for a better price or on better terms. He obtained for it the sum it cost the parties, and interest on the deferred payments, from the date of sale. We think from all of the circumstances attending the transaction, we may safely infer that he acted in pursuance of the design of the parties, in making the sale. If he did not act in accordance with their design, they have failed to rebut that presumption.

It is again urged, that Matteson, as trustee, is not entitled to receive a compensation for managing this trust property. As a general rule, a trustee is not entitled to compensation, either for his labor or time bestowed in the care of the trust, unless it is by stipulation and agreement. It is his duty to take all reasonable care of the property, and when necessary for its preservation, he may expend reasonable sums of money, or employ agents for the purpose, and so far as such outlays are necessary, he is entitled to have them refunded. But even in this, courts will guard the fund with jealous care, and be vigilant to prevent the fund from being wasted. Matteson would have a right to be paid money expended for employing agents to hold

and preserve the property, in employing the auctioneer and clerk at the sale, to the extent of a reasonable compensation, if it had been claimed. But he is not entitled to a commission or compensation for assuming the responsibility of becoming a trustee, nor for making the sale to Aldrich. To have entitled himself to it, he should have provided for it, by agreement with the parties.

In the pleadings we find nothing requiring, or even authorizing the court to state an account between Matteson and Constant, growing out of their dealings with the hotel after the property was reduced to possession and until its sale to Aldrich. And unless such a case were made by the pleadings, the court has no power to state their accounts, growing out of this transaction. That is a matter with which the other parties have no concern. They were not parties to it, nor was it necessary for the preservation of the property, so far as we can see. It seems to have been a losing business, and it is not right that this fund should be applied to cover that loss. The other creditors not being parties to the transaction, have no interest in the board bills due the hotel, or debts and liabilities incurred on its account. These are matters between Matteson and Constant, and outside of the issues involved in this case.

The court below erred in allowing Matteson a solicitor's fee, to be taxed on the fund as costs in the case. The statute regulating fees of officers, provides for no such fee as that of an attorney or solicitor; and the court must, in taxing and allowing costs, look to the statute as its warrant of authority. While the court of equity has a discretion in awarding costs in chancery causes, it must confine that discretion to the fees allowed by the statute.

It is conceded by all the parties in interest, that Dodge's mortgage was a prior and first lien on all the money arising from a sale of the silver-plated ware, and that his debt was more than sufficient to absorb the whole of that portion of the fund; and, as his mortgage embraced no other portion of the property, it is confined to that alone.

McCabe and Van Ness, although holding a junior mortgage to those of Matteson and Constant, dated December the 12th, 1856, after the first of June, 1857, and until the 6th of that month, had an equal right with them to have reduced the property to possession under their mortgage falling due in the month of May previous. But failing to do so, Constant acquired a superior lien by his mortgage of the 6th of June, 1857. And when Matteson and Constant obtained possession under this latter mortgage, and those of the 12th of December, 1856, they acquired a superior lien under all these mortgages, to that

of McCabe and Van Ness. But all of these mortgages, except that of Constant of the sixth of June, were postponed by the mortgage to Russell and Parsons of the 27th June, 1857, which was not due when possession of the property was taken. Their mortgage would stand as a lien next in order after Constant's second mortgage, and prior to his and Matteson's mortgages of December 12th, 1856. And the claim of McCabe and Van Ness, the claim of Miller and Scott, and the claim of Dunn, were all postponed to Dodge's claim, Constant's claim under his second mortgage, Russell and Parsons' claim, and the claims of Matteson and Constant under their mortgages of the 12th December, 1856.

We are of opinion that the decree of the Circuit Court should be reversed, and that the proper decree to which the parties are entitled under this record, should be entered in this court.

Decree reversed.

NOTE.—The following is the decree directed to be entered:

It is therefore considered and found by the court, that the sum of seven thousand four hundred and eighty-nine dollars, for which the said property was sold by said Matteson to said Aldrich, is a trust and proper fund for distribution among Wickersham's creditors, who are parties to this bill; and that the same, collected and yet to be collected under the two notes of Aldrich last falling due and now unpaid, is in the hands of and held by said Matteson as trustee for said creditors. The court, from the record in this case, finds that the costs of the court below, and of this court, are properly chargeable on the said fund.

The court further finds that there was due to the said Joel A. Matteson, as the assignee of the said R. V. Dodge, on the 19th day of November, 1858, from the said T. D. Wickersham, the sum of four hundred and ninety-four dollars and eight cents, as appears from the proofs in the record herein. The court further finds from the proofs in the record, that there was due to the said Archibald E. Constant, from the said Wickersham, on the 19th day of November, 1858, the sum of one thousand nine hundred and fifteen dollars and fifty cents, under his claim secured by mortgage of the 6th of June, 1857. The court further finds from the proofs in the record, that there was due from the said Wickersham to the said David A. Russell and Jacob Parsons, on the 19th day of November, 1858, the sum of six hundred and thirty-one dollars and ninety-eight cents, on their claim secured by mortgage of the 27th June, 1857. The court further finds that there was due to the said Joel A. Matteson from the said Wickersham, on the 19th day of November, 1858, the sum of two thousand four hundred and sixty dollars and fifty-six cents, on his claim secured by mortgage dated the 12th day of December, 1856. The court further finds that there was due to the said Archibald E. Constant from the said Wickersham, on the 19th day of November, 1858, the sum of two thousand four hundred and sixty dollars and fifty-six cents, secured by mortgage dated the 12th day of December, 1856. The court further finds that there was due to William McCabe and John Q. Van Ness from the said Wickersham, on the 19th day of November, 1858, the sum of twelve hundred and ten dollars and thirty cents, under their mortgage dated the 9th day of March, 1857. The court further finds that on the same day, there was due to the said Walter T. H. Miller and Solomon Scott from the said Wickersham, the sum of one thousand six hundred and thirty-seven dollars and fourteen cents, for goods sold to him. And the court further finds that the said Wickersham was indebted to the said Charles Dunn, on the 19th November, 1858, in the sum of one thousand seven hundred and forty-seven dollars and ninety-four cents. And the court further finds that the foregoing claims are properly and of right entitled to a distribution out of said fund in the order as hereinafter decreed.

It is thereupon ordered and decreed by the court, that the said Joel A. Matteson, within ten days after the filing of this decree with the clerk of the Supreme Court of the second grand division, pay out of the said fund, all of the costs in this cause, as well in the Sangamon Circuit Court as of this court, and a fee of fifty dollars to A. Campbell, master in chancery, as a part of the costs of the court below. It is further ordered that the said Matteson be and he is allowed to retain and hold, out of the said fund, the sum of two hundred and seventy-four dollars and twenty-five cents, the amount of said fund to which he is entitled by his first lien thereon, as assignee of the said Dodge, it being the proceeds of the sale of the silver-plated ware. It is further ordered and decreed, that the said Matteson, next in its order of priority of lien, within ten days after filing this decree as aforesaid, pay out of said fund, to the said Archibald E. Constant, the sum of one thousand nine hundred and fifteen dollars and fifty cents, with interest, from the said nineteenth day of November, 1858, at the rate of six per cent., until paid, it being the sum so found due to him, under his mortgage of 6th June. It is further ordered and decreed by the court, that the said Matteson next pay in the order of distribution and priority, out of said fund, to the said David A. Russell and Jacob Parsons, within two days after this decree shall be filed as aforesaid, the sum of six hundred and thirty-one dollars and ninety-eight cents, with six per cent. interest, from the said 19th day of November, 1858, until paid, it being the amount so found to be due to them, as aforesaid. It is further ordered and decreed by the court, that the said Matteson be permitted and authorized to hold and retain, out of said fund, the sum of two thousand four hundred and sixty dollars and fifty-six cents, with interest thereon, at the rate of six per cent., from the 19th day of November, 1858, until the filing of this decree, it being the amount so found due him under his mortgage of the 12th December, 1856. And that he pay to said Constant, out of the said fund, the sum of two thousand four hundred and sixty dollars and fifty-six cents, with six per cent. interest, from the 19th Nov. 1858 until paid, the amount found to be due him under his mortgage of December 12th, 1856. And that in distributing and paying these two latter claims, that the sum which has been already collected on said fund and which shall not be exhausted by the payment of the costs, the sum to be retained under the Dodge claim, Constant's claim, under his second mortgage, and Russell and Parsons' claim as herein decreed to be paid, shall be equally divided between the said Matteson and Constant, on their said claims under their mortgages of the 12th December, 1856, and that the half thereof to Constant, be paid to him by the said Matteson, within ten days from the filing of this decree. And it is further ordered and decreed, that so soon as the money shall be collected on Aldrich's note, falling due on the first day of July, 1859, the same shall in like manner be equally divided between the said Matteson and Constant, on their claims under their mortgages of the date of December 12th, 1856, and that the said Matteson pay to the said Constant, one-half thereof, within ten days after the same shall be collected. And it is further ordered and decreed, that when the money shall be collected on Aldrich's note, falling due the first day of July, 1860, the balance of their claims under their mortgages of the 12th of December, 1856, be paid and satisfied with interest thereon, if said fund shall be sufficient for that purpose, and if not, that then the same be equally divided between them. And that said Matteson pay to the said Constant, his share of the fund arising from the last of said notes, within ten days after the same shall be received and collected. And it is further ordered and decreed, that if there shall still remain any portion of said fund, after paying the several aforesaid sums and interest, that such balance be distributed and divided in *pro rata* proportions between the said Miller and Scott, on their claim of $1,637.14, McCabe and Van Ness, on their claim of $1,210.35, and the said Dunn, on his claim of $1,747.94, and that the said Matteson pay to each of them, such *pro rata* portion on their claims, out of the balance of said fund as aforesaid, if any balance there shall be, within ten days after the same shall be collected.

And it is further ordered and decreed, that if the said Matteson shall fail or refuse to pay any or either of said sums of money within the time, or in the manner specified, that an execution or executions may issue for the collection thereof, in the same manner as upon judgments at law.

Henry McAuley, Appellant, *v.* The City of Chicago, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The law raises a presumption in favor of the regularity of all proceedings levying assessments, which must be rebutted by showing affirmatively, that something was omitted or improperly done, if they are to be defeated.

An additional notice to parties interested, is not required, where an assessment is postponed from one meeting of the Common Council to another.

This was a suit instituted below, upon an *assessment warrant*, by the collector of Chicago, under the provisions of the act entitled "An Act to amend the act entitled 'An Act to reduce the law incorporating the city of Chicago, and the several acts amendatory thereof, into one act, and to amend the same,'" approved February 16, 1857.

Under section forty, of said act, the city collector, at the January special term of said court, filed his report for judgment against the several lots, set out and described in said warrant, for the planking and filling of Lumber street, in said city, and obtained a judgment against certain lots of appellant, for the sum of $533.78, besides ten per cent. added, and costs.

It appears that said report of the collector to said court, was a general report of the taxes unpaid of the year 1858, and the annual tax roll, as well as a report on this special warrant for *this* assessment; while this assessment warrant is dated and issued upon the 9th day of October, A. D. 1857,—more than one year previous to this application for judgment.

It appears that the warrant, dated in October, 1857, was delivered to the city collector, with the other warrants, as appears from his report to the court for judgment, only on or before the second Tuesday of October, 1858, when it had been in fact issued prior to the second Tuesday of October, 1857, and a court had been held in January following the first Tuesday of January in 1858, to which the city collector had returned all his warrants uncollected for 1857.

There were two assessment rolls returned in this case, and only *one* notice given of the confirmation, *one* notice given by the commissioners of their meeting, and *one* notice to present objections to the Common Council, and only one opportunity given to take any appeal from the action of the Common Council. (See section 38, chapter 7, of city charter.) All these notices were given before the new assessment roll was filed, and no notice afterwards was given.

The order to fill and plank Lumber street, was passed April

27, 1857, and three commissioners were appointed to make the assessment.

These commissioners returned their assessment roll to the city clerk's office, on May 18, 1857, and notice was given to all persons interested, that they must file their objections in writing, in the city clerk's office, on or before the first day of June, 1857.

On June 1st, 1857, the following appears on the Common Council proceedings:

"The clerk presented assessment roll for planking Lumber street, and opening alley on block 111, school section, together with objections thereto. Referred to committee on local assessments."

July 20, 1857, the following appears:

"Alderman La Rue, of committee on local assessments, to whom was referred the assessment roll for planking Lumber street, together with objections thereto, recommended that assessment roll be rescinded. Referred to the commissioners with instructions to report, explaining the basis of their assessments."

August 10th, 1857, the following appears:

"The committee for making the assessment for planking Lumber street, to whom was referred the roll for explanation, reported thereon, asking leave to make certain amendments.

"Alderman La Rue moved to proceed to elect commissioners to make a new assessment, and demanded the ayes and nays, which resulted as follows: ayes, 7; nays, 9; and on motion the roll was *referred back for amendment.*"

Hoyne, Miller & Lewis, for Appellant.

E. Anthony, for Appellee.

Caton, C. J. The only question raised upon this record by the assignment, not decided in other cases at this term, which we deem it necessary to notice, is that which is presented by the objection, that the commissioners amended the assessment first filed by them, without authority, and without having published any new notice, and that no notice was published by the city clerk after the amended assessment was filed, for owners to appear before the Common Council, to object to the assessment and ask for its correction there.

The report of the collector, asking for judgment, appears in this record to be regular, and to justify the judgment, unless a proper defense was shown on the hearing, by the owner of the premises. The owner appeared and showed in defense, the ordinance directing the improvement and the assessment, and the appointment of commissioners to make the assessment; also

a report of the commissioners, containing an assessment roll, dated the 13th day of May, 1857, upon the back of which, appears the following memoranda: "Referred back to commissioners, with instructions to report, explaining the basis of the assessment, July 20th, 1857," "Referred back to commissioners for amendment, August 10th, 1857;" and afterwards, but on what day it does not appear, the commissioners attached to their report another assessment roll, by which the assessment upon the property in question, was increased over the amount stated in the first roll. Notice to the owners of property, dated the 18th of May, 1857, was published, notifying them that the assessment had been returned by the commissioners, and to attend the Common Council on the first of June, and make objections to the assessment. The owner of the land then introduced in evidence, an ordinance, passed by the Common Council on the 5th of October, 1857, as follows: "Whereas due notice has been given by the city clerk, of the return of the foregoing assessment roll, and objections thereto having been filed. It is therefore ordered that the said assessment, as revised and corrected by the council, be and the same is hereby confirmed, and such assessment is hereby required to be paid within thirty days from this date, and that a warrant be issued for the collection thereof, returnable in thirty days from this date." The revised and corrected assessment to which this ordinance refers, does not appear to have been offered in evidence. But that may not be very important, as we see by comparing the collector's return with the amended assessment roll, made by the commissioners, that the Common Council did not change the assessment upon this property.

The defendant then introduced records of proceedings of the council, in relation to this assessment, under dates respectively of June 1st, and July 20th, and August 10th, 1857. But there is no evidence showing that these were all the proceedings of the council on the subject, even of those dates. Indeed the inference is very strong, that the defendant did not introduce all the proceedings. All we have of the proceedings on the last day named, is an entry, showing that the committee to whom the assessment roll had been referred, "reported thereon, asking leave to make certain amendments," and the next is, (without showing any disposition of this report,) a motion by alderman La Rue, that the council proceed to elect commissioners to make a new assessment; which motion was lost. And here the defendant stopped with his evidence, without showing by the city clerk, or in any other way, that these were all the proceedings of the council on the subject, till the passage of the final order of confirmation, on the 5th of October following. The law

raises a presumption in favor of the regularity of all the proceedings levying the assessment, by requiring the court to render a judgment upon the report of the collector, which is not required to refer to or state any of them, but merely to describe the land, and state the amount of the assessment against each parcel. It was for the defendant to overcome this presumption by showing affirmatively, that something was omitted or improperly done. There was no difficulty in proving by the city clerk, that the council had never referred the assessment back to the commissioners, and required them to correct it; or that the council had never corrected it themselves, or that there was no such corrected assessment roll, as is referred to by the ordinance of the 5th of October, 1857. The absence of such proceedings is as capable of proof, as any affirmative fact, which a party is ever required to establish in a court of justice. Nor does the statute require any additional notice to be given, when an assessment is referred back to commissioners, nor in case the consideration of the assessment is postponed or laid over, from one meeting of the Common Council to another. We are of opinion that the owner of the land has not sustained the objections which he interposed in the court below, and the judgment must be affirmed.

Judgment affirmed.

David Gibson *et al.*, Plaintiffs in Error, *v.* The City of Chicago, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

In making assessments for public improvements, in the city of Chicago, the costs of engineering, superintending and collecting, may be included.

The Common Pleas Court, has the same authority to continue a case for assessments, that it has to continue any other case.

In showing an assessment, there must be something to indicate clearly what the figures used, stand for, or are intended to represent.

On the 11th day of May, 1857, the Common Council of the city of Chicago ordered that Canal street, from Van Buren street to Old street, be filled in accordance with estimate and specifications of the city superintendent, and also ordered that $20,814, be assessed upon the real estate in the west division of the city, deemed benefited by said improvements, and elected three disinterested freeholders, to make such assessment.

The estimate of the city superintendent, above referred to, was made on the 9th day of May, 1857, under a requisition of the committee on streets and alleys of the west division, and after stating the general character of the work to be performed, states that the cost will be as follows:

Whole Distance (lineal) 7,300 feet.

1,520 cords stone broken and delivered, $12	$18,240.00
7,240 cubic yards earth filling, 45c	2,258.00
Advertising	16.00
Engineering and Superintendence	75.00
Commissioners for making assessment	75.00
Collecting	150.00
Total estimated cost	$20,814.00

On the 18th day of July, 1857, the commissioners reported that they had assessed said sum of $20,814, upon the real estate therein described, as the only real estate benefited by said improvement, and that the benefits resulting thereto were in the proportion of said sum set oposite to each lot, part of lot and land respectively in said assessment roll. They further reported that said assessment did not exceed three per cent. per annum on the property assessed. The following is a copy of the assessment roll so far as the same relates to the property of the plaintiffs in error:

ASSESSMENT ROLL.

A description of the real estate in the west division of Chicago, deemed benefited by Macadamizing Canal street, from Van Buren street to Old street, with the valuation thereof, and of the sums of money severally assessed thereon, for benefits, by the commissioners, to wit:

School Section Addition.

Name of Owner.	Part of Lot of Land.	Sub Lot.	Lot.	Block.	Valuation.	Assessment.
E. Morrison			1	53	3,000	76.92
Jas. Granger			2	53	2,500	47.73
John Gooche			32	56	2,500	55.36
David Gibson			7	60	4,000	59.32
"			8	60	6,000	177.97
"			9	60	6,000	174.09
"			10	60	4,000	58.03
"			23	60	4,000	60.36
"			24	60	6,500	181.08
C. B. Farwell			1	61	6,500	193.81
"			2	61	4,500	64.61

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Name of Owner.	Part of Lot of Land.	Sub Lot.	Lot.	Block.	Valuation.	Assessment.
Brainard and Evans' Addition.						
Daniel Brainard			1	5	2,500	53.22
"			2	5	2,500	56.18
"			3	5	2,500	57.66
"			4	5	2,500	63.57
Richard Finneman	160 ft. on Canal st. by 120 ft. on Judd st.			5	11,000	280.94
Daniel Brainard			10	6	2,500	55.05
"			11	6	2,500	58.10
"			12	6	2,500	56.58
"			13	6	2,500	53.52
"			14	6	2,500	53.52
"			15	6	2,500	56.57
"			16	6	2,500	58.10
"			17	6	2,500	55.05
"			10	7	2,500	55.05
"			11	7	2,500	58.10
"			12	7	2,500	56.58
"			13	7	2,500	53.52
"			14	7	2,500	54.28
"			15	7	2,500	57.64
"			16	7	2,500	59.33
"			17	7	2,500	56.58
P. Brennan,			1	8	2,500	53.22
Daniel Brainard			2	8	2,500	56.12
M. Walsh			3	8	2,500	54.71
Daniel Brainard			4	8	2,500	51.75
"			5	8	2,500	52.49
"			6	8	2,500	55.74
"			7	8	2,500	57.37
"			8	8	2,500	60.62
Canal Trustees' Subdivision of S. W. $\frac{1}{4}$, and so much of the S. E. $\frac{1}{4}$ of Sec. 21, T. 39, R. 14, as lies west of Chicago River.						
G. W. Penny			2	43	20,000	555.06
"			1	44	20,000	555.76
J. F. Irwin		1	4	44	2,500	29.57
Canal Trustees' Subdivision of N. W. $\frac{1}{4}$ of S. 21, T. 39, R. 14.						
Michael Kehoe			14	49	125,000	277.99
J. Clowry		4	14	62	2,500	48.79
		5	14	62	2,500	48.35
		6	14	62	2,500	49.97
		7	14	62	2,500	53.22

The assessment roll shows that the whole assessment is less than three per cent. upon the assessed value of the whole property assessed.

The commissioners' assessment was returned to and filed in the city clerk's office, July 22nd, 1857. The city clerk gave

notice, by publication in the corporation newspaper, to file objections to the assessment, on the 22nd of July, 1857, which notice was published ten days consecutively, commencing July 23rd, 1857. The assessment was confirmed by the council, October 5th, 1857.

A warrant was issued to the collector, in due form, October 9th, 1857. On the 27th day of January, 1858, the collector reported to and filed with the clerk of the Cook County Court of Common Pleas, a list of lands, lots, parcels of land, and other real estate, situated within the city of Chicago, on which said assessment remained due and unpaid, attached to which report were certificates of the publisher of the corporation newspaper, of the publication of a notice by the city collector, that said warrant had come into his hands, and requiring payment of the same; and also, of a notice of his intended application for judgment, at a special term of the Cook County Court of Common Pleas, to be held on the 27th day of January, 1858. The notice of the application for judgment described the warrant as follows:

WEST DIVISION.

"Special warrant No. 306, dated October 5, 1857, for macadamizing Canal street from Van Buren to Old street."

On the 28th day of January, 1858, Daniel Brainard, E. Morrison, and James Granger, filed their objections to the rendition of a judgment against block 57, S. S. Addition to Chicago, and blocks 5, 6, 7, and 8, in Brainard & Evans' Addition to Chicago.

Among other objections filed were the following:

1st. That the amount levied and assessed was greater than the cost of the work authorized to be done by said order.

2nd. That the assessment made was unequal between the parties assessed, and not in relative proportion to amount of benefit to them, respectively, from said improvement.

4th. That the amount of benefit assessed on the property of the objectors, was much greater than upon adjoining property, appraised by the commissioners under such order at the same amount as the property of these defendants, and in every way similarly situated and equally benefited by said improvement.

10th. That the city council were not authorized to assess for certain purposes set forth in the estimate of the superintendent, and on account of which certain amounts were computed and assessed in said assessment; to wit, for engineering and superintending, the sum of $75 was computed in the sum to be assessed; for collecting, the sum of $150; for assessing, the sum of $75; whereas, the duties of engineering, superintending,

collecting, and a portion of the assessing, appertain to and are to be performed exclusively by certain salaried officers.

12th. That the assessment was not delivered to the city clerk within forty days from the appointment of the commissioners.

13th. That the notice gives no description of the lands or lots, or of the amount of taxes or assessment, interest or costs.

15th. That said assessment upon said property, assesses the same at an amount greater than three per cent. thereon.

On the trial, on the 28th day of January, 1858, the plaintiff offered in evidence the above warrant.

The defendants offered in evidence the estimate of the city superintendent above referred to, which was objected to by plaintiff, and excluded by the court. The defendants also offered in evidence, a certificate of the city clerk, showing that an assessment roll was then on file in his office, for planking Van Buren street from the south-west plank road, which said assessment was confirmed July 6th, 1857; that lot one, of block 53, of School Section Addition to Chicago, was assessed in the name of E. Morrison, at a value of $2,500, and to pay $53.54, for said planking, and showing that it appeared by a warrant on file in the office of the city comptroller of said city, that said assessment had been paid; which it was agreed should have the same force and effect as the original papers to which they refer, and none other.

The court, after hearing the case, took the same under advisement, and continued it until the next term. At the June term, 1858, the court rendered a judgment against the lands and lots described in the warrant, for the sum annexed to each lot and parcel of land, and for costs, and for ten per cent. thereon for damages, and ordered a sale of the property against which judgment was rendered.

Daniel Brainard, E. Morrison, and James Granger, bring the case to this court by writ of error. David Gibson, John Gooche, C. B. Farwell, R. Finneman, P. Brennan, Michael Walsh, George W. Penny, J. F. Irwin, M. Kehoe, and Jeremiah Clowry, also bring the case to this court by writ of error. The errors assigned in both cases are,

1st. Judgment should have been for defendants, and not for plaintiff.

2nd. The objections of the defendants should not have been overruled.

3rd. The court should have admitted the evidence offered by defendants, and set forth in bill of exceptions.

4th. The assessment roll and warrant are invalid, having

nothing upon them to indicate the assessed value of the property, nor the amount assessed upon the same.

5th. The court had no authority to continue the case to and render judgment at a term subsequent to the one at which the application for judgment was made.

6th. The judgment is a nullity, it not appearing for what sums it was rendered.

7th. The court erred in rendering judgment for ten per cent. damages.

Beckwith, Merrick & Cassin, for Plaintiffs in Error.

E. Anthony, for Defendant in Error.

Caton, C. J. We are of opinion that the court had authority to continue the case under advisement, and render a judgment at a subsequent term, the same as any other case within its general jurisdiction.

The first section of the seventh chapter of the City Charter authorized the Common Council to cause this improvement to be made. The second section declares that the expenses of the improvement with the costs of the proceedings therein, shall be assessed upon the property benefited thereby. The third section says, "The amount to be assessed for any such improvement * * shall be determined by the Common Council." It is now objected that the Common Council levied an assessment for too much. Under the direction of the city authorities, the engineer made a specification of the work, and an estimate of the expense, in which he included an estimate of seventy-five dollars for engineering and superintendence, and one hundred and fifty dollars for collecting. For the amount of the engineer's estimate including these items, this assessment was levied, and because these items were included, it is insisted that the assessment was illegal, because they were for services to be performed by salaried officers of the corporation. If these were to be a part of the expenses of the improvement or the costs consequent upon the proceeding, then the law expressly declares, that they are to be included in the assessment. That the expense of engineering and superintending is a part of the indispensable expense of the improvement, as much as the expense of breaking the stone, or hauling the material, would seem to require no argument to prove, and it was immaterial to the owners of the property, whether the corporation employed an engineer for the particular work and paid him for that alone, as they had an undoubted right to do, or employed an engineer by the year and directed him to attend to this and other work. It was no less

a part of the expense of the improvement, in the one case than in the other. It was an indisputable expense, and properly included in the estimate. So also of the cost of collecting the assessment. It seems difficult to discuss a point which appears so self evident. There must be room for argument before a sensible argument can be made. Surely the assessment would not collect itself, or at least the Common Council must have had remarkable confidence in the ability and punctuality of all the property holders, to have been justified in omitting in their estimate, this expense. There is, however, a fatal defect in this assessment, which we should not regret to get over, could it be done consistently with the principles of law. In the assessment roll are two columns, one headed "valuation," and the other "assessment," in each of which, certain figures are set down. The last column is footed up thus, "$20,814 00," and between the 4 and the next to the last 0 is a red line drawn, which may be fairly understood to mean twenty thousand eight hundred and fourteen dollars and no cents, and when the footing at the bottom of the column is found to be the sum of all the figures in the column above, we are reasonably informed that the figures above are designed for dollars and cents, although there is nothing in the column above to indicate what those figures were intended to stand for. We are disposed to embrace anything, which can, by any reasonable intendment, inform us of the meaning of the figures set down in the assessment. But if there be nothing to indicate the meaning of the figures, then we are left to the merest conjecture. No suspicion, no mere conjecture without a particle of proof to warrant them, no matter how violent they may be, in any well-regulated government, has ever been held sufficient by its legal tribunals, to warrant a condemnation; and we hope to be the last to depart from a rule, upon the inviolability of which the life, the liberty and the property of every member of the community depends. The column headed valuation, is filled with figures—nothing else. There is no word, mark or character, attached to or connected with any of these figures, showing what they were designed to represent. There is no proof in this case, showing what was the valuation placed upon any lot, in this assessment. If we adhere to the decision made at the last term, in the case of *Lawrence* v. *Fast*, 20 Ill. 340, this must be held to be a fatal defect in the assessment. We have seen no reason to doubt the correctness of the views there expressed, and have no inclination to depart from them. The law will not authorize this or any other court, to assume any fact to exist without the least particle of proof, either direct or circumstantial. But we do not propose to renew the discussion of this point. We see no way to avoid a

new assessment, to compel the owners of the property benefited by this improvement who have not paid their proportion of the expense, to do so, unless this defect can be cured by further proof.

The judgment must be reversed and cause remanded.

Judgment reversed.

Ezekiel Morrison *et al.*, Plaintiffs in Error, *v.* The City of Chicago, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

The charter of the city of Chicago does not permit any property to be burthened exceeding three per cent. in any year, for improvements on streets, etc.

This case is presented, upon the same state of facts, as that preceding it, of *Gibson et al.* v. *The City*, where the point decided in this case, is set out in the statement.

Beckwith, Merrick & Cassin, for Plaintiffs in Error.

E. Anthony, for Defendant in Error.

Caton, C. J. The only question which we propose to consider in these cases, arises on the decision of the court, in sustaining the objection made to the evidence offered by the owners of the land, tending to prove that another assessment had been levied and paid upon the same lot for the same year, which, together with this assessment, amounted to more than than three per cent., on the valuation of the lot. In this we think the court erred. This question depends on the construction to be given to the proviso to the second section of the seventh chapter of the city charter, which is quoted in the case of *Pease* v. *City of Chicago*, 21 Ill. R. 500, and the opinion is there expressed, that the proviso was designed to limit the power of the city, in making an assessment, to three per cent., upon the valuation of each lot. We now express the opinion, that the limitation is not confined to one assessment for a single improvement, but it was the intention of the legislature to limit the power of the city to three per cent. per annum, in laying assessments upon property, no matter whether the assessment be for one, or many improvements. The legislature intended that no property should be specifically burthened to an amount greater

than three per cent., in any one year, for that class of benefits. The judgment against lot one, in block fifty-three, school section addition, must be reversed.

Judgment reversed.

Silas McBride, Appellant, *v.* The City of Chicago, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Equity will not interfere to correct proceedings on the part of the city of Chicago, in collecting an assessment; a party should take his appeal, or resort to a writ of certiorari.

If the assessment was vitiated by fraud, or the party assessed was likely to sustain an irreparable injury, equity might relieve. Mere irregularities in making an assessment, will not be regarded in equity.

Silas McBride shows, by his bill, that he is the owner, in fee, of certain real estate, situate in said city, and described as follows, viz.: Lot four, block thirty-five, school section addition to Chicago.

That he was such owner on the first day of July, A. D. 1855, and from thence hitherto.

That said lots of land front and butt on a certain street or highway, in said city, usually called and known as Taylor street; that certain proceedings have been taken by said city for the purpose of widening said street, from the Chicago river, to a point thereon, west of the lands of your orator, and in so doing, seek to take and appropriate some of the lands of your orator, fronting on said street; and to that end and purpose have instituted and carried on certain proceedings.

That the said proceedings are irregular and defective in several material matters and things, namely, in this:

1st. That the notice by the clerk, that the Common Council intended to take and appropriate the land for the purpose of widening said street, is vague and indefinite, no time being therein specified when the Council would act in the premises.

2nd. That at the expiration of the time required by law for giving the notice, the Common Council did not act, nor did they act at all in the matter, either by adjournment or otherwise, until the 12th day of May, 1856, six months afterwards or thereabouts.

3rd. That the commissioners did not within forty days from the time of their appointment, make their report and return of

their actings and doings as such commissioners—they being appointed the 12th day of May, and making their return the 30th day of June then next.

4th. They did not, in fact, act within forty days next after their appointment, as their return shows that they did not act till the 28th day of June, in making their assessment.

5th. The notice of confirmation of the report of such commissioners was published on the 12th day of July, for the 14th July, and was not, in fact, acted on until the 18th of August, no order being taken by the council on the 14th July, nor until the 18th August.

That said proceedings are irregular and void, and conferred no right, power or authority in the said city, either to condemn and appropriate said land, or to levy and assess said special assessment thereon.

That under color of said proceedings, the said city of Chicago hath caused to be levied and assessed upon his lands the sum of eighty-two dollars.

That, notwithstanding such irregularities of the said proceedings, and the want of right and power on the part of said city, to take the said lands, and assess said tax or assessment for the supposed benefits of that alleged improvement, yet the said city has proceeded to issue its warrant for the collection of the said assessment; and the said assessment levied on said lands having been returned unpaid, such proceedings have been thereupon had, that, upon application to the court, judgment hath been rendered against said lands, in favor of the said city, and the same ordered to be sold to pay said assessment, on the 31st day of March, 1858, and that the said city, or its agents, will proceed on that day and sell the same under said judgment and order, unless restrained by the court.

That he files his bill on behalf of himself and all others whose property has been taken or assessment levied thereon, by virtue of said proceedings, who may come in and become parties hereto, and share the expense of this suit.

An injunction was issued in conformity with the prayer in the bill.

The city, by its attorney, moved the court to dissolve the injunction, for want of equity appearing upon the face of the bill, which was done, at the cost of complainant, which was assigned for error.

W. T. Burgess, for Appellant.

E. Anthony, for Appellee.

Walker, J. Numerous objections are urged, to reverse the decree of the court below dissolving the injunction and dismissing appellant's bill. These objections are to the mode of exercising a power, with which the appellees were clearly invested, by their charter. It authorizes the Common Council to open, widen and extend streets within the city limits, and to appoint commissioners to ascertain and assess the damage and recompense due the owners of lands affected by such improvement; and, at the same time, to determine what persons will be benefited by such improvement, and to assess the damages and expenses thereof, on the real estate of persons benefited, as nearly as may be, to the benefits resulting to each. The objections urged are:

1st. That the notice by the clerk, that the Common Council intended to take and appropriate the land for the purpose of widening said street, is vague and indefinite, no time being therein specified when the Council would act in the premises.

2nd. That at the expiration of the time required by law for giving the notice, the Common Council did not act, nor did they act at all in the matter, either by adjournment or otherwise, until the 12th day of May, 1856, six months afterwards or thereabouts.

3rd. That the commissioners did not, within forty days from the time of their appointment, make their report and return of their actings and doings as such commissioners, they being appointed the 12th day of May and making their return the 30th day of June then next.

4th. That they did not, in fact, act within forty days next after their appointment, as their return shows that they did not act till the 28th day of June, in making their assessment.

5th. That the notice of confirmation of the report of such commissioners was published on the 12th day of July, for the 14th July, and was not in fact acted on until the 18th of August, no order being taken by the council on the 14th of July, nor until the 18th of August.

Upon a careful examination of the works on chancery jurisdiction, as well as reported cases, we are unable to find that a court of equity has ever entertained jurisdiction to enjoin the collection of a tax, when the objection was urged against the jurisdiction. And it is for the plain and obvious reason, that if the tax is illegal and void, the party has his remedy at law, which would be as complete and ample as could be afforded by a court of equity. If the tax is levied without authority, the persons assuming to act are clearly liable; and if in the exercise of authority legally possessed, it is exceeded, or any irregularity occurs, which renders the assessment and tax void, those

committing the irregularity are liable to the party suffering injury. While an assessment of this character is not a tax, and differs in some respects from it, it is nevertheless in many respects similar. They both proceed to raise money by authority of law from the citizen, without his assent, and are required to proceed upon the basis of equality, either as to benefits conferred, or in proportion to the ability of the person taxed. Uniformity and equality are in each observed, as a principle of justice and duty. They are each of them enforced by summary proceedings and without judgment, based upon indebtedness and without personal service. In each, the process is compulsory and enforced by distress.

These assessments are authorized alone by statute, and the mode of levying and collecting them, is specified by the charter conferring the power. When the commissioners shall have made the assessment and returned it to the Common Council, the clerk is required to give at least ten days' notice by publication, that the assessment has been returned, and that on a day to be named therein, it will be affirmed by the Common Council, unless objections to the same are made by some person interested. Objections may be heard before the Common Council, and the hearing may be adjourned from day to day. The Common Council are given power, in their discretion, to confirm or annul the assessment, or to refer it back to the commissioners. And the 17th section of the sixth chapter of the city charter, gives an appeal to any court of record in Cook county, from the order for opening or widening any street, etc., and opens all questions in such proceeding to hearing on the appeal. It prescribes the mode of trying the case. It also provides that no appeal or writ of error shall lie to the judgment of the court, on the trial.

Ample opportunity is thus given to the party feeling himself aggrieved, to be twice heard. First, before the Common Council on the return by the commissioners, and if not satisfied with their determination, then by an appeal to any court of record, in the county of Cook. And if the party having notice, lies by, and fails to urge a hearing before the Common Council, and fails to take an appeal or remove the record of confirmation by *certiorari*, to a court of competent jurisdiction, he must be held in a court of equity, to have waived all irregularities, and cannot, by applying to this tribunal, have a hearing, which he has failed to avail himself of at law. If he had no notice, when the proceeding did come to his knowledge, he could have removed the record to the Cook Circuit Court by *certiorari*, and if it were essentially defective, the order would be quashed. By either the appeal, or *certiorari*, an ample and complete remedy at law could have been had. And therefore a court of equity

should not assume jurisdiction for mere irregularities, or even for a want of compliance with material requirements of the law.

That a case might occur, as where the injury likely to result from the enforcement of a void assessment would be irreparable, from the irresponsibility of the officers committing the irregularity, or in a case where the whole proceeding was tainted and vitiated by fraud and corruption, a court of equity might, by either of those means, acquire jurisdiction to inhibit the corporation from executing its order. But in cases where officers, either *de jure* or *de facto* are exercising the functions of that office, and the law authorizes them to levy a tax, or a special assessment, a court of equity will not restrain them from acting for a want of regularity in the exercise of the power, while it might entertain jurisdiction where persons are acting neither as officers *de jure* or *de facto*, or having no pretense of legal power to levy a tax or make an assessment. But such cases should be clear and free from doubt.

In this case, the various objections to this proceeding could have been fully heard and determined on an appeal, or by writ of *certiorari*, if the appellant had been disposed to have availed himself of his legal remedies. But failing to do so, we see no reason why a court of equity should, or even if so disposed, could afford the relief sought by the bill. Therefore, the decree of the court below, dissolving the injunction and dismissing the complainant's bill, must be affirmed.

Decree affirmed.

PHILLIP F. W. PECK, Appellant, *v.* THE CITY OF CHICAGO, Appellee.

JOSEPH N. BARKER, Appellant, *v.* THE CITY OF CHICAGO, Appellee.

THE CITY OF CHICAGO, Plaintiff in Error, *v.* CHARLES R. STARKWEATHER, Defendant in Error.

FROM COOK COUNTY COURT OF COMMON PLEAS.

Assessments for improvements already made, by parties other than the city, are illegal.

The bill of exceptions sets forth in substance, that defendants filed the following among other objections, to the rendition of a judgment:

The order of the Common Council, directing that the sum of $18,200 be assessed on real estate of the city of Chicago, deemed benefited by the filling, curbing and paving of Washington street, from the west line of LaSalle street to the east line of Market street, "in accordance with the superintendent's specifications for the same," was made by the Common Council without having adopted or agreed upon any plan, or mode, or specification for said improvements, but the same was an arbitrary order for assessing that sum for the purpose of raising money to pay one John McBean for paving said street, under private contract with some of the property holders on said street, and this warrant is being now prosecuted for that purpose.

That a large part of the said work was done by said McBean, under said private agreement with said property holders, before said order was made.

Scates, McAllister & Jewett, for Appellants and Plaintiff in Error.

T. Hoyne, for P. F. W. Peck.

E. Anthony, for the City of Chicago.

Caton, C. J. The assessments in these cases, were in part for improvements already executed by parties other than the city, and without any liability on the part of the city. The assessments were therefore illegal, and it was the duty of the court to refuse to render judgments for them. *Pease* v. *City of Chicago*, 21 Ill. R. 500.

The judgments in the two first cases are reversed, and in the last the judgment is affirmed.

RICHARD J. HAMILTON, ESTHER EWING, GEORGE W. EWING, MURRAY F. TULEY, B. F. BLACKBURN, GEORGE W. TURNER, THOMAS J. BYRD and JANE F. BYRD, Appellants, *v.* THE CITY OF CHICAGO, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Proceedings under special assessment for the city of Chicago, prior to the passage of the law of 1857, were limited in time, both as to the order of sale and the sale of property, and the sale was required to be within two years from the date of the order confirming the assessment; unless it was delayed by legal proceedings.

THIS was a proceeding to levy a special assessment in the city of Chicago.

The collector reported to a special term of the Common Pleas, that the warrants for the collection of these assessments were issued, as required by law, and were delivered to him on or before the second Tuesday of October, 1858.

That he forthwith published a notice in the corporation newspaper, that such warrants were in his hands for collection, describing the nature of the warrants and requesting all persons forthwith to make payment, and that, in default, the assessment would be collected at the cost and expense of plaintiffs in error.

That he had given ten days' notice of his intended application to the court, for a judgment against said lots, for the amount, interest and costs due; in which he himself set forth the nature of said warrants, and in which he requested all persons interested therein to attend at said term.

The warrant contains the assessment roll, as follows:

"ASSESSMENT ROLL.

"Description of a *portion* of the real estate, deemed benefited by filling up and planking North Clark street from the river to Ontario street, with valuation thereof, and the sums of money, severally assessed thereon for benefits, by the commissioners, to wit:

"ORIGINAL TOWN OF CHICAGO.

Names of Owners.	Description.	Lots.	Blocks.	Valuation.	Assessments.
R. J. Hamilton,		4	2	48,000	560.93
W. G. and G. W. Ewing,		5	2	39,000	573.97
J. V. and F. Byrd,		1	3	44,000	560.93

"The collector is commanded to levy, make and collect of the owners of the real estate, described in the warrant, the

money assessed thereon, for which each may be liable, and make due return in what manner he shall execute the writ, within thirty days from the date thereof.

"The collector makes return on the warrant, that he has made demand of the assessment on all the parties, opposite whose names, in its appropriate column, the word 'paid' is not written. That he has not been able to find any personal property belonging to any of them, subject to the payment thereof. He, therefore, returns the warrants unsatisfied as to all assessments not marked 'paid' on the face of the warrant."

"CORPORATION NOTICE.

CITY COLLECTOR'S OFFICE, CHICAGO, }
January 7, 1859. }

"Public notice is hereby given, that I shall apply to the Cook County Court of Common Pleas, on the first day of the special term thereof, to be holden at the court house, in the city of Chicago, on the 27th day of January, A. D. 1859, for judgment against all blocks, lots, sub-lots, pieces and parcels of land, together with the improvements, if any, situated thereon, for all taxes, assessments, interest and costs thereon remaining unpaid, as appears from the following described warrants now in my hands for collection."

"Warrant No. 106, north, dated November 24, 1856, for filling and planking North Clark street, from the river to Ontario street."

Defendants object to judgment being pronounced against said land mentioned in warrant number 106, and assign the following reasons:

Because said warrant was never delivered to the city collector, who makes this application.

Because said warrant was issued prior to the passage of the act of February 14, 1857, amending the charter of the city of Chicago.

Because the assessment upon which said warrant was issued was confirmed by the Common Council of said city, prior to the passage of said act of February 14, 1857, from which this court derives its jurisdiction.

This court has no jurisdiction or power to pronounce judgment in this cause, because the said special assessment upon and for which this warrant was issued, was duly confirmed by the Common Council of the said city of Chicago, more than two years previous to this application being made, to wit, on the 24th day of November, A. D. 1856.

Because more than two years have elapsed since the corrected assessment roll, upon which this warrant issued, was confirmed by the said Common Council.

Because an application was made by the proper city authority at the County Court of Cook county, (which court then had jurisdiction in such cases,) for judgment against the lots and real estate, mentioned in said warrant, for the amount of said assessment upon the same at the —— term of said court, for the year A. D. 1857, and that the said court refused said application, and that the judgment of said court refusing said application was a final decision as to right of the city authorities to have judgment in favor of the city upon said warrant.

Because the said assessment was not levied according to law.

Because the several orders and proceedings of the Common Council, for said improvement, and in assessing and collecting the moneys for the same, are illegal, improper and void.

Because no sufficient notice of the application for judgment has been given.

Because the prerequisites for the resolutions of judgment, by this court, have not been complied with.

Because said alleged warrant was issued prior to the act of February 14, 1857, and the assessment upon which said alleged warrant is claimed to have been issued, was confirmed by the Common Council, prior to the passage of said act, from which this court obtains its jurisdiction.

The court has no jurisdiction, because said special assessment, upon which this alleged warrant was issued, was confirmed by the Common Council of the city of Chicago, more than two years previous to this application being made, and to the filing of the collector's report.

On the 3rd of February, the court rendered a judgment against said lands described in aforesaid warrant, for the sum annexed to each lot, piece or parcel of land, and for costs of suit severally thereon; and the further sum of ten per cent. upon the amount of assessments respectively due and unpaid, upon each of the lots therein, and made an order for sale of said lots, for the payment of the amount of said judgment.

And thereupon Richard J. Hamilton, owner of lot 4, block 2, and G. W. Ewing, owner of lot 5, block 2, Esther Ewing, owner of sixty feet of said lot 5, in block 2, and G. W. Turner and Jane F. Byrd, owners of lot 1, in block 3, of original town of Chicago, severally entered their exceptions herein, and prayed an appeal to the Supreme Court for the lots belonging to them severally.

Afterwards comes the said city attorney, and moved that judgment be entered against the said lots and pieces of land, in said warrant number 106, described, in favor of said city of Chicago.

Thereupon, defendants, by their attorneys, object, and insist that plaintiff should produce, and offer in evidence, the original warrant described in the said city collector's report as number 106, before he could demand judgment against said land.

And thereupon, defendants, in support of their objections aforesaid, by them filed, offered as a witness, one *Gray*, who being sworn, deposes and says, he was then a deputy city collector, and had been, as such deputy, in the said collector's office, ever since the said collector had been in office. That the warrant produced by the witness was the only warrant in the possession of the city collector, relating to the assessments described in warrant number 106, of the city collector's report, and that it was the original of the warrant described in said report as warrant 106, and that said original was received by the present city collector, with a number of warrants, from the special collectors of said city, who were in office previous to the said city collector.

Defendants then offered in evidence the said original warrant and return thereto. Said warrant and return, as set out above.

Defendants further offered in evidence the orders and proceedings of said Common Council in reference to said assessment, and the assessment roll returned by said commissioners, as follows:

"IN COMMON COUNCIL,

SEPTEMBER THE 26TH, 1856.

"Ordered, That the old plank, in North Clark street, from the dock line to the north line of Ontario street, be taken up, and said part of said North Clark street be filled up to the established grade. That the same be planked twenty-four feet, in the center, and curbed with new plank, and the sides be planked with selected old plank; that both sides of said part of said street be substantially curbed with new plank. All to be done in accordance with superintendent's estimate, herewith submitted. Said work to be commenced within seventy days from date.

"Ordered, That the sum of $12,468.11, be assessed upon the real estate in the north division of the city of Chicago, deemed benefited by the said improvement, and that the Common Council do now elect, by ballot, three reputable and disinterested freeholders, of the city of Chicago, to make said assessment.

"The orders were passed, and the council proceeded to the election of commissioners thereunder."

The commissioners' return certifies that they were duly qualified; that they published a notice of the time and place of meeting, for the purpose of making said assessment, in "Chicago

Daily Times," the corporation newspaper, for six consecutive days previous to such meeting, a certificate of which is hereunto attached; that they were present at the time and place designated, and did then and there make said assessment upon the real estate hereinbefore described; and that the assessment does not exceed three per cent. on the property assessed.

"COMMISSIONERS' NOTICE.

"Public notice is hereby given to all persons interested, that the undersigned commissioners, appointed by the Common Council of the city of Chicago, to assess the sum of $12,468.11, upon the real estate in the north division, by them deemed benefited by filling up and re-planking North Clark street, from the river to Ontario street, will meet at room number three, in the court house, on the 7th day of October, 1856, at the hour of 10 o'clock A. M., for the purpose of making said assessment."

Certificate of publishers, that notice was published in "Chicago Daily Times," six days consecutively, commencing with September 26th, 1856.

"ASSESSMENT NOTICE.

CITY CLERK'S OFFICE, CHICAGO, }
October 27, 1856. }

"Public notice is hereby given to all persons interested, that the commissioners appointed as aforesaid, and for purpose aforesaid, have completed their assessment and made returns thereof.

"Any person wishing to appeal from said assessment, must file their objections, in writing, in my office, on or before the 10th day of November, 1856, at 7 o'clock, P. M., as the Common Council will, at that time, in the council room, hear all objections to said assessment, and revise and confirm or amend the same."

"IN COMMON COUNCIL,

NOVEMBER 24, 1856.

"Whereas, due notice has been given by the city clerk of the return of the foregoing assessment roll, and no objections thereto having been filed, it is therefore ordered that the said assessment, as revised and corrected by the council, be and the same is hereby confirmed, and such assessment is hereby required to be paid within thirty days from this date, and that a warrant be issued for the collection thereof, returnable in thirty days from this date.

"It is further ordered, that upon the return of the said warrant, if any part of said assessment shall not be collected, the superintendent of special assessments shall apply to the County Court of Cook county, for judgment upon the real estate upon which said assessment remains unpaid, for the amount of such assessment and costs, after publishing a notice of such in-

tended application in the corporation newspaper for five days."

It was admitted by defendants, that the city collector made application for and obtained judgment upon said warrant, number 106, at the January special term, 1858, of said court; that said judgment was set aside, on motion of defendants, and the said judge did then and there give his opinion, and decide that said objections be overruled.

To which decision defendants excepted.

Scates, McAllister & Jewett, for Appellants.

E. Anthony, for Appellee.

Caton, C. J. We shall confine ourselves in this case, to the single question which it presents, and which is not raised in any of the other cases. The order of the Common Council confirming the corrected assessment roll, was passed on the 24th of November, 1856, and the application for judgment against the lots, was not made by the collector, till the January term, 1859, and the objection is, that the specific lien had terminated and no judgment *in rem*, could by law be rendered against the lots for the assessment. When the warrant for the collection of this assessment was issued, and till the passage of the law of 1857, no judgment of a court of law was required, to subject lands to the payment of assessments in Chicago. The eighth section of the city charter provided, that in case of non-payment of taxes and assessments, an order should be made by the Common Council, and entered at large on its records, directing the collector to sell the delinquent premises, which were to be particularly described in the order, as well as the assessment for which the sale was to be made, a certified copy of which, with the warrant, constituted the process, on which the sale was to be made. This provision was superseded by the 40th section of the amendment of the charter passed in 1857, which requires the judgment of a court of general jurisdiction, before the sale of the land. It is unnecessary now to say, whether the law of 1857, had so far a retroactive operation as to stop the execution of process for the sale of real estate, which had been regularly issued by the Common Council, but which yet remained unexecuted, until the judgment of condemnation by a court of law was obtained. The present inquiry is, whether a court of law, admitting its jurisdiction in such case, could render a judgment of condemnation against the land after two years from the order of confirmation of the assessment roll. This judgment is strictly *in rem*, and creates no personal liability against the owner of the land. It is for the enforcement of a specific lien,

existing upon the land, and not for the collection of a general debt, against the owner. This judgment of a court, was designed to supersede and take the place of the order of the Common Council, provided for in the 8th section of the city charter, and consequently, can only be made in a case where the Common Council could have passed such an order, had the law of 1857 not been passed. The proper solution of this question, must then depend upon the old law, existing prior to the amendment of 1857. It provides that all taxes and assessments levied under that act, "shall be a lien upon the real estate upon which the same may be imposed, rated or assessed, from and after the corrected assessment roll shall have been confirmed, and on personal estate, from and after the delivery of the warrant for the collection thereof, until paid, and no sale or transfer shall affect the lien." And the 8th section provides: "In case of the nonpayment of any taxes or assessments, levied or assessed under this act, the premises may be sold for the payment thereof, at any time within two years after the confirmation of the assessment, by the Common Council," and the section then goes on to provide, that before such sale, an order for the sale shall be made by the Common Council, and entered at large on its records, a copy of which, together with the collector's warrant, shall constitute the process on which the sale shall be made. When these provisions of the charter are considered, there can be no doubt that it was the intention of the law, to limit not only the time within which the order of sale should be made by the Common Council, but actually the sale itself, to within two years of the date of the order confirming the corrected assessment roll, unless the sale was delayed by injunction or other legal process, as is contemplated by the proviso to the 4th section. There is certainly no intention to enlarge the time within which the order of sale shall be made, manifested by the 40th section of the amendment of 1857. Whatever there is in that, bearing on this subject, is restrictive in its character. That provides: "If from any cause the taxes and assessments charged in said collection warrants, are not collected or paid on the lands or lots described in such warrants, on or before the first Tuesday in January, ensuing the date of such warrant, it shall be the duty of the collector to prepare and make report thereof, to some court of general jurisdiction," etc. Now there is certainly nothing here, showing a design to enlarge the time within which judgment of condemnation shall be made; but it even limits the time within which the collector shall report and make application for judgment, to the first term after the first Tuesday in January, ensuing the date of the warrant. And this presents also another objection, which is urged to this proceeding, and that is that the

report and application for judgment, was not made within the time prescribed by this law. This warrant was dated more than two years before the report and application was made to the court for judgment, and hence the report was not within the time required.

The judgment must be reversed.

Judgment reversed.

Richard C. Bristol, Plaintiff in Error, *v.* The City of Chicago, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

The collector for the city of Chicago is required to state in his report, asking for a judgment against delinquent lots, etc., the amount of taxes and assessments which remain unpaid, after the first Tuesday of January, but not the particular object for which the assessment was levied, nor the value of the property upon which it has been levied.

The collector's report is *prima facie* evidence of the amount due, if the owner of the land is in default, and upon this, judgment may be rendered. The report does not prejudice any party, by any statement in it, beyond what the law requires shall be stated. Nothing beyond is evidence.

A party may appear and rebut a presumption, arising from the report of the collector.

No piece of property can be assessed exceeding three per cent., in one year, for any improvement specified in the first section of the charter; and if it is shown that a greater sum has been levied, judgment should be refused.

Ten per cent. may be collected in addition to the assessment and costs.

This was a proceeding to levy a special assessment.

The collector reported to a special term of the Common Pleas, that the warrant for the collection of this assessment was issued as required by law, and delivered to him on or before the 2nd Tuesday of October, 1858.

That he forthwith published a notice in the corporation newspaper, that such warrant was in his hands for collection, describing the nature of the warrant, and requesting all persons forthwith to make payment, and that in default, the assessment would be collected at the cost and expense of plaintiff in error. That said notice was published for thirty days.

That he had given ten days' notice of his intended application to the court for a judgment against the plaintiff's lot, for the amount, interest and costs due, in which he briefly set forth the nature of said warrant, and in which he requested all persons therein interested to attend at said term.

The following is the assessment roll annexed to the warrant, viz.:

"ORIGINAL TOWN OF CHICAGO.

Names of Owners.	Description of Lot.	Lot.	Bl'k.	Valua'n.	Assess'nt.	
Garrett Institute,		4	31	70,000	2294 22	Paid.
George Smith,	N. ½	5	"	50,000	1617 16	Paid.
J. B. Busch,	S. 20 fr.	"	"	10,000	389 09	Paid.
C. McDonnell,	70 fr. N. & adj. S. 20 fr.	"	"	40,000	1210 64	
	Wharfing Lots,					
R. C. Bristol,		28		75,000	2342 07	
		29				
S. Lind,		30		70,000	2148 82	Paid.
		31				
				Total,	$10,000 00	

On 28th January, 1859, at a special term called for this purpose, the court rendered a judgment against said wharfing lot, 28, for said sum of $2,342.07, and ten per cent. thereof in addition thereto, making in all the sum of $2,576.27, and made an order for the sale of said lot for the payment of the amount of said judgment.

The plaintiff assigns the following errors:

1st. The Common Council had no power, jurisdiction or authority, to assess any greater sum than three per cent. upon the value of the real estate of plaintiff, in any one year, for any improvement in said city.

2nd. The court below rendered a judgment against wharf lot 28, original town, now city of Chicago, for a greater sum than three per cent. per annum of value for grading, filling, building area wall, and paving Market street in said city, and ordered said premises to be sold to pay the same.

3rd. The court rendered a judgment for ten per cent. over and above the amount assessed by the Common Council on said lot, and made an order to sell said premises for the payment of the same.

Scates, McAllister & Jewett, for Plaintiff in Error.

E. Anthony, for Defendant in Error.

Caton, C. J. This was a judgment rendered upon the application of the collector, under section forty of the amendment to the city charter, passed in 1857, and which is quoted at length in the case of *Pease* v. *City of Chicago*, 21 Ill. R. 500. By reference to that section, it will be observed, that in case a tax or assessment from any cause, is not paid on or before the first Tuesday of January, " it shall be the duty of the collector to prepare and make report thereof to some court of general jurisdiction, to be held in Chicago, at any vacation, special or general term thereof,

for judgment against the lands, etc., for the amount of taxes, assessments, interest and costs, respectively due thereon." The first inquiry is, what is the collector required to state in his report to the court, upon which he is to ask for judgment. It is simply the amount of taxes and assessments which remain due and unpaid, after the first Tuesday of January, upon the lands and lots against which he asks judgment. He is not required to state for what particular object the assessment was levied, nor the valuation of the property upon which the assessment was made. By the forty-third section of the same act, which is also quoted at length in the case above referred to, it is provided that "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." This law clearly makes the collector's report, *prima facie* evidence of the amount due, in case of default by the owner of the land, and upon that report alone, the court is required to render the judgment. And the only serious question in this case, is whether either the city or the owner shall be prejudiced by any statement which the collector may choose to make in his report, above and beyond that which he is required by the law to insert. We are of opinion that this report is an official document, so far as the law makes it the duty of the court to act upon it, and so far as the statements are concerned, which the law requires him to insert in the report, and no farther. All that he states beyond that, is extra official, and cannot be taken as evidence of the truth of such statements. He may be considered as the agent of the city, for the purpose of making such statements as the law requires him to make, but more properly speaking, he is the agent of the law, to inform the court of certain facts, and upon which the court shall act, unless the owner of the land shall appear and show in his defense, some matter destroying the presumption arising from the collector's report, and in that event, the law declares that judgment shall be rendered for the amount which he states is due and unpaid. In his report in this case, the collector states that he attaches, as a part thereof, the warrant by which he was ordered to collect the tax, and uses it as a schedule, to show the description of the land and the amount of the taxes, assessments, interest and costs, due upon the land. The language of his report is this: "That the annexed schedule is a correct list of the lands, lots and parcels of lands, together with the amounts of the taxes and assessments, interest and costs respectively due thereon, as set forth in the said warrant, which remains unpaid and uncollected." Here then, the collector vouches no fact which the law did not require him to state in his report. Although the paper attached and referred to in this report, and

which, so far as a description of the land and the amount of the assessment is concerned, is made a part of the report, whatever statement it contains beyond these facts, the collector does not certify to, and if he did, such certificate would be extra official, and the court could not act upon or take any notice of it. The court below could not, and this court cannot receive from the collector any statement as official, or assume it to be true, which the law did not require him to make in his report, on which his application was founded. There was not then before the court below, and there is nothing before this court, legitimately showing, what was the valuation of the property upon which the assessment was levied, so that it cannot be seen, whether the amount of the assessment exceeded three per cent. on the valuation of the property or not. Had the owner of the property appeared and made defense, and shown that the amount of the assessment exceeded three per cent. on the valuation of the property, we should not hesitate to hold such assessment to be in direct hostility to the proviso to the second section of the seventh chapter of the city charter, which is in these words: "Provided, such assessments shall not exceed three per cent. per annum on the property assessed." The counsel for the city insists, that the gross assessment on the aggregate value of all the property assessed, shall not exceed three per cent. That if a part of the property is benefited but one per cent., the assessment may be five per cent. on other property, which may be benefited to that amount, by the improvement. This we do not think a fair construction of the statute. It was manifestly the intention of the legislature, to limit the power of the Common Council, so that no piece of property, should be burthened more than three per cent. in any one year, by an assessment for any improvement specified in the first section of that act. And when that is legitimately shown to have been done, in a defense properly interposed, it becomes the duty of the court to refuse to render a judgment for the assessment.

The next objection to be considered is, that the court rendered a judgment for ten per cent. upon the assessment, in addition to the amount of the assessment and ordinary costs. This depends upon the fifty-second section of the act of 1857. That provides: "But in all cases where said assessments are not paid on or before the day of filing the collector's report in any court of general jurisdiction, ten per cent. shall be collected as additional costs, and be added to and collected with the other assessments and expenses, authorized to be collected on the property assessed, and for this purpose, the collector shall add to his said report, in a separate column, the amount of such additional costs." It is first objected, that the legislature had

no authority to authorize a judgment to be rendered for the additional amount of ten per cent. It is immaterial whether we call it costs, damages, interest or penalty, it is all the same thing, and is the imposition of a burthen, in consideration of the delay, inconvenience and expense, arising to the city, consequent upon the neglect of the person, whose duty it was to pay the assessment. It is objected that the legislature had no authority to impose this additional burthen upon the tax payer. We cannot appreciate the force of this objection. It is a power constantly exercised by legislative bodies, and hitherto without question. In the exercise of the same power, the legislature has authorized this court to give judgment for damages, at a certain per cent., on the amount of the judgment, in cases of appeal taken for delay, and so where a penalty is imposed for delay, in paying school notes after they are due.

The statute, it is true, does not in express terms say, that this ten per cent. shall be included in the judgment, but merely says that ten per cent. shall be collected as additional costs, in case the assessment is not paid before the collector's report is filed, and for the purpose of convenience, the collector was directed to extend the amount of the ten per cent. additional costs, in a separate column, in his report to the court. The legislature either intended that this ten per cent. should be included in the judgment, or that the law itself should operate to add that amount to the judgment, which the collector was required to collect. To say the least of it, we think there was no error in including, in express terms, this ten per cent. in the judgment. At most it was but expressing, what by force of the law was necessarily implied, if it was not absolutely necessary to have included it expressly in the judgment. We think it safer, at least, to express it in the judgment. Nor was it fatal to the validity of the judgment, that the collector neglected to follow the directions of the statute, in making up his report, by extending the ten per cent. in a separate column. The amount of it was a mere matter of computation, and the extension in a separate column, was a mere matter of convenience, and directory.

The judgment must be affirmed.

Judgment affirmed.

William B. Ogden *et al.*, Plaintiffs in Error, *v.* The City of Chicago, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where it is stipulated that a judgment shall be rendered as if by default, upon certain conditions, the judgment will stand; all that part of the report not required by the law, being disregarded.

This was a proceeding to make a special assessment for *deepening* and widening the North Branch of the Chicago river.

The collector gave due notice of his having the warrant for collection, and also of his intended application to the January special term of the Cook County Court of Common Pleas, for judgment against the delinquent lots and lands.

The collector's report contained the warrant at large, and the warrant contained an exact copy of the assessment roll, as made and returned by the commissioners.

The following is a copy of the caption and tabular statement of the property and assessment in said roll:

"Assessment roll.

"A description of the real estate in the north and west divisions of the city of Chicago, deemed benefited by deepening and widening the North Branch of the Chicago river, with the valuation thereof, and the sums of money severally assessed thereon for benefit by the commissioners, to wit:

Wight's Addition to Chicago.

Owners.	Description.	Sub Lot.	Lot.	Block.	Valuation.	Assessment.
Ogden & Jones,			1	1	7,500	222.70
				2	7,500	222.70
				3	7,500	222.70
J. Y. Scammon,			1	6	8,000	231.98
Elston's Addition to Chicago.						
Daniel Elston,				1	170,000	5,029.29
Wm. B. Ogden,				95	105,000	3,099.21

The collector also filed the proceedings of the Common Council in ordering the assessment, in which it is set forth that on the 24th August, 1857, it was "Ordered, that the North Branch of the Chicago river be deepened to the depth of eleven feet below low water mark, and widened so as to afford a channel of fifty feet on the bottom, and not less than seventy-five feet at low water mark, in accordance with the superintendent's estimate, herewith submitted.

Ordered, that the sum of sixty-four thousand four hundred

and fifty-five dollars be assessed upon the real estate deemed benefited by the said improvement," etc.

Commissioners were elected to make the assessment, who made the foregoing return, and that the same did not exceed three per cent. upon the valuation of the property assessed.

The council confirmed the assessment.

Defendants filed objections, and afterwards by a stipulation, the objections were withdrawn, and judgment taken as by default.

Thereupon the court rendered a judgment against each lot, etc., for the sum annexed to each parcel of land, together with the further sum of ten per cent. thereon, and for the sale of the premises therefor.

The assignment of errors is as follows:

1st. The Common Council had no power, jurisdiction, or authority to assess any greater sum than three per cent. upon the value of real estate of plaintiffs in any one year, for any improvement in said city.

2nd. The court below rendered a judgment against the lots for a greater sum than three per centum per annum of the value, for deepening and widening the North Branch of the Chicago river.

3rd. The court rendered a judgment for ten per cent. over and above the amount assessed by the Common Council on said lots, and made an order to sell said premises for the payment of the same.

4th. The Common Council had no jurisdiction to confirm, and the court below had no jurisdiction to render judgment for this amount, because there was no valid assessment made in the case; and because the commissioners made no assessment of any sum of money against or upon either of the said premises, as appears by the assessment roll returned by them; and because the Common Council has no power to make a special assessment for *deepening* the North Branch of the Chicago river.

5th. The court erred in rendering judgment for the defendant and against the plaintiffs in error, when, by the law of the land, judgment should have been rendered for the plaintiffs in error for their costs.

Scates, McAllister & Jewett, for Plaintiffs in Error.

E. Anthony, for Defendant in Error.

Caton, C. J. The judgment in this case must be affirmed, upon the principles stated in the case of *Bristol* v. *City of Chicago*, *ante*.

Although the owners of the land appeared and filed objections to the judgment, which if they had sustained by proof, would have been fatal to it, yet before they introduced any evidence to sustain them, they entered into a stipulation with the city attorney, that judgment should be entered against the lands for the assessment, "in the same manner in all respects, and to the same extent and effect, as if the application of said city for said judgment, had not been resisted and in no other respect shall said judgment be entered, it being hereby agreed that the same shall be entered, as if by default, save as hereinafter mentioned." The subsequent clauses referred to, do not affect the character of the judgment, but provide against a sale under it, and the mode of payment. We are bound then to consider this judgment, as if rendered by default, the only legitimate evidence before the court upon which it could act, being the report of the collector, and so much of that report only, as the law authorized and required him to make to the court. As in the Bristol case, any foreign matter which he may have put in his report, is not binding upon either party, and the court could not act upon it. The clerk has embodied in the record, copies of what purports to be proceedings of the Common Council on the subject of an assessment to widen and deepen the Chicago river, but by whom they were filed we are not informed, and they are not sent to us with the sanction of the judge, by a bill of exceptions, as all evidence should be, to enable this court to consider it. We repeat, that in this case we are required to treat this judgment as one rendered by default, and it must be controled by the decision of the case above referred to. What the assessment was levied for, whether to deepen the river or to pave a street, we cannot know.

The judgment must be affirmed.

Judgment affirmed.

William Munson, Plaintiff in Error, *v.* Samuel E. Minor, Defendant in Error.

ERROR TO LA SALLE.

Directors of district schools have power to levy taxes for the purpose of supporting a school for six months in the year, without first submitting the question to a vote of the inhabitants; but cannot erect a house costing more than $1,000, nor change a site.

The powers and duties of school officers, in reference to imposing and collecting taxes under the school laws of 1857, considered and discussed.

The provision which requires a map of the school district to be furnished to the county clerk, to aid in the extension of the tax, is directory, and the defect may be cured by the revenue act of 1853.

A court of equity will not enjoin a tax for mere errors, if it is attempted to be levied by an officer *de facto*, under authority incident to his office; but may do so, if the levy is by one without pretense of authority, or color of office to which such a right is an incident.

This bill alleges that Munson owns the north-east quarter and south-east quarter, section 1, township 35 north, range 3 east, and lives on the south-east quarter; that said land is a part of school district No. 5, in Serena, township 35, range 4 east, and has been for six or seven years.

That the directors of district No. 5, levied a tax of twenty-five cents on each $100 of property in said district, for 1858, and returned said Munson as one of the tax-payers; but whether or not said tax was carried out, on the collector's book, complainant does not know.

That the north-east quarter is assessed at $987, the south-east quarter at $1,920, and the personal property of complainant at $1,493.

That the directors of district No. 9, township 35 north, range 3, in Freedom, levied a tax of $2 on each $100 of property in said district for 1858, and returned complainant as one of the tax payers of said district.

That the tax in No. 9 was carried out on the collector's book against said south-east quarter, and on the personal property of said Munson, and amounted to $68.24.

That there is no map of districts, in township 35 north, range 3 east, on file or recorded in the county clerk's office, as required by law, but only a paper with lines drawn thereon, from which the county clerk pretends to determine what lands lie in district No. 9. That by said paper it does appear that said south-east quarter is in No. 9, but that it was a mistake to represent the south-east quarter in No. 9, and contrary to the intentions of the school trustees of Freedom.

That such trustees, in conjunction with trustees of township 35 north, range 4 east, in the spring of 1858, before the tax was levied, corrected said mistake.

That the tax in No. 9, was not submitted to the voters thereof, for approval or rejection.

That defendant is collector of the town of Freedom, 35 north, range 3 east; has received his warrant for collecting the taxes of 1858, and intends to force the collection of said school tax from said complainant.

Prayer to enjoin collection of $68.24, school tax.

Injunction issued as prayed for.

The answer admits that Munson is the owner of said lands, and that the north-east quarter is in district No. 5, and distinctly denies that the said south-east quarter, on which Munson resides, has been for six or seven years a part of district No. 5, in the town of Serena; but that in 1853, a district was created, including the south-east quarter, called district No. 9.

That it continued to form a part of district No. 9, until October, 1858, when it was attached to No. 5, in Serena, township 35 north, range 4 east, but that was not done until after the school tax mentioned in the bill, was estimated and levied.

Admits that the tax levied in district No. 5, was as stated in the bill, and denies that it was carried out on the collector's book against said south-east quarter, and the said personal property.

Admits that the assessed value on all said property is as alleged in the bill, and that the school tax of district No. 9, on the south-east quarter, and the personal property, is $68.24 in all.

Neither admits nor denies the allegations of the bill concerning the map, and alleges that whether there is any map or not is immaterial, and denies that it was a mistake to represent the south-east quarter as belonging to district No. 9, as alleged in the bill.

Admits that said tax for No. 9, was not submitted to the voters of said district, for approval or rejection, but alleges that the tax was not for building or repairing a school-house, but for extending the term of schools for a longer time than the regular school fund would pay for, not to exceed in all six months in said year, and that the law did not require such submission.

Admits that defendant is collector of Freedom, township 35 north, range 3 east; that he has received his warrant for collecting taxes, and intends to enforce the collection of said school tax, from the complainant.

The evidence shows that on the hearing of the cause, the complainant admitted that said south-east quarter was, at the time the tax was levied, a part of district No. 9.

The complainant introduced the following certificate:

We, the undersigned, directors of district No. 9, township 35, range 3, in the county of La Salle, and State of Illinois, do hereby certify, that said board have estimated and required to be levied, for the year 1858, the rate of one 50-100 dollars on each one hundred dollars valuation of taxable property in said district, for paying teacher and extending term of schools, and fifty cents for general school purposes, on each one hundred dollars valuation.

Given under our hands, this 26th day of June, 1858.

MAHLEN DECKERSON,
JAMES SKETTER,
JOHN COREY,
} *Directors.*

There was a decree dissolving the injunction and dismissing the bill.

The errors assigned are, the dissolving the injunction and dismissal of the bill, and refusing to grant a perpetual injunction.

J. Avery, for Plaintiff in Error.

W. H. L. Wallace, for Defendant in Error.

Walker, J. It is urged that directors of district schools, have no power to levy taxes for school purposes without submitting the question to a vote of the inhabitants of the district. This of course depends upon the power delegated to them by the law creating them a board of directors. The 43rd section of the act "To establish and maintain a system of Free Schools," Scates' Comp. p. 445, confers full power without any limitation upon the directors, for the purpose of erecting school-houses, or purchasing school-house sites, or for the repairing and improving the same, for procuring furniture, fuel and district libraries, and for the purpose of paying the balance due teachers, after the State and township funds are exhausted, to have levied and collected a tax annually, on all the property in their district. This section gives ample power to levy a tax, to any extent that may be necessary for these various purposes.

By the 44th section the directors are required at their annual meeting in October or some meeting thereafter, before the first Monday in July, to determine by estimate as near as practicable, the entire amount of money necessary to be expended in the district, to keep in good condition and operation a sufficient number of free schools for the accomodation of all the children in said district, during the ensuing year, over and above the available funds arising from the township fund, or from other sources, and also such additional amount as the board may think necessary, for the exclusive purpose of supplying any deficiency in the fund for the payment of teachers, and for the purpose of extending the terms of schools, after the State and common school fund shall have been exhausted; and shall determine as nearly as practicable, what rate per cent. on the one hundred dollars valuation, of all the taxable property in the district each of said amounts, separately, will require to be levied; each of which rates so estimated and required to be levied, together with a list of all the resident tax-payers of the district, the board of directors shall make known by certificate in writing, signed by the president and clerk of the board, or at least two directors, to the clerk of the County Court, on or before the

first Monday in July next thereafter, in each year: Provided the people vote the same as hereinafter expressed.

The 45th section provides the modes of extending the tax on the collector's books, and for the collection and payment of the same to the treasurer. The 46th section confers jurisdiction upon the County Court, to render judgment against collectors for a failure to pay the tax or any part of it, over to the treasurer. And provides for a forfeiture of twelve per cent. for a default in such payment.

The 47th section makes provision for the collection of taxes in districts, composed of territory of two or more counties. It then provides, that districts may borrow money for the purpose of erecting school-houses, purchasing sites for the same, or for repairing and improving them, at a rate of interest not exceeding ten per cent. per annum, and to issue bonds therefor, and provides, that the total indebtedness of the district under this section, shall not exceed at any time, three per cent. per annum, of the assessed value of the real and personal estate of the district. And with a further proviso, that the same shall be voted by a majority of the votes cast at any election, on notice given as required.

The 48th section creates the directors of each district a body politic and corporate, by their appropriate name. Prescribes the mode of transacting the business of the district, and then prescribes their duties. "They shall establish a sufficient number of common schools for the education of every individual person over the age of five and under twenty-one years, in their respective districts, and shall make the necessary provision for continuing such schools in operation, for at least six months in each year, and longer if practicable. They shall cause suitable lots of ground to be procured and suitable buildings to be erected, purchased or rented for school-houses; shall supply the same with furniture and fuel, and make all other provisions relative to schools which they may deem proper; they may adopt rules for the government of schools and shall exercise a general supervision over the schools of their respective districts, and shall by one or more of their number visit every school in the district at least once a month, and shall cause the result of such visit to be entered on the records of the board." It also provides for the employment of teachers, and for the application of surplus funds to the purchase of libraries and apparatus, in the discretion of the directors. It then provides that, "No school site shall be purchased, nor shall a school-house be erected, located, purchased or changed without the consent of a majority of the legal voters of any district at an election, in which case notice shall be given in the same manner, and for the same

number of days, as is required for the election of directors, either by the directors, or, at least, ten legal voters of the district: *Provided, however*, If a majority of the votes at said election is not obtained for any site, the directors shall have power to locate and build a school-house which shall not cost over the sum of one thousand dollars; nor shall the directors have power to levy taxes for the purpose of extending the terms of schools for a longer period than six months in each year; nor for the purpose of building a school-house to cost over the sum of one thousand dollars without the consent of a majority of the votes cast at said election. The notice shall state the questions to be decided at said election."

These are believed to be the only provisions of the law in force at the time this tax was levied, conferring power on directors of common schools to levy and collect taxes for school purposes. And from the phraseology of these various provisions there is a want of clearness of expression, that leads to some doubt as to the intention of the legislature. Had there been no other provision than that contained in the 43rd section, it would have been manifest that the directors would have a discretionary power to levy a tax for all the purposes enumerated in the section, without any control of the voters or tax payers. And unless it has been limited by subsequent provisions, they are still invested with such a power. The 44th section does limit that power, in so far only as it relates to levying a tax, to supply any deficiency in the State and township fund for the payment of teachers and for extending the terms of schools, after that fund has been exhausted, as to require a vote of the same as thereinafter expressed.

If this had been all the legislation, they would have had the power to levy, without the consent of the voters of the district, for every purpose enumerated, except for the deficiency in the State and township fund, for the payment of teachers and for the extension of the terms of schools, after that fund was exhausted. But the subsequent provision contained in the 47th section, limits the borrowing of money, to an amount not exceeding three per cent. on the assessed value of the property of the district, and to the consent of the majority of the voters, at an election for the purpose. And the 48th section, peremptorily requires the directors to establish and maintain a sufficient number of common schools, to accomodate all the persons entitled to the benefits of such schools in their districts, and to make provision for continuing them in operation, for at least six months in each year, and longer if practicable. The very fact that it is imposed as a positive duty, without any discretion, implies the power to raise the necessary means. And to provide the means, they must re-

sort to the power conferred. And as the direct means are not enumerated in this section, we must resort to other provisions of the act, and in the 43rd and 45th sections, it is explicitly conferred, and the mode pointed out. The proviso in the 44th section is repugnant to the provisions of the 48th section. The former provision, limits the levy for paying teachers and extending the terms of schools by taxation, to a consent of the majority of the voters of the district, while the latter section requires them to provide and keep in operation a sufficient number of schools, for at least six months in each year, without any reference to a consent of the voters of the district. If the former provision were to prevail, it would defeat the design of the latter. If the voters refused to tax for the purpose, the directors could not continue schools beyond the period that the State and township funds would provide for. And as the two provisions are repugnant, the latter must prevail, as the last expressed will of the legislature. This construction is also made more manifest, as the true one, when we see, that in case the directors continue the school beyond the period of six months by taxation, the tax must be levied by a vote of the district. Why insert such a provision, if they were prohibited in all cases from levying a tax for a deficiency, to pay teachers and extend schools beyond the period the State and township funds would provide. If it was intended that the proviso in the 44th section should remain in force, this last limitation upon levying a tax to extend schools beyond six months, was entirely useless. The 48th section also prohibits the purchase, by the directors, of a site for a school-house, the erection or location, the change or purchase of a school-house, without the consent of a majority of the voters of the district, unless the voters, at the election, shall fail to select a site, in which case, the directors are empowered to select a site and build a house, not to cost more than one thousand dollars. In a previous portion of this section, they are peremptorily required to purchase sites and erect and furnish school-houses, and were it not for this provision, their discretion and judgment would be the limit to their action as to the amount of its cost, as well as its location. This section then, limits the power conferred on the directors by the 43rd section, and prohibits a levy of a tax to extend schools beyond the period of six months in each year, or from purchasing or erecting a school-house, to cost more than one thousand dollars, or from changing the site of a school-house, and confers these powers upon the voters of the district.

In this case, the levy of the tax was not to extend the term of the schools of the district beyond six months in the year, nor was it to build a school-house, the cost of which would exceed

one thousand dollars. It appears, on the contrary, to have been levied to pay teachers and to support the schools of the district, for the period of six months, as required by the statute, and for general school purposes. This they had authority to do, and were required by the statute to perform it as a duty. Even if the question had been submitted to the people, whether this tax should be levied, and they had decided against it, the directors should nevertheless have proceeded to levy and collect it.

It was urged that the case of *Beverly* v. *Sabin*, 20 Ill. R. 357, holds such a vote to be necessary. In that case, the directors, without having submitted the question to a vote of the district, proceeded to levy a tax to pay for a school-house, which had been constructed without the consent of the voters, at a cost of more than one thousand dollars. That case holds, that they had no power to make the levy, without its being submitted to the voters of the district. And although that opinion does not in terms refer to the 48th section, it is based upon its provisions, and is in harmony with the construction here given, to those sections of the law.

It was also insisted that the plat of the district, furnished to the county clerk, was not properly certified, and conferred upon that officer no authority to extend the tax on the collector's warrant. The object in requiring this map to be returned, was to enable the clerk to correctly extend the tax against the tax payers of the district. This map was not certified by the president and clerk of the board of directors, as required by the act, but when we consider the object of the law, we are inclined to the opinion that the provision is only directory, and as there is no pretense but that the clerk has extended the tax correctly, that it can form no objection in a collateral proceeding. If this were an objection, it only relates to the mode of assessment, and the 44th section of the revenue act of February 12th, 1853, (Scates' Comp. 1042,) which was in force when this levy was made, provides that "no assessment of property or charge for taxes thereon, shall be considered illegal, on account of any informality in making the assessment, or in the tax lists, or on account of the assessments not being made or completed within the time required by law," which is certainly broad enough in its terms, to cover this defect. It is only urged that this certified plat was requisite, because it was one of the formal requirements of the statute in levying the tax. This provision was doubtless intended to cover formal defects of this character.

Upon a careful examination of all the elementary treatises on equity jurisprudence, as well as the adjudged cases to which we have had access, we do not find that a court of equity has assumed jurisdiction to enjoin a tax, for mere errors in its assess-

ment or the collector's warrant, in case it was levied by officers *de facto*, when authority to levy such a tax, was incident to their office. And it is believed that the cases are rare, even where the tax had been levied by persons having no pretense of legal authority to make such a levy, or in cases where the tax was not authorized by law, or where the warrant for its collection was void, that courts have interposed to stay its collection. In the few cases that we have found, where relief was granted, no question as to jurisdiction was raised. No rule is more familiar than that courts of equity will not interpose to give relief, in cases where the party has a full and complete remedy at law, unless it be where the jurisdictions are concurrent. That in case of a levy of an illegal tax, a court of law has jurisdiction, there can be no doubt. If the directors had the legal right to levy the tax, they no doubt have the right to collect it, and if they were not vested with such a power, or if they failed to observe essential legal requirements in its exercise, it would be void, and if coerced by distress, they would be guilty of a wrong, for which a court of law would afford an adequate remedy. *Trustees of Louisville* v. *Gwathmey*, 1 A. K. Marsh. 554. If persons having no pretense of legal authority, were to levy a tax, or if persons not holding an office to which the power to levy a tax is incident, or holding an office to which it is not incident, were to levy a tax, the court might interpose. But if officers *de facto* or *de jure*, exercising an office to which the power is incident, exercise it, the courts will not interpose to prevent its collection. If courts of equity were to entertain jurisdiction, and enjoin the collection of taxes, in all cases in which mere informalities and irregularities have occurred in their assessment and levy, it would lead to great delay in their collection, and tend seriously to embarrass every department of the government, whether of state, county, town, or city, and would render the operation of the school system very precarious. While, if the party conceiving himself aggrieved, is left to his remedy at law, such inconveniences will not be felt. And even if we had the power to assume jurisdiction to grant relief, when we see that its exercise would probably lead to such embarrassment in the finances of these various departments of our municipal polity, we should hesitate long before assuming the exercise of such a power. But we conceive that a court of equity is vested with no such authority.

The decree of the court below is affirmed.

Decree affirmed.

Phillip Byrne, Appellant, *v.* Dickinson B. Morehouse *et al.*, Appellees.

APPEAL FROM JO DAVIESS.

Parties are estopped by the recitals in their deed.

Where commissioners to allot government land in Galena, decided that A. B. and C. were entitled to the preëmption to two lots, and a partition of the same was made by deed between them, each would hold under the partition deed, whatever their anterior rights might have been.

This was an action of ejectment, declaring for the undivided half of lot No. 8, block A, in the city of Galena, county of Jo Daviess, Illinois. Plea, general issue.

Stipulation by parties, upon which cause was tried.

Lot entered by David Smith and John McNulty, July 26, 1837. May 29, 1838, deed of partition made of said lot between Smith, McNulty and James Nagle. Recorded July 26th, 1839.

Wm. Navin recovered judgment against said Nagle, before a justice of the peace, and filed transcript in the clerk's office of the Circuit Court. Execution issued, and all of Nagle's interest in said lot was sold by the sheriff, to Wm. Navin, 16th September, 1840.

Phillip Byrne, the plaintiff, recovered judgment in the Circuit Court, October term, 1841, against Nagle, and redeemed from Navin's judgment, and sold the interest of Nagle and got sheriff's deed, December 27, 1841.

It is admitted that all the proceedings under said sales were regular, and all the title Nagle ever had in said lot vested, and still vests, in the plaintiff.

Defendants' possession admitted.

Defendants have undivided half of said lot, and plaintiff seeks to recover the other half.

Cause to be submitted on this statement upon the construction of the partition deed, as to the interest the parties took under said deed, for a trial; either party to appeal, if desired.

Court found an estate in fee of the undivided one-fourth part of the said premises in the plaintiff.

Court overruled motion for new trial, and rendered judgment on the finding, to which plaintiff excepted, and prayed an appeal, which was granted.

Errors assigned:

1. The court erred in finding that plaintiff was entitled to only one-fourth interest in the said premises, instead of one-half of the same.

2. The court erred in overruling plaintiff's motion for a new trial.

3. The court erred in rendering the judgment aforesaid in manner and form aforesaid.

Cook & Glover, for Appellant.

M. Y. Johnson, for Appellee.

Caton, C. J. The only question which this record presents, arises upon the deed of partition executed on the 29th of May, 1838, by McNulty, Smith and Nagle. That deed must receive the same construction, now that the grantees of the parties to it are contesting their respective rights arising under it, as if this controversy had arisen between the original parties to the deed. That deed recites that whereas Wann, Turney and Leach, commissioners on behalf of the United States, did, on the 28th of February, 1838, certify that McNulty, Smith and Nagle, were entitled to a pre-emption to lots eight and nine, in Galena, as will more fully appear by the certificate of the commissioners, therefore the parties, did by that deed, make a full, perfect and absolute partition of the said lot of land to and among them, in two parts. The deed then proceeds to assign one portion of lot nine to Smith and the other portion of lot nine and the whole of lot eight to McNulty and Nagle, Smith conveying his interest in the portion assigned to McNulty and Nagle to them, and they conveying the portion assigned to Smith to him. In an agreed statement of facts, it is admitted that the two lots in question, were entered by McNulty and Smith on the 26th day of July, 1837, and a certificate of entry duly issued to them, by the land officers. The question now is, whether Nagle took by the partition deed one-half, or one-fourth of the portion of land, assigned to McNulty and Nagle. The facts admitted show that the legal title, both at the time of the award of the commissioners and also at the time of the execution of the deed of partition, was vested in McNulty and Smith alone. How it is, that the commissioners appointed by the general government to award pre-emptions to certain lands in Galena, should be deciding upon lands already entered by individuals, and which entry does not appear to have been disputed or questioned, is not shown by this record. But we shall not trouble ourselves with that inquiry,—we will content ourselves with construing the deed with the light before us.

The award of the pre-emption, to the three, could not of itself convey to them the legal title, had it still remained in the United States, much less could it divest the title previously vested in McNulty and Smith. We recognize, to its fullest extent, the doctrine of estoppel by the recitals in this deed,

which is insisted upon by the counsel for the plaintiff. No party claiming title under that deed, however remotely, can be permitted to deny any fact admitted to exist by those recitals. However contrary to the truth they may be, unless obtained by fraud, they must stand as uncontroverted truth ; and whatever rights legitimately arise upon such admitted facts, may be at all times asserted, whether it be to obtain or to defend the possession of such rights. What fact, is by this recital admitted to exist ? It is simply, that the commissioners awarded to the three a pre-emption to land which is the subject of partition by the deed. As already stated, that award by the commissioners, did not invest Nagle with any title, nor did it divest McNulty and Smith of any title. The legal title to the land continued precisely as it was before. Strike out of the deed this recital and Nagle took one-half of the title which Smith conveyed to him and McNulty, and McNulty took the other half, leaving Nagle possessed of the title to one-fourth of the premises, and McNulty of three-fourths. If the recital in the deed had been that Nagle was at the time of its execution, a joint owner of the premises with the others, or that he was invested with any portion of the title to them, effect would have to be given to the deed, as if such fact were true, although it might be admitted on the trial that it was false. Such, however, is not the case. The admission is, that the commissioners awarded to him jointly with the others, a pre-emption right to the premises,—that is, a right in preference to all others, to purchase them of the government at a certain price. Suppose the fact admitted by this recital were not in the deed, but had, upon the trial been admitted to be true, could it have the effect to make Nagle a joint owner of the land with the others, at the time of the execution of the deed of partition ? Probably, no one would ever insist that such a result would flow from the existence of such a fact. This it seems to us decides this whole case. We may conclude that both McNulty and Smith recognized in Nagle some right or interest to these premises as flowing from this award of the commissioners, but whatever that right may have been, it was of an equitable and not of a legal character. Whether it was a tangible equitable right, capable of being established in a court of equity, it is not for us now to say. We concur with the court below in the construction given to this deed, and affirm the judgment.

Judgment affirmed.

David Barnes *et al.*, Plaintiffs in Error, *v.* Spier Whitaker, Defendant in Error.

ERROR TO ROCK ISLAND.

A plea which properly avers the making of a note in Iowa, and that it was tainted with usury by the laws of that State where the parties to it resided, and with reference to the laws of which State it was executed, is good. But if the penalty for usury, by the laws of Iowa, goes to the school fund, that part of the law will not be exeeuted.

Defendant in error filed his declaration in assumpsit, against plaintiffs in error, containing a special count upon a promissory note, made at Davenport, Iowa, by plaintiffs in error and one Bailey to defendant in error, dated March 11th, A. D. 1857, for $2,165, payable one hundred and seventeen days after date, at Davenport, Iowa, with a penalty of two per cent. per month after due, if not paid; and also the common counts.

The plaintiffs in error plead to the declaration,

1. The general issue.

2. As to the $165, and as to the penalty in note mentioned: that the note mentioned in the declaration was made at Davenport, in the State of Iowa, and was made payable there, with reference to the laws of that State; setting up *in hæc verba* the statute of Iowa regulating interest; averring that, in compliance with its terms, said statute was published, etc., and became of force; that before the making of the note in the declaration, Whitaker agreed to lend Barnes $2,000, for one hundred and seventeen days—that for the loan of the $2,000 for the time aforesaid, Barnes agreed to pay $165, and two per cent. per month on the $2,165, after due; and that it was further agreed, that Barnes, Webber and Bailey should execute their note for $2,165, with two per cent. per month after due, as a penalty. That in pursuance of the above corrupt agreement, defendants in error and said Bailey did execute the note declared upon, and that Whitaker did lend Barnes the $2,000; that as to the $165, and the penalty, the note was and is void.

3. Same as second, but goes only to the $165.

4. Set-off.

5. Payment.

The defendant in error filed his general demurrer to the second and third pleas, and joined issue as to the first, fourth and fifth.

Demurrer to second and third pleas sustained by the court. Plaintiffs in error withdrew first, fourth and fifth pleas, and judgment is entered for defendant in error by default; the clerk being ordered to assess the damages, reported the same at

$2,252.44, which was approved by the court, and final judgment entered.

The errors assigned are:

1st. That the court erred in sustaining the demurrer to the second and third pleas.

2nd. That the court erred in approving the assessment.

3rd. That the court erred in rendering judgment for the plaintiff.

4th. That the court erred in not rendering judgment for the defendant.

E. T. Wells, for Plaintiffs in Error.

Wilkinson & Pleasants, for Defendant in Error.

Caton, C. J. The second plea, is in bar of the per centage agreed to be paid, after the money became due, in case it was not promptly paid, as well as the usurious interest included in the note itself, and seems to be disposed of by the case of *Lawrence* v. *Cowles*, 13 Ill. R. 577, which case is supported by the uniform current of decisions, and must be adhered to, although were it a new question, we might hesitate before arriving at the same conclusion. The demurrer to that plea was properly sustained.

The third plea, is in bar of only one hundred and sixty-five dollars, which it avers, was included in the note for the loan and forbearance of two thousand dollars for one hundred and seventeen days. That plea avers, with all necessary form and circumstance, that the note was made in the State of Iowa, where the parties resided, and with reference to the laws of that State; that the defendant borrowed of the plaintiffs two thousand dollars for one hundred and seventeen days, and that it was corruptly agreed between the parties, that the defendant should give the plaintiffs for the loan and forbearance of that money, for that time, one hundred and sixty-five dollars, and that in pursuance of such corrupt agreement the note was made, including the one hundred and sixty-five dollars. The plea then recites the statute of Iowa on the subject of interest, by the second section of which parties are allowed to agree in writing to receive ten per cent. interest per annum for the forbearance of money. The fourth section forbids the taking of a greater rate of interest than by that statute allowed. The fifth section, is as follows: "If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this act, either directly or indirectly, in money, property or other valuable thing, the same

shall work a forfeiture of ten per cent. per annum upon the amount of such contract to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum without either interest or costs. The court in which said suit is prosecuted, shall render judgment for the amount of interest forfeited as aforesaid against the defendant, in favor of the State of Iowa, for the use of the school fund of said county, whether the said suit is contested or not, and in all cases where the unlawful interest is not apparent on the contract or writing, the person contracting to pay the unlawful interest, shall be a competent witness to prove that the contract is usurious; and in no case when unlawful interest is contracted for, shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not."

The note on which this action was brought was made under this law, and was expected and intended that it should be subject to its influence. The parties understood and knew, that it fixed the measure of their rights and liabilities. When the plaintiff took this note couched in terms which are stated in this record, he knew that the legal effect of it, so far as the maker was concerned, was precisely the same as if it had expressly stipulated that he should only be entitled at maturity to the principal sum loaned. So the law dictated, and such the parties knew to be its legal effect. If such was the nature and meaning of the contract in Iowa, it must be the same in Illinois and everywhere, and all courts are bound to enforce the contract according to its legal effect. We must enforce the obligation which the contract created between the parties. Iowa had the right to make such laws as she pleased, as to the meaning and effect of certain contracts made within her borders, and it is not for the legal tribunals to question their policy, but it is their duty to enforce them as they are made, by the law and the parties. The reason of this is simply because the law is so, and it ought to be so. Otherwise a contract would be one thing in one jurisdiction and another in another jurisdiction. Were it otherwise, the rights and liabilities under a contract would depend, not upon its legal efficacy, but upon the place where it is enforced. Can it be that this defendant was legally bound to pay one hundred and sixty-five dollars more on one side of the Mississippi river, than on the other? If that be so, a new law of comity has lately arisen among these States. We do not so understand it. The law where the contract was made declares that "in no case where unlawful interest is contracted for, shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not."

Here unlawful interest was contracted for, and the interest was incorporated with the principal, and the law in effect says that the interest shall be expunged from the note, and it shall be read and adjudged the same as if the principal sum alone had been expressed in dollars and cents, and this law entering into and forming a part of the contract goes with it, wherever it goes. It is admitted that such would be the effect of this law, if it had declared that the plaintiff should have judgment, for nothing. How much more so in common sense and common reason where it allows him to take judgment for the principal sum loaned. The distinction in the two cases is not only without reason but is against all reason and all sound law and the philosophy of law.

So much for the influence of this law upon the contract itself, and the rights and liabilities of the parties as between themselves, arising under it. With the penalties imposed by the law upon the usurers for their violation of it, we have nothing to do. That is a matter between the State of Iowa and her citizens. We cannot punish her citizens for violating the laws to which they owe allegiance. We cannot render judgment in favor of that State for the benefit of her school funds for the penalty or forfeiture of ten per cent. per annum, which this law imposes. We have no jurisdiction to vindicate the violated majesty of her laws, as was held in *Shuman* v. *Gassett*, 4 Gilm. R. 521. That task must be left to her own tribunals. We can enforce contracts made there according to her laws. We can read them in the light of her statutes, because in that light were they written. But it is only with the parties to the contract and the cause, that we have to do. The State is a third party which may appear in her own courts and claim the penalty imposed by her offended laws, but in our courts she is a stranger, except as the law maker. When she descends to a lower sphere and seeks to become a party to the controversy, she must look to her own courts as her proper theatre.

The demurrer to the third plea must be overruled, and because it was sustained, the judgment must be reversed and the cause remanded.

Judgment reversed.

Theodore N. Morrison, Plaintiff in Error, *v.* William Kelly, Defendant in Error.

ERROR TO LA SALLE.

Where a trustee is appointed by deed, with a provision that in case of his decease or legal incapacity, that the chancellor shall be vested with all the trusts and confidences reposed in the trustee named, the chancellor may appoint a trustee, by virtue of his office, to execute the desire of the grantor, and the right of the chancellor does not depend upon his acquiring jurisdiction over the heirs and personal representatives of the *cestui que trust.*

Possession is actual when there is an occupancy, according to its adaptation to use; constructive, when there is a paramount title to it; and adverse, when there is such an appropriation of it as will inform the vicinage that it is in the exclusive use and enjoyment of some known person.

Under the registry laws, notice of a prior conveyance, is as effectual as the registry of the deed.

The second grantee will be affected by a notice to his grantor, if, with the exercise of ordinary prudence and caution, he could have ascertained the fact of such notice.

An open and visible occupation of land, is notice, to put a party on inquiry.

The delivery of a deed to a stranger, if ratified by the grantee, is good.

The delivery of a deed to one other than the grantee, having an interest in the land, is good.

The payment of taxes by any person extinguishes them, and if a voluntary attempt is made to pay them a second time, the last will be considered a gratuity to the taxing power.

The recording of a deed, is notice to a purchaser, although recorded after a conveyance to the grantor of such purchaser, if the fact is brought to his knowledge, or such notice of it as ought to have instigated inquiry, before conveyance to the purchaser.

A *cestui que trust,* has such an interest as will enable him to put a purchaser on inquiry.

The proof of notice of an unrecorded deed, may be established like any other fact.

The plaintiff in error brought this action of ejectment to the Circuit Court of La Salle county. The declaration is in the usual form, and is for the recovery of the undivided one-half of a tract of land, of which the boundary line, beginning at the S. W. corner of the S. E. quarter section of section 6, in town 33 North, range 4 East of the 3rd principal meridian, runs thence east, along the south line of said section six, 15 chains; thence north, parallel with the east line of said section six, to the south line of the Fox River Feeder; thence westerly, along the south line of said Feeder, to the west line of said S. E. quarter section of said section six; thence south, along said west line, to the place of beginning, the title to which plaintiff claims in fee simple.

Defendant filed his plea of not guilty.

At the November term of said Circuit Court, A. D. 1858, the cause was tried, and verdict found for the defendant. Plaintiff

entered a motion for a new trial, which motion was overruled by the court, and judgment rendered against the plaintiff for costs.

Plaintiff filed a bill of exceptions, of which the following is an abstract:

Plaintiff read in evidence,

First. An exemplification of a patent from the United States to Henry Green, assignee of Allen H. Howland, for the west fraction of the south-east fractional quarter of section six, in township thirty-three north, of range four east of the third principal meridian. Said patent is dated October 1st, 1839.

Second. A warrantee deed from Henry Green to Aaron Reed, Sen., conveying the one undivided one-half of said west fraction in said patent described, to said Reed, in trust for and to the separate use of Catharine Howland, wife of Allen H. Howland, and providing that, in case of the decease or legal incapacity of said Reed, before the full execution, discharge and performance of all and singular the trusts in and by said deed created or declared, then, in either case, the trusts shall be executed, discharged and performed by the court of chancery of the judicial district or circuit in which La Salle county shall then be situated; and that the estates in and by said deed granted and conveyed to said Reed, shall, on the decease or legal incapacity of said Reed, vest in such court of chancery as aforesaid, subject to all and singular the trusts and confidences in said deed created and declared, and that said court of chancery shall exercise the same powers and perform all and singular the trusts that may remain unexecuted and unperformed, with the same legal effect as the said Reed might or could, were he capable of performing the same; and that the mode of performing said trusts shall be such as said court of chancery shall order or decree, or agreeable to the course of practice of said court. Said deed is dated December 26th, 1835, and was filed for record, March 24th, 1847, in the recorder's office of La Salle county, and duly recorded.

Third. A certain petition by Allen Howland and Catharine, his wife, Theodore N. Morrison and Ann Eliza, his wife, and Henry A. Howland, a minor, by George Howland, his next friend, filed in the Circuit Court of La Salle county, and State of Illinois, on the 1st day of March, A. D. 1852, and a decree of said Circuit Court, according to the prayer of said petition, appointing Theodore N. Morrison, trustee, in the place of Aaron Reed, Sen., deceased, and vesting the legal title in fee simple of, in and to the one undivided one-half of the west fraction of the south-east fractional quarter of section No. six, in township No. thirty-three north, and range four east of third principal merid-

ian, in Theodore N. Morrison, as fully and absolutely as the same was vested in the said Aaron Reed, Sen., by the said deed from Green to Reed.

The plaintiff then read in evidence a deed from Allen H. Howland and Catharine Howland, his wife, to Theodore N. Morrison, by which the said Catharine Howland and Allen H. Howland, her said husband, quitclaimed, released and conveyed to the said Theodore N. Morrison, all the interest which they had in and to the undivided one-half of the west fraction of the south-east fractional quarter of section six, township 33 north, range four east of the third principal meridian. Said deed was dated 12th of January, A. D. 1858, and duly recorded in the recorder's office of La Salle county.

The court permitted the said Allen H. Howland, husband of Catharine Howland, to testify, to which defendant objected; the court overruled the objection, and defendant excepted. Said Howland testified that he was well acquainted with the premises described in the declaration, and they were a part of the said west fraction of the south-east quarter of section six, township thirty-three north, of range four east of the third principal meridian.

Plaintiff here rested his case.

The defendant, to maintain the issues on his part, read in evidence a deed from Henry Green to Wm. H. W. Cushman, for the one undivided one-half of the *North* fraction of south-east fractional quarter of section six, in township thirty-three north, of four east of the third principal meridian. Which deed was filed for record March 17, 1841, and bears date March 10, 1841.

And also a deed from the said Green to said Cushman, for the one undivided one-half of the west fraction of the south-east fractional quarter of said section six, dated March 28th, 1842, and filed for record, March 29th, 1842.

The defendant then read in evidence, receipts for the payment of taxes on the undivided one-half of the west fraction of the south-east fractional quarter of said section six, for the years 1848, 1849, 1850, 1851, 1852, 1853, 1854, and 1855, under the title derived through the conveyance from Green to Cushman. The tax receipt for 1849, was dated April 13, 1850. And it appeared that Kelly was in possession under the title, if any, which passed from Green to Cushman; Cushman having parted with the title after the recording of the deed from Green to Reed.

The plaintiff objected to the introduction of said receipts. The defendant then proved that they were executed by the collector of taxes, for the years respectively when they purported

to have been paid. The court then admitted them, and to the opinion of the court in so doing, the plaintiff excepted.

Defendant read in evidence a deed from Henry Green and wife to Henry L. Brush, for the undivided one-half of the west fraction of the south-east fractional quarter of said section six; dated August 31, 1835.

Defendant rested.

The plaintiff read in evidence a receipt for the payment of the taxes of 1849, which receipt is in the words and figures following, to wit:

"Received, Ottawa, March 18, 1850, of Allen H. Howland, by W. H. W. Cushman, thirty-nine 40-100 dollars, in full for taxes of 1849, upon personal property, and the following real estate, to wit:

65½.	Undivided ½ S. fr. S. E. fr'l ¼, Sec. 1, T. 33, R. 3 E. Undivided ½ N. fr. S. E. fr'l ¼, Sec. 1, T. 33, R. 3 E. Undivided ½ E. fr. S. W. fr'l ¼, Sec. 1, T. 35, R. 3 E.	$9.45
80.	E. ½ N. W. ¼, Sec. 22, T. 33, R. 3 E.	3.19
80.	W. ½ S. E. ¼, Sec. 18, T. 32, R. 4 E.	2.97
160.	N. E. ¼, Sec. 20, T. 33, R. 4 E.	6.26
10.	S. fr. N. W. ¼ fr'l Sec. 16, T. 33, R. 4 E.	26
50.	Undivided ½ W. fr. S. E. fr'l ¼, Sec. 6, T. 33, R. 4 E.	2.04
69.	S. W. fr'l ¼, Sec. 6, T. 33, R. 4 E.	4.54
	S. ½ N. W. ¼ of Lot 3, Block 26, Town of Ottawa	1.48
	Lot 4, Block 86, State's Addition to Ottawa	5.32
	Personal property	3 89
		$39.40

The plaintiff called *Dr. Howland*, who testified as follows:

My recollection is, that Mr. Cushman agreed to pay my taxes for the year 1849 for me; I gave him a schedule of the lands on which I had to pay the taxes for the year 1849; Mr. Cushman took the schedule and paid my taxes for the year 1849 for me, and kept the tax receipt several months, until I paid him; I paid the taxes of 1849 on the undivided one-half of the west fraction of the south-east fractional quarter of section six, township 33, range 4 east of the third principal meridian, under the deed from Henry Green to Dr. Reed; I had direction from Dr. Reed to pay the taxes of 1849; Dr. Reed furnished the money to pay these taxes indirectly; he held a note against me for five hundred dollars, and the money paid for these taxes was credited by Reed on my note to him.

In December, 1835, when Mr. Green made this deed to Dr. Reed, I had a field running across the line, between the two quarter sections, a part of the field being on the east side of the line; on the west fraction of the south-east fractional quarter of section six, I had a log house in the field, on the line between the two quarter sections; one-half of the log house was on the

east side of the line, and one-half on the west side; the field was made to extend across the line, between the two quarter sections, in order to get a pre-emption on both tracts, and which pre-emption I obtained in May, 1835; I had possession of the land, by myself or tenants, and cultivated this field each year, from 1833 until 1840; in the fall of 1833, I built a cabin on this tract, and built some fence on it, and in the spring of 1834 I made a field of seven acres on it and the adjoining tract—half on each tract; I continued to cultivate, and was in possession, by my tenants or by occupying and cultivating myself, every year until 1840; in the spring of 1840, I leased it to Alexander and went East, and did not return here until January, 1842; the deed from Green to Dr. Reed, was taken East, through mistake, by my wife, who was the daughter of Dr. Reed, and was not returned until 1847; I supposed that the deed had been recorded; after the conveyance by Green to Reed, I was in possession under the deed from Green to Reed, as the agent of Dr. Reed; in February, 1842, after I had returned from the East, I was looking over the records in the recorder's office, and found a deed from Green to Cushman, for the north fraction of section six, township thirty-three, range four; I went immediately to them to inquire what it meant; they were both at Cushman's store; I told Mr. Cushman about this deed, and asked him what it meant; he said, I suppose it is the land you used to own, or pretended to own, up in the bend of the Fox; what, said I, that land the field is on? he said it was; I told him that Green had before deeded that land to Dr. Reed, and I asked Mr. Green how he came to deed that land twice, if he meant that land, as the deed to Mr. Cushman called for the north fraction; he said it was a mistake, and he would clear the title by paying Mr. Cushman what he owed him, when he should sell his wheat; Mr. Cushman then said, if Mr. Green paid him he would give up the land. During five or six years subsequent, I had several conversations with Mr. Green and Cushman separately, in all of which Mr. Cushman said he would give it up when Green paid him, and Mr. Green invariably said he meant to clear the title. About 1849 or 1850, Mr. Green told me he had paid Cushman, and that Cushman could give up the land; I then told Mr. Cushman, at his residence, in front of Mechanics' Hall, that Green had told me that he had paid him what he owed him, and that he (Cushman) could now give up the land; Mr. Cushman replied, well, if he says so, *so it must be*, I suppose. I then asked Mr. Cushman when he could attend to the matter; he replied, he would attend to it in a short time; I had never before this heard one word about my owing Mr. Cushman anything; but when I asked him again when he would give up the land, he said he would give it

up when I paid him what I owed him; and Mr. Green afterwards told me that Mr. Cushman was holding on to the land for some old demand which I owed him, Cushman. I gave him a deed for a piece of land to pay this demand, and he gave me a bond for reconveyance when I paid him; I offered to give a mortgage of the land, but he insisted that the land should go to pay the demand, if I failed to pay it; the land conveyed by me to Cushman, was then worth much more than the demand he had against me. I afterwards asked him what demand he had against me; he said it was the demand for which I conveyed him this land; he said the land did not sell for enough to pay the demand; I told him that he insisted on taking the land in payment of the demand, and that it would have sold for more than enough to pay this debt at the time he took the land.

Afterwards I had a conversation with Mr. Cushman; I told him that if he did not attend to this matter soon, I should commence suit against him for the land; I told him to figure up all the money due on the old bond, and the interest on it at ten per cent., and I would, for the sake of having the matter settled up, pay it to him, if he would give up the land.

I believe there were frequent conversations between Mr. Cushman and myself, about my old Woodworth controversy; this controversy arose about my improvements and possession of the premises now in controversy, for the purpose of getting a pre-emption; Woodworth having contested my right to a pre-emption.

He, Cushman, was a witness in that suit; I spoke to him, or in his presence, about my improvements on the land now in controversy; when I returned from the East, in January, 1842, the house remained there; the roof was off, and the logs partly down; some of the fence was still remaining; the field was perfectly perceptible; it was plowed in 1840; the field, house and orchard were all on there, and in good repair, until I went East in May, 1840; Mr. Green never exercised any acts of ownership over the land in controversy, but was a witness for me in 1837, in the suit with Dr. Woodworth, in which he swore that I had made improvements on it; nor did he exercise any acts of ownership after he sold it to Cushman, except to steal the rails away, and this he denied to me over and over again; said he had not meddled with them, and that the Irish must have stolen them.

Dr. Howland also testified that the consideration for the conveyance by Green to Brush, passed from Brush to him (Howland), and that Green received nothing for making this deed.

The plaintiff called one *Watkins*, who testified:

I am acquainted with the location of the west fraction of the south-east quarter of section six, township thirty-three, range

four, and know where the lines are. I lived near this land. I came there in 1833, and remained until 1835, when I went to Missouri, and came back, and staid until 1837. Lord built the house for Dr. Howland; the house stood on the line between the two quarter sections, and on the west line of the fraction; there was a field inclosed of about ten acres; the field was situated on both quarter sections; about half of the field on the said west fraction of the south-east quarter, and half on the quarter west of it. The house stood in the inclosure. The house and field were made to extend on both quarters, for the purpose of getting a pre-emption on both tracts. About three or four acres of the field were cultivated in the years 1834 and 1835; not much more was cultivated while I was there; do not know, of my own knowledge, whether the field was cultivated in 1836 or not. I was here in 1837; in 1833 and 1834 the house was occupied by Disney. I went to Rock river in 1837, and returned in 1838; the ploughing was made in 1834; I think that afterwards nearly all of the field was plowed. Mr. Cushman was living here during all the time I was here. Dr. Howland's possession of this land was notorious. In the Woodworth suit the question was, whether Dr. Howland was in possession of this land or not, and whether he had made improvements.

The plaintiff called *Alexander*, who testified:

I know the land in controversy, spoken of by the other witnesses; I had a lease of it in 1840, and raised a crop on the land that year. (Plaintiff here read in evidence a lease from Dr. Howland to Alexander, which was identified as the one under which he occupied, and which was in the words and figures following, viz.:

Lease from Howland to Alexander of a field situated on the south half of section six, township thirty-three, range 4 east, in La Salle county, Ill., for the purpose of raising one summer's crop in the year 1840, Alexander agreeing to pay Howland one-third of the crops raised on the premises. Dated April 24th, 1840.)

Plaintiff called *L. B. Delano*, who testified:

I know the field that Alexander was on. I came here in 1837—it was a large field at that time. In June, 1837, my brother and I were on the place; there was a house on the place, and a family living in it; there was a fine orchard and garden on the place. I recollect of Alexander carrying on the place. I was on the place after Alexander had left the place; do not recollect what year; it was in the winter; there were improvements there then. The fence was partly down, and looked as if some one had been taking it away. Whole lengths

of the fence had been taken away in some places, in other places the fence was standing full height. The roof was off the house, and the logs nearly down on one side. Some of the apple trees were standing; the field was easily perceptible.

I could not tell anything about who had the title to the land—it was known as Howland's land. I think that it was in 1841 that I was on the place; it was after Alexander carried it on.

The plaintiff requested the court to give the jury the following instructions:

Although Cushman may not have known of the existence of the deed from Green to Reed at the time of the delivery of the deed from Green to him; yet, if the means of information that he possessed were such, and his attention so directed that by the exercise of ordinary prudence and caution, he would, after inquiry, have discovered the existence of the deed from Green to Reed, he must be deemed to have had notice of its existence, and the title from Green to Reed would be the better title.

And, if the facts are as mentioned in this instruction, the possession and payment of taxes for seven years would not make the title, under the deed from Green to Cushman, the best. It would not be claim and color of title made in good faith.

If, at the time Brush and Kelly derived title from Cushman, the deed from Green to Reed had been recorded in the recorder's office of La Salle county, they were purchasers with notice of the existence of this deed; and, if Cushman, at the time of his purchase, had notice to put him on inquiry, as mentioned in the first instruction, then the title under the deed from Green to Reed is better than that under the subsequent deed from Green to Cushman.

The court instruct the jury that, if Howland, either for his wife or as the agent of Reed, paid the taxes for 1849, before they were paid by Cushman; and, if it is not proved that Cushman, or those claiming under him, paid the taxes for seven successive years, not including the tax of 1849, then neither Cushman or those claiming under him, can claim any title by means of having paid taxes on said land and taking possession thereof.

If Cushman had knowledge of the unrecorded deed from Green to Reed when he made his purchase from Green, he cannot protect himself against said deed from Green to Reed. He is as effectually bound by knowledge of the existence of the prior deed, as he is by its registration. It is deemed an act of fraud in him to take a second deed under such circumstances; and whatever is sufficient to put him on inquiry as to the rights of others, is considered legal notice to him of those rights.

He is chargeable with knowledge of such facts as might be ascertained by the exercise of ordinary diligence and understanding. The actual possession of land is notice that the possessor has some interest therein. The party who purchases the same while that possession continues, takes the premises subject to that interest whatever it may be. The possession is sufficient to put him on inquiry as to the title of the possessor, and it is his own fault if he does not ascertain the extent and character of that title.

In order to constitute an actual possession of land, it is not necessary that the person claiming, or others claiming under him, should actually reside on the land. It is sufficient if the land is appropriated to individual use, and used in such a manner as to apprise the community or neighborhood of its locality, that the land is in the exclusive use and enjoyment of another, and the possession will be deemed coextensive with the title under which the occupant claims; and if, at the time this negotiation between Cushman and Green, for the conveyance of this land, commenced, there was such possession of the premises by Reed, or those claiming under his title, then Cushman is in law deemed to have notice, whether he actually knew of the possession or not.

The court modified this instruction by adding, at the end of it, these words, viz.: "The possession necessary to constitute notice to subsequent purchasers must be open and notorious, and continued to the time of the subsequent purchase, and in this case connected with the title from Green to Reed."

The court instruct the jury that the patent to Green, the deed from Green to Reed, and the proceedings of the court appointing Morrison trustee, in the place of Reed, prove a title in fee simple in the plaintiff to the land in the declaration mentioned, if the same is a part of the land described in the said two deeds and proceedings of the court, and that this is sufficient to entitle the plaintiff to recover, unless a better title in some other person is shown. If the jury find for the plaintiff, the form of their verdict will be as follows: We, the jury, find the defendant guilty of unlawfully withholding the premises in the declaration mentioned, in manner and form as therein alleged, and we further find the plaintiff seized of a fee simple estate in said premises.

The court instruct the jury that the production of the deed from Green to Reed, by the plaintiff in this suit, makes a *prima facie* case that this deed was delivered at or about the time of its date, and unless there is other evidence showing that it was not delivered, the jury should presume that it was delivered as above.

If, at the time of the occupation by Alexander, under Howland, the only legal title or claim that Howland had was under the deed from Green to Reed, then the possession of Alexander was under said deed, whether Howland disclosed to Alexander that Reed was the owner or not, and Alexander's possession would be notice that he was in possession under this deed to Reed.

The court instruct the jury, that it is necessary for a purchaser under a subsequent deed, in order to defeat the title under a prior unrecorded deed, to prove that there was a valuable consideration for the execution of said subsequent deed, passing from the grantee to the grantor.

The court instruct the jury that it does not affect the validity of the plaintiff's title in this case, that the deed from Green to Reed was made to protect property and keep it away from the creditors of Howland; even if this is so, it is not material.

The court modified this instruction by adding at the end thereof the following words, viz.: "This is the law, if such deed was not made with the intent and for the purpose to defraud or deceive those who shall purchase the lands therein described."

The court instruct the jury that, although Alexander's lease may have expired, and although he may have surrendered the possession of the premises to Howland, before the conveyance to Cushman, yet if they were, at the time of the execution of the deed from Green to Cushman, in the actual visible possession of Howland, claiming as the agent of Reed, or under his title, and such possession was such as mentioned in the fifth instruction, then Cushman is deemed in law to have had notice.

The court instruct the jury that, if Alexander was in possession under Howland, and Howland, at the time he let Alexander into the possession, was in possession as the agent of Reed, or under his title, that then the possession of Alexander was notice to put Cushman on inquiry.

The court instruct the jury that, if prior to the conveyance by Green to Cushman, he, Cushman, was informed by Howland that this land was his; and if at the time the title was in Reed, in trust for Howland's wife; and if Cushman, by exercising ordinary diligence in inquiring into the matter of Howland's claim to this land, would have discovered the existence of this trust deed, then he is deemed in law to have had notice of the existence of said deed.

The court modified this instruction by adding at the end thereof the following words, to wit: "It is for the jury to determine whether the claim by Howland to Cushman, that the

land was his, (if proven,) was or was not sufficient to satisfy a reasonable person that the title at the time was in Green.

The court gave the first, second, third, fourth, sixth, ninth, eleventh and twelfth, as asked; modified the fifth, tenth and thirteenth, as stated above; did not mark on the margin of the seventh either the word "given" or "refused," but read the same to the jury as the law, and refused the eighth instruction.

And to the opinion of the court in refusing said eighth instruction, and in modifying said fifth, tenth and thirteenth instructions, and each of them, the plaintiff at the time thereof excepted.

At the request of the defendant, the court gave the jury the following instructions:

That unless it is proven that the deed from Green and wife to Reed was delivered to Reed or Reed's agent, or the person for whose use and benefit it was made, it is not proven that any title passed by that deed.

Green's deed to Reed could pass the title to the land from Green to Reed only from the time it was delivered to Reed, or Reed's agent, or the person for whose use and benefit it was made.

A delivery of the deed from Green to Reed, to Howland, would be of no force, unless it is shown that Howland was the agent of Reed to receive the deed.

If the deed from Green to Cushman was filed for record, in the recorder's office, before the deed from Green to Reed was filed, then the deed to Cushman would hold the land as against Reed's deed, unless Cushman, at the time he received the deed, had notice of the existence of the deed to Reed.

Possession of the land in question by Alexander was not constructive notice to Cushman of Reed's claim, unless Alexander held under Reed, and unless his possession continued up to the time when Cushman made the purchase from Green, or the time when he received his conveyance.

Notice to Cushman by Howland, that Howland claimed the land as his own, is not notice to Cushman of the deed to Reed.

If Cushman had no notice of Reed's title when he purchased of Green, then Cushman, if his deed was recorded first, could give good title to Brush as against Reed's title, even if Brush had notice of Reed's deed when he purchased.

If possession is relied upon as notice of title, such possession, in order to amount to constructive notice, must be continued up to the time when the second purchase is made.

To give an unrecorded deed priority over a recorded one, on the ground that the grantee in the recorded deed had notice of

the unrecorded deed, the proof of such notice must be clear and satisfactory.

The burden of proof in this case, is upon the plaintiff; and, if upon any point necessary to be proved to make out the plaintiff's title, there is as much weight of proof for the defendant as for the plaintiff, the jury should find for the defendant.

Delivery by the grantor and acceptance by the grantee are essential to the validity of the deed. The deed takes effect only from its delivery, and there can be no delivery without acceptance either by the grantee or some one under his authority. And if the jury believe, from the evidence, the deed from Green to Reed was never delivered to Reed, or his agent, or the person for whose use and benefit it was made, or if delivered at all, not until after the deed from Green to Cushman was executed and recorded, then Cushman's title to the land is perfect under that deed.

If a description of a tract of land in a deed is such that the land, intended to be conveyed, can be located, and the references to the tract of land are such that the tract can be identified and distinguished by them, the grantee under such deed would hold the property.

If Howland had a field inclosed on the land in question, in 1840, and that field was abandoned, and the rails and other improvements had been removed from the land, and the land was vacant and unoccupied when Cushman purchased the land, the fact that the land had been occupied *previously* by Howland, would not be constructive notice to Cushman, at the time he purchased the land, of Reed's or Howland's title.

The possession of the land, which is constructive notice to a purchaser of the title of the occupant, must be an actual possession at the time. An old improvement, which has been abandoned, is not such notice.

If the jury believe from the evidence, that the witness Howland, received the deed from Green to Reed, and at the same time, or soon after, received the bond from Green to himself for the conveyance of the land, it is a circumstance to be considered in determining the question as to whether the deed was treated as valid or not.

And to the giving of each of said instructions the plaintiff objected; the court overruled the objection and gave each of said instructions, and to the giving of each of them the plaintiff excepted.

The jury found a verdict for the defendant; the plaintiff moved for a new trial; the court overruled the motion, and to the opinion of the court, in overruling said motion, the plaintiff

then and there excepted, and prays the court to sign and seal this his bill of exceptions, which is done.

Leland & Leland, and T. Reed, for Plaintiff in Error.

B. C. Cook, for Defendant in Error.

Walker, J. It is urged that the appointment of plaintiff, as trustee, to fill the place after the death of Aaron Reed, was irregular because the heirs of Reed were not made parties to the application. And that by the death of the trustee, his heirs became invested with the legal title, and as they were not parties to that proceeding they are still the owners of the legal title, and the plaintiff, by his appointment took no interest. The deed purports to convey the property to Aaron Reed, and to his heirs and assigns, and then declares the trust, and creates the power of the trustee over the estate. Had the grantor declared no trust, Reed would, under the language employed, have taken a fee simple estate of inheritance. But, it is the object of the declaration of the trusts, and the creation of the powers conferred upon the trustee, to limit and control the estate granted. The grantor may declare any use or trust, or confer any power upon the trustee or others, which he may choose, so that their object is not prohibited by law, by public policy, or good morals, and it will be binding. He may declare the objects of the trust, and confer the power to execute them upon the trustee or upon another. He may convey to a trustee for a limited period, and provide that at that period another may take, or that at the end of the time, or upon the happening of an event designated, a person named by the deed may nominate and appoint a trustee to execute the trust and perform the powers. It will not be contested that a grantor conveying to a trustee, may confer a power upon an officer, as the chief executive of the State, a circuit judge, a probate judge, or upon any court of record, the power to appoint a trustee, in the event of the death of the trustee named in the deed. Then if it was the object of the clause in this deed to confer upon the Circuit Court of La Salle, such a power, so soon as Reed's death occurred, the court became invested with jurisdiction to appoint a trustee, and such jurisdiction would not depend upon acquiring jurisdiction of his heirs or personal representatives. This deed provides, "That in case of the decease or legal incapacity of said Reed, before the full execution, discharge and performance of all and singular the trusts in and by said deed created or declared, then, in either case, the trusts shall be executed, discharged and performed by the court of chancery of the judicial

district or circuit in which La Salle county shall then be situated; and that the estates in and by said deed granted and conveyed to said Reed, shall, on the decease or legal incapacity of said Reed, vest in such court of chancery, as aforesaid, subject to all and singular the trusts and confidences in said deed created and declared, and that said court of chancery shall exercise the same powers, and perform all and singular the trusts that may remain unexecuted and unperformed, with the same legal effect as the said Reed might or could, were he capable of performing the same; and that the mode of performing said trusts shall be such as said court of chancery shall order or decree, or agreeable to the course of practice of said court." From this language it is clear and free from all doubt, that it was the intention of the grantor, in case of the death of Reed before the trust was executed, to confer upon the court the power to complete its execution, and expressly provides that it shall do so, in such a manner as the court shall order or decree, or according to the practice of the court. And when the court became satisfied of the death of the trustee, and that the trusts created by the deed were not fully executed, it became the duty of the court, on the application, to proceed to have the trust executed, precisely as if a trustee were to die without heirs, or a trustee in whom a personal trust and confidence is reposed by the deed, dies before he has carried out its provisions. In such cases it is the practice of the court of chancery rather than permit the trust to fail for want of a trustee, to appoint a suitable trustee, who succeeds to all the powers, rights and duties, as if he were named by the deed. We are, for these reasons, clearly of the opinion that the appointment of plaintiff, by the order of the court of chancery, was valid, and that he thereby succeeded to all the rights, powers and duties which the deed conferred upon Reed.

The doctrine is well recognized and established that a man may have the actual possession of real estate without a residence upon it. And it may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which in contemplation of law draws to, and connects with it the possession. But to be adverse, it must be a *pedis possessio*, or an actual possession. And to constitute such a possession, there must be such an appropriation of the land to the individual, as will apprise the community in its vicinity that the land is in the exclusive use and enjoyment of such person. Trifling acts, doubtful and equivocal in their character, and which do not clearly indicate the intention with which they are performed, cannot be regarded as amounting

to possession. But it has been held that neither actual occupancy, cultivation, or residence, are necessary to constitute actual possession. *Ewing* v. *Burnett*, 11 Peters R. 53. And where the property is so situated as not to admit of any permanent, useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim, has been held to be such possession as will create a bar under the statute of limitations. *Ewing* v. *Burnett*, 11 Peters R. 53. What acts may or may not constitute a possession, are necessarily varied, and depend to some extent upon the nature, locality and use to which the property may be applied, the situation of the parties, and a variety of circumstances necessarily have to be taken into consideration, in determining the question. They must necessarily be left to the jury, whose peculiar province it is, to pass upon the question of possession. *Ewing* v. *Burnett*, 11 Peters R. 53.

It is the settled doctrine of this court, and it is believed to be in Great Britain, and the various courts of the Union, that under the registry laws, a notice of the prior conveyance is as effectual as the registry of the deed. The object of recording the deed being to give notice to the world of the purchaser's claim of title, when that end is attained, whether by recording, actual notice, or such circumstances brought to the knowledge of the subsequent purchaser or creditor, as would induce a prudent man to make inquiry before he acted, answers the object of the statute. *Doyle* v. *Teas*, 4 Scam. R. 202. When the deed is filed and recorded in the proper office, it is frequently only constructive notice, and defeats the title of the second purchaser, not because he has seen the deed and has actual notice of its existence, but because he has the means afforded him of informing himself of the existence of the prior conveyance. It has always been held sufficient, if actual notice has come to the knowledge of the second grantee before his purchase. While there is a conflict of authorities as to what circumstances brought to his knowledge are sufficient notice to protect the holder under an unrecorded deed, against a subsequent purchaser, it has been held by this court that, " Where the court is satisfied that the subsequent purchaser acted in bad faith, and that he either had actual notice, or might have had that notice, had he not willfully or negligently shut his eyes against those lights, which with proper observation, would have led him to knowledge, he must suffer the consequences of his ignorance, and be held to have had notice so as to taint his purchase with fraud in law. It is sufficient if the channels

which would have led him to the truth, were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequences of his ignorance. The law will not permit him to shut his eyes when his ignorance is to benefit himself at the expense of another, when he would have had them open and inquiring, had the consequences of his ignorance been detrimental to himself and advantageous to the other." *Doyle* v. *Teas*, 4 Scam. R. 250. The doctrine of this case was again recognized by this court in the cases of *Rupert* v. *Mack*, 15 Ill. R. 541; *Mc Connell* v. *Read*, 4 Scam. R. 123, and in *Merrick* v. *Wallace*, 19 Ill. R. 486. And it should now be regarded as the settled doctrine of this court.

In the application of this rule this court has repeatedly held that, where the first purchaser is in possession, that it constitutes sufficient notice, and protects his rights as effectually as by recording his deed. 4 Scam. R. 117; 15 Ill. R. 540. The evidence in this case shows an open, visible possession of the premises at the time Cushman purchased and received his first deed with an erroneous description of the land. A portion of the premises were then inclosed, with a cabin and some fruit trees on it. The evidence seems to show that Howland gave Cushman notice, that either Reed or himself was the owner, which, is not very certain. He swears that he notified Cushman that Reed was the owner, while Green and Cushman testify that he stated that he was the owner. We deem it immaterial whether the notice was given the one way or the other, as Reed was the trustee, and held the legal title; and Howland, by the trust deed, had a contingent remainder, dependent upon his surviving his wife. He then may be said to be the owner, although his estate is contingent. And had Cushman not known and been fully advised of the situation of the title, it is strange that he made no inquiry as to the nature and extent of his title. Had he asked the question, Howland would have undoubtedly fully explained the nature of his title. But his silence indicates that he was informed, and had no desire for any other or further information. And having notice to put him upon inquiry at that time, both by the possession of the premises and the notice given to him by Howland, he could not protect himself by waiting some months and then taking a conveyance without further inquiry, or by removing the improvements, that were sufficient notice when he first purchased. He might remove the improvements and have the premises in such a condition as not to indicate any possession to others not knowing the facts, but he could not remove or obliterate the notice which he had previously received, and he could not take by the second deed free

from the notice he had at and subsequent to receiving his first conveyance.

The evidence shows that the trust deed was delivered. That is evidenced by its being in the custody of the trustee. But if it was not delivered to the trustee at the date of its execution, and even if it were necessary that it should be delivered to him, it was taken East and delivered to him by Mrs. Howland before Cushman attempted to purchase, which would be sufficient. If a deed is delivered to a stranger, who has no authority to receive it, the grantee may ratify the act of the stranger, and the delivery will be good, even in cases where the deed is made without the grantee's knowledge. But in this case, if either Howland or his wife received the deed at the time of its execution, their interest in the title conveyed by the deed was such as to make such a delivery operative.

The question of good faith is one of fact for the jury, and while good faith will be inferred when the party having claim and color of title, holds possession and pays taxes for the period limited, bad faith may be shown by the other party. And whenever it appears that the occupant knew he was acquiring no title when he received his deed, or was acting in fraud of the true owner, the presumption of good faith is overcome. The evidence, however, fails to show a payment of all taxes legally assessed upon this land for seven successive years. Howland showed, by the collector's receipt, the payment of the taxes which had been assessed upon it for the year 1849, which bore date in March, 1850. He by that payment satisfied the tax and discharged both the land and owner from all taxes assessed upon the land for that year. From the moment that payment was made, there were no taxes in existence legally assessed for that year. The money existed, but its payment extinguished and discharged the tax, and when Cushman, in April following, paid an amount of money to the collector, corresponding in amount to the tax which had previously existed against the land, it was not in payment of the tax, because that had already been paid and had ceased to exist. There was at that time no tax legally assessed against the land, and his payment was not of a tax legally assessed, but it only amounted to a gratuity to the state, county, etc., which had no claim, and consequently no payment could be made to them or their officers. To constitute a payment, the money must be given in discharge of a debt, demand, assessment, or public charge, neither of which existed at the time Cushman gave this money to the collector. To permit the owner to defeat the occupant's payment, by paying an amount of money to the collector equal to the tax which had been previously paid by the occupant in discharge of all taxes assessed

on the land, would render the provisions of this statute inoperative, and would amount virtually to its repeal, as the holder of the better title would surely make such a payment once in seven years.

When the deed to Reed was recorded, it became notice to the world, and any person purchasing from Cushman after that time, took the title just as he held it. If Cushman was chargeable with notice when he purchased, his grantee, receiving a conveyance after the deed to Reed was recorded, would be chargeable with the same notice that Cushman had. It would, however, be different, if the trust deed to Reed had not been recorded in the proper office when they purchased. In that event, to resist successfully a conveyance from Cushman, actual notice or a knowledge of such circumstances as would put a prudent man on inquiry, would have to be brought home to his grantee before his purchase.

It is urged that the court erred in refusing to give plaintiff's eighth instruction asked. It was: "If at the time of the occupation by Alexander, under Howland, the only legal title or claim that Howland had was under the deed from Green to Reed, then the possession of Alexander was under said deed, whether Howland disclosed to Alexander that Reed was the owner or not, and Alexander's possession would be notice that he was in possession under this deed to Reed." The possession of the tenant is that of his landlord, and it is the same, whether he acquires it from the owner or from his agent. Alexander could not have disputed the title of Reed, if Howland was acting as his agent. But in this case, as a means of notice, the occupancy by Alexander was the same notice to Cushman as if he had made his contract with and received his lease from Reed. Had Cushman seen Alexander and inquired of him how he was holding, he would have referred him to Howland, from whom, by inquiry, he could have learned the nature and extent of the title, and this instruction should therefore have been given.

The court erred in giving defendant's third instruction, as a delivery of the deed to Howland or wife as the beneficial parties to this deed, or a subsequent ratification of a delivery to any person, by receiving, holding or acting under it, or receiving it without disclaiming the act, would be a sufficient delivery, and would relate to its execution. This instruction should have been so modified before it was given.

The defendant's sixth instruction, as given, was calculated to mislead the jury. It asserts that notice given by Howland to Cushman, that he was the owner of the land, is not sufficient notice to Cushman of Reed's deed. We have already seen that the *cestui que trust* has such an interest in the deed as to be for

the purposes and to the extent of the trust declared and created by its provisions, the beneficial owner of the land, and Howland, in equity, was an owner of the trust created by the deed, and had the contingent remainder of the property, to appoint, by sale, its disposition. And had Cushman asked how he held, or what his title or interest was, he would have doubtless been fully informed. And we are of the opinion, that such a declaration or notice was sufficient.

The proof of notice of the existence of an unrecorded deed, must be made in the same manner, and its measure must be the same as that which establishes a fact in other civil cases. This we have seen is the principle established in the cases of *Doyle* v. *Teas*, *Rupert* v. *Mack*, and *Mc Connell* v. *Read*, where it is asserted that any circumstance which is calculated to put a prudent man on inquiry, is sufficient. The ninth instruction given for defendant was therefore incorrect.

The defendant's eleventh instruction was not properly qualified by pointing out which deed from Green to Cushman was referred to, whether the first or last. If it was applied to the first, by which no title passed, it was wrong, and if to the latter, as an abstract proposition, it was perhaps correct; but as it was given, the jury may have understood it as referring to the first and not the latter of these two deeds. But we cannot see why it should have been given, even if modified, as the deed came from the proper custody, and was received by Howland, who had, as we have seen, such an interest as would authorize him to receive it for the benefit of the grantees.

There are no other errors perceived in the record, of which the plaintiff has a right to complain. But for these errors, committed by the court below, the judgment of that court must be reversed, and the cause remanded.

Judgment reversed.

James H. Eames, Appellant, *v.* Thomas Hennessy, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

An application for a continuance, on account of the absence of a witness, should not only show diligence, but that there are no others to prove the same facts, and that the witness may be in attendance at another term. A delay of six months, without serving process on a witness, is a want of diligence.

An officer may recover for his reasonable expenses, in keeping property levied on, by attachment or execution.

This declaration in assumpsit states that Eames, at Chicago, made his draft or order, in writing, for payment of money, usually called a check, on a banker, directed to E. H. Huntington & Co., requiring them to pay Hennessy or bearer, $109.20; that on same day said draft was presented to Huntington & Co., and payment demanded and refused, of which Eames had notice. By means whereof, etc. Common counts for money lent, money paid, money had and received, account stated, promises to pay, and breach.

Pleas filed, and affidavit of merits.

1st plea, general issue.

2nd plea, that the check was given without any good or valuable consideration, in this: that the same was for certain fees which Hennessy, as a constable in and for said county, claimed he had a right to charge Eames, but which, in fact, he had no right to charge; and the same was illegal, and without warrant of law; concluding with verification.

3rd plea, that at the time when, etc., Hennessy was a constable, and as such, set up and claimed certain fees to be due him from defendant, in virtue of his office, and for services by him rendered in the course of his office, and that the sole and only consideration for which the check was given, was in payment of the fees so claimed by him. That the fees were illegal, and the services for which they were charged, had not in fact been rendered by Hennessy, and so the consideration for the check had wholly failed; verification, etc.

4th plea, as to $100 of said check, same as last plea; and as to balance, payment; verification, etc.

Similiter added, and replications filed,

To 2nd plea, that the check was not given for fees which were illegal, and charged without warrant of law, in manner and form, etc., and concludes to the country.

To 3rd plea, that the consideration had not failed in manner and form, etc., and concludes to the country, etc.

To 4th plea, that the consideration of the check had not failed to $100, nor had Eames paid the balance, and concludes to the country.

Motion for continuance overruled. The cause was tried by court. Judgment at November special term, for Hennessy, for $127.72.

The errors assigned are: The refusal of the continuance; the finding the issues for appellee; the refusing motion for new trial; and the rendition of judgment for appellee.

W. T. Burgess, for Appellant.

Scates, McAllister & Jewett, for Appellee.

WALKER, J. This was an action of assumpsit instituted by Hennessy against Eames to the June term, 1857, of the Cook County Court of Common Pleas, on a draft or order from Eames in favor of Hennessy, drawn on Huntington & Co., for $109.20. The declaration contained a special count on the draft and also the common counts. It was averred in the special counts that the draft was drawn, presented and protested, by the drawers. The defendant below filed the general issue, a plea of no consideration, a plea of failure of consideration, and a plea of part failure of consideration. At the October term, 1857, the defendant filed an affidavit and entered a motion for a continuance on account of the absence of James Jones, one of his witnesses. The court overruled the motion, and the cause was tried by the court, by consent, without the intervention of a jury. And the court, on the evidence, found for the plaintiff below, and rendered a judgment against defendant below for $127.72, damages and costs of suit, from which he appeals to this court.

The first question presented for our consideration in this case, is, whether the court below erred in overruling the motion for a continuance. The affidavit states that defendant expected to be able to prove on the trial by James Jones, that in November, 1854, the plaintiff claimed to hold the schooner Baltic under a writ of attachment issued by a justice of the peace, and had placed the same in the hands of said Jones; that at the time of the levy the said Jones was the captain of said schooner, in the employment of the owners; that Hennessy had not paid Jones anything therefor, nor offered to do so, and no compensation was agreed upon by them, and that Jones made no claim upon Hennessy for taking care of the vessel. That within five days after the levy, Jones stripped her of her sails and loose rigging and towed her up the south branch of the Chicago river, where she was soon after frozen in and remained without any person in the actual charge of her, until the next spring; and that this suit was brought on a check given for fees claimed by Hennessy as a constable, to be due to him for taking care of the vessel. He then claimed that there was due to him about seventy dollars for fees, which defendant refuses to pay. The defendant, for the purpose of collecting these fees, undertook to sell the vessel, to prevent which, defendant gave the check for the amount claimed, and the only consideration thereof was the fees claimed in the attachment suit, the defendant having previously paid the judgment and costs in the attachment suit, except the fees claimed by plaintiff. That Jones, when the affidavit was made, was captain of the Experiment, a vessel plying between Chicago and Kalamazoo, and was expected to return in a week or ten days, that she had left Chicago the week previous, and that affiant had

seen the captain shortly before he left port and informed him that he was wanted as a witness in the case. That he refused to remain, and left before he could get a subpœna and have him served. That the witness resided in Chicago, and the application was not made for delay, but that justice might be done.

This affidavit shows but little effort to procure the attendance of this witness. Service was had on the defendant on the 14th day of April, and this trial was not had until the 9th day of October following, and during all that time, and until a week previous to the trial, no efforts of any kind are shown to have been made to procure his attendance, no subpœna was issued, nor does he show that the issuing of a subpœna, would have been unavailing. Can this be held, to be reasonable diligence? While courts must necessarily exercise a large discretion in allowing continuances, they must be satisfied that the party has made reasonable efforts to procure the attendance of the absent witness. In determining that question it will be necessary for the judge to consider all the circumstances, the time which has intervened after the service of process, whether it be a first, second or third application. On a first application soon after the service of the process, a less degree of effort should satisfy the court, than when a longer time has elapsed, and so of a second or a subsequent application by the same party. In this case we think proper diligence is not shown, as near six months had transpired after service and before the application was made, and no subpœna was during all that time issued, for the witness residing in the same city, and no reason given why such process would not have been availing.

This affiant fails to state that this is the only witness by whom the same facts can be proved. Nor does it state that there will be a contrariety of evidence on the question. For aught appearing, the appellant may have had numerous witnesses present by whom he could have proved the same facts, just as satisfactorily as by the absent witness. And if so, the evidence was not material, unless there were other witnesses to contradict his evidence on that point, and having failed to state these facts, the presumption is that he had other witnesses to prove all that he could have proved by Jones, and that his evidence was not needed on the trial. In this the affidavit is, we think, insufficient.

Again, this affidavit wholly fails to state that, he expected to be able to procure the attendance of the witness, or his evidence by the next term of the court. In this respect the affidavit was also insufficient, as a continuance would be useless unless the absent evidence were produced. And there can be no pre-

sumption that the witness will give his voluntary attendance, and the applicant for a continuance must know whether he has a reasonable prospect of procuring the evidence. In this respect this affidavit was insufficient. We are therefore of the opinion that the court below did not err in overruling this motion for a continuance.

It was insisted that a constable has no right to charge for expenses in taking care of property levied under execution or attachment. To make a levy he has to take the property into his possession, and the law holds him responsible for its preservation. It would be strange if the law imposed a duty on an officer involving expense and outlay, and then denied him compensation to reimburse his outlays. His duty to levy, keep and preserve the property, is imperative, and he has no option in the matter. The defendant in execution or attachment has the right to release the property from the custody of the officer, by giving bond and security for the return of the property to the officer, and when he fails to so return the property from the levy, he impliedly constitutes the officer his bailee, and he, as such, has a right to look to the defendant for reasonable compensation for such services, and has a lien on the property for his charges, for which he may retain it till they are paid, or until the property shall be sold under the execution, when he may retain his charges out of the proceeds of the sale. The law having imposed the duty on the officer, it must have intended he should receive a compensation for its performance. When the defendant fails or refuses to release the property from the levy, he has no right to complain if he has to satisfy the expense of keeping the property. It would be highly unjust to require the officer to make the levy and incur this expense or be liable to an action for a false return, when he was not to be refunded his actual expenditures. The check on which this suit was instituted was given on settlement for a claim for expenses incurred in keeping this vessel, and they constituted a sufficient consideration to support the promise to pay. The question of whether such charges may be taxed and collected by fee-bill, after the satisfaction of the judgment in the original suit, is not presented by this record, and is not, therefore considered. This charge must no doubt be a reasonable one, having regard to the care, expense, trouble and responsibility which has been actually incurred by the officer in taking care of the property attached. Whether the charge made in this case, or, whether the check was given under such circumstances of constraint as to authorize an inquiry into its consideration, it is not necessary now to say. We think the court properly overruled the motion for a continuance, and its judgment must be affirmed.

Judgment affirmed.

William S. Moss *et al.*, Appellants, *v.* John M. Johnson, Appellee.

APPEAL FROM TAZEWELL.

A party asking a change of venue, should give notice of his intention at the earliest period. If the cause for the change is known in vacation, notice should be given and the application should be made at chambers.

The averments and proof should correspond.

A person who obtrudes himself upon a locomotive or cars, cannot recover, if he sustains injury.

A person who has a contract with parties running a road, as an employee, going upon a railway train, with full knowledge of the condition of the road, and its management, cannot recover for injuries he may sustain.

This suit was commenced in Peoria county, and removed by change of venue to Tazewell county, where it was tried by jury at the April term, 1858, and a verdict and judgment rendered for the plaintiff for $4,000.

The declaration contained two counts.

The first count states, in substance, that the defendants were lessees and proprietors of the Peoria and Oquawka Railroad, and cars used thereon for carrying passengers for hire, from Peoria to Edwards Station. That on the 19th November, 1856, the plaintiff, at the special instance and request of the defendants, became a passenger on said road, to be safely carried from Peoria to Edwards Station, for a certain fee or reward; that defendants received the plaintiff as such passenger; that it was defendants' duty to see that plaintiff was carried on his journey in safety, which they did not do; by reason whereof, the cars ran off the track, and the plaintiff's legs were broken, and he was otherwise seriously injured and damaged, and was prevented from attending to business, and compelled to expend large sums of money in curing his wounds, etc.

The second count is substantially the same as the first, with this additional averment, "That the defendants, not regarding their duty in that behalf, so carelessly, negligently, unskillfully and improperly managed and conducted said cars, that, whilst said cars were proceeding on said railroad, (with the plaintiff as a passenger,) the said cars, by and through the carelessness, negligence and improper conduct of the said defendants and their servants, ran off the track," etc., whereby the plaintiff was injured, as stated in first count.

The defendants pleaded:

1st. The general issue—not guilty; upon which plaintiff took issue to the country.

2nd. That the causes of action in the two counts are the same. That at the time when, etc., the plaintiff was one of the

servants of the defendants, engaged as a carpenter and bridge builder, aiding as such, in the construction of said road; and that without any request or invitation of the defendants, and without paying or assuming to pay any fare, had got voluntarily upon the freight and construction train of the defendants, to ride from Peoria to the place where he was engaged in work on said road for defendants. That while he was so proceeding on said train, without any gross fraud or negligence on the part of the defendants, the plaintiff received the injuries complained of in the declaration.

To this plea the plaintiff demurred specially, assigning for causes:

1. That it amounts only to the general issue.
2. That it is double, and attempts to set up two defenses in the same plea.
3. It neither confesses nor avoids the cause of action set forth, nor denies it.

The court sustained the demurrer to the plea. The defendants' counsel abided by the demurrer.

Prior to this time, to wit: on the 7th of April, A. D. 1858, and after the venue in the cause had been changed to Tazewell county, and at the April term of said court, the defendants gave notice that they would apply for a change of venue in the cause, on account of the prejudice of the inhabitants of the county of Tazewell, and filed their petition, which states as follows:

"The petition of the undersigned, defendants in this suit, respectfully represents that the inhabitants of the county of Tazewell, in which this suit is pending, are prejudiced against the defendants, so that they fear that they will not receive a fair trial in the Circuit Court of Tazewell county aforesaid, in which said suit is pending, for the reason aforesaid; and that the said defendants did not ascertain the existence of such prejudice, until within the last ten days; and that the cause of the prejudice aforesaid, did not come to the knowledge of the petitioners aforesaid, until within the last ten days. Petitioners therefore pray for a change of venue in this cause, pursuant to the statute in such cases made and provided.

WM. S. MOSS.
WM. KELLOGG,
CHARLES S. CLARK,
HERVEY LIGHTNER,
RICHARD GREGG."

The petition was sworn to by Wm. Kellogg, who states, also, that the application is made by the consent of all the defendants.

The court overruled the motion for a change of venue, and the defendants filed their bill of exceptions, setting out the notice of application, etc., which was signed by the judge.

The cause proceeded to trial at April term, A. D. 1858.

James D. Barr stated for plaintiff as follows:

My occupation is that of a carpenter; I was, in 1855, foreman of the carpenters employed on the Peoria and Oquawka Railroad; the plaintiff was also at the same time employed as a carpenter on said road, and was working under me, and had been so working for the company for a month or two. At the time he received his injury, he was going out on the freight and construction train to his work on a water tank, being a hand employed on said road as a carpenter. I have no recollection that I directed or requested plaintiff to go out on the cars that morning; I and several hands were going out to work on the road; it was usual for them to ride out on the train; there was a box car attached to the train, which had been fitted up with seats to convey the hands and passengers who wished to travel on the route of the road, in which plaintiff was at the time of the accident; this box car was placed in front of the other cars, and behind the engine and next to the tender; two other cars immediately in rear of the box car were loaded with iron for the road, and the other still behind them with ties; this was not the usual manner of making up a train, and in my judgment was improper; the box or passenger car ought to have been placed behind the others.

There were forty or fifty persons in the box car, principally hands of the defendants, going to their work. E. D. Palmer was engineer, and Smith Frye, conductor, on the train. There were two or three passengers who paid fare in this box or passenger car.

The accident happened about five miles from Peoria, at a curve in the road; it was a slight curve; the car ran off the track about one hundred feet before we reached the trestle work, and as soon as that was reached it was broken down, and the car in which the plaintiff and other hands and passengers were, was overturned, and fell down off the trestle work some fifteen or twenty feet. The plaintiff's leg was broken, and his shoulder dislocated; several other persons were injured, and a brakeman was killed. Johnson was taken into a car and taken back to Peoria. The engine did not run off the track; some of the wheels of the tender did; we were running eight or ten miles an hour; the plaintiff had nothing to do with the running of the cars. On the embankment, before reaching the trestle work, there were no chairs to hold the rails; they were only secured by spikes.

At the speed we were running, I think the spikes were sufficient; some roads use larger ones; the spikes had been put in at every place where they ought to have been. The plaintiff

was a hand employed in the construction of the road; he was not requested by defendants or ony other person to ride out on the cars. The road was unfinished and in process of construction. The plaintiff had been over this portion of the road before; the cars had been running over the road for more than a year previous to the accident, and none had previously occurred. The plaintiff might, if he had chosen, have got on the hind car, instead of into the box or passenger car; I think he was not as good a judge as myself as to the manner in which a train ought to be made up. There was in my judgment no carelessness or negligence in the conducting or running the train; and this portion of the road where the accident occurred had been constructed by the Peoria and Oquawka Railroad Company before the defendants came into possession of the road. The defendants had been operating and constructing the road since April previous to the accident.

The witness further stated, that in his opinion, the accident occurred by reason of a defect in the friction plate of the car; that it was too tight to allow the car to turn easily."

E. D. Richardson testified:

I was a passenger in the car at the time when the accident happened; the box car in which I rode was next to the tender, and the cars loaded with iron next to it in the rear; this is not the usual way of making up a train; the passenger car was thrown from the track; the locomotive did not run off; one man was killed, and Mr. and Mrs. Lowe were injured; Johnson, the plaintiff, was also injured; I was not; I went back to see how the accident occurred, and I think I know. There were no chairs where the accident happened; there is a slight curve in the track; It had the appearance that the flange of the wheels had struck the square end of the rails which had got out of place, not coming square together at the ends, thus throwing the cars off the track, and running the same against the trestle work, knocking the same down and throwing the cars off the track; the track had been in that way for several days; the man that was killed had thrown off a stick of wood at the place a day or two before, to show the superintendent that the road was out of order there; I think the cause of the accident was the misjoinder of the rails.

There was no mismanagement in the running or conducting of the train; it was not running on that day as fast as usual.

W. G. Wheaton, called by the plaintiff, testified:

That he is an engineer by occupation; has been so for nine or ten years; the proper manner for making up a freight and passenger train is, to put the passenger car behind, in order to insure safety. I should not think it was proper to put passen-

ger cars before heavy loaded freight trains and cars. I never considered a road finished without chairs; but with proper attention they might be safe. They would be less safe on a curve, and less safe with a half-inch spike. This road was in process of construction at the time of the accident; but I do not know the condition of the road at this particular place. All the roads with which I am acquainted except this, use a large spike, which is a five-eighth inch spike, which makes the road safer.

Edward Palmer, called by the defendants, testified, that he was engineer, and was running the engine in the train at the time the accident occurred; the train was running at the rate of eight or ten miles per hour; I had been employed on the road from two and a half to three years; I was employed first by the Peoria and Oquawka Railroad Company; I think this portion of the road was constructed by the Peoria and Oquawka Railroad Company before the defendants had charge of the road; I had run over the road for a year or more previous to the accident to the plaintiff. I know the plaintiff; he was a hand employed on the road; he was not a passenger on the day of the accident, for fare; he got on the train to ride to his work with the rest of the hands; think the train was carefully and prudently managed and conducted on that day.

The court, at the request of the plaintiff, gave the following instructions:

1st. If the jury believe, from the evidence, that the accident to the plaintiff was caused by the negligence and carelessness of the defendants in running their cars, the plaintiff is entitled to recover.

2nd. If the jury believe, from the evidence, that the road was unsafe, and that the accident happened in consequence of the road being unsafe, or in consequence of the cars being out of order, the plaintiff is entitled to recover.

3rd. If the defendants undertook to carry the plaintiff in their cars, they were bound to use proper care, skill and prudence, in carrying him; and if the accident happened in consequence of a want of such care, skill and prudence, then the plaintiff is entitled to recover.

4th. That, whether the plaintiff was or was not in the employment of the company, unless he had some control over the train or road, they were bound, if they undertook to transport him on the cars, to have a safe road, well built, of sufficient material, and to use ordinary care, skill and diligence, in transporting him; and if they have failed in either of these particulars, the plaintiff is entitled to recover.

5th. The defendants were bound to know whether their road

and machinery were safe and in proper condition, and if they were not safe and in proper condition, and the accident was occasioned by reason of the road or machinery not being safe and in proper condition, the plaintiff is entitled to recover.

6th. It makes no difference whether the plaintiff paid any fare or not, if he was lawfully on the train. It was the duty of the defendants to use all reasonable care and prudence to insure his safety.

7th. In assessing damages, the jury can find such an amount as will fully compensate him for his sufferings and the injuries he has sustained.

The defendants requested the court to instruct the jury,

That a master who employs several servants, who are engaged in different branches of the same business, is not liable for the negligence or carelessness of one, through which another sustains an injury.

If the jury believe, from the evidence, that the plaintiff was a carpenter employed by the defendants in the construction of the Peoria and Oquawka Railroad; that he had, without any special request from the defendants, been in the habit of riding into Peoria at night, and back to his work in the morning, free of charge or expense, and that if he had on the day of the alleged injury got voluntarily on to the construction train, to go to his work, without the request of the defendants, and without the payment of fare, the defendants are not liable, although the injury may have occurred through the carelessness of their servants.

That if the jury believe, from the evidence, that at the time the injury was received by him, he was a hand employed by the defendants upon the road as a carpenter, aiding in the construction of the same, and that he got voluntarily upon the cars without paying any fare, or assuming to pay any, without any request from the defendants, and that the accident occurred without the gross fault or negligence of the defendants, they will find for the defendants.

If the jury believe, from the evidence, that the plaintiff's injury was occasioned by reason of any defect in the construction of the railroad, or any defect in the same, they will find for the defendants.

That unless the jury believe, from the evidence, that the defendants were guilty of gross negligence in conducting and running the train of cars at the time this accident happened, they will find for the defendants.

All which instructions the court refused to give, and the defendants excepted.

Defendants moved for a new trial for the following reasons:

1st. The verdict is against law and evidence.

2nd. The court permitted improper evidence to be given to the jury by the plaintiff.

3rd. The court misdirected the jury in giving the instructions asked by the plaintiff.

4th. The court refused proper instructions asked by defendants.

5th. The court refused proper evidence offered to the jury by the defendants.

The motion was overruled, and judgment entered on the verdict, and defendants excepted.

The errors assigned are:

1st. Admitting the plaintiff's evidence, which was objected to by defendants.

2nd. Giving plaintiff's instructions.

3rd. Refusing instructions asked by the defendants.

4th. Overruling defendants' motion for a new trial.

5th. Rendering judgment for plaintiff upon the verdict.

6th. Refusing change of venue.

N. H. Purple, for Appellants.

H. M. Wead, and A. L. Davison, for Appellee.

Breese, J. A preliminary question is raised in this case, growing out of the ruling of the court, on the motion and application of the plaintiffs in error for a change of venue in the cause, on account of prejudice of the minds of the inhabitants of the county in which the suit was pending, against them.

The record shows that the action originated in Peoria county, and the venue changed to Tazewell, on the motion and affidavit of the plaintiff, of prejudice in the judge of the Peoria Circuit Court.

The cause being removed to Tazewell, the defendants made their application for a change of venue, on the eighth day of April, being the third day of the term, having given the notice on the seventh, the day previous. The affidavit stated that the cause of the application, was only known to them within ten days, without stating where they obtained the knowledge. As such applications can be made in vacation as well as in term time, it behooves the party, if the cause is ascertained in vacation, to give the notice at once to the opposite party, and make application to the judge at chambers or elsewhere, wherever he may be, for a change of venue, and thus prevent accumulation of costs and the exercise of diligence by the opposite party to be prepared for trial, which is always attended with expense. We know too well, when such applications are made at the

term, they are made, for the most part, for a sinister purpose, and it should be the endeavor of the courts to frustrate their accomplishment. The plaintiffs in error by their own showing, did know of the cause, as we infer from the language of the affidavit, some days before the sitting of the court. They were negligent in not giving the earliest and speediest notice of their intended application, and the court did not err in refusing the motion.

The merits of the case are, however, with the plaintiffs in error.

It is a rule in pleading, subject to no exception, that a party must recover, if at all, on, and according to, the case he has made for himself in his declaration. He is not permitted to make one case by his allegations, and recover on a different case made by the proof.

There are two counts in the declaration.

The first count states in substance, that the defendants were lessees and proprietors of the Peoria and Oquawka Railroad, and cars used thereon for carrying passengers for hire, from Peoria to Edwards Station. That on the 19th November, 1856, the plaintiff, at the special instance and request of the defendants, became a passenger on said road, to be safely carried from Peoria to Edwards Station for a certain fee or reward: That defendants received the plaintiff as such passenger: That it was defendants' duty to see that plaintiff was carried on his journey in safety, which they did not do; by reason whereof, the cars ran off the track, and the plaintiff's legs were broken, and he was otherwise seriously injured and damaged, and was prevented from attending to business, and compelled to expend large sums of money in curing his wounds, etc.

The second count is substantially the same as the first, with this additional averment, "That the defendants, not regarding their duty in that behalf, so carelessly, negligently, unskillfully and improperly managed and conducted said cars, that, whilst said cars were proceeding on said railroad, (with the plaintiff as a passenger,) the said cars, by and through the carelessness, negligence, and improper conduct of the said defendants and their servants, ran off the track," etc., whereby the plaintiff was injured, as stated in first count.

The allegations of neither count are proved. In the first place he was not a passenger, nor received as such, nor in any sense under the care of the plaintiffs in error. He voluntarily placed himself on a car, to go to his work on the road, and not at the request of plaintiff, in dangerous proximity to the engine, in a train with the heavy burden cars loaded with iron rails and wooden ties behind the car which he chose to get into. This

distinguishes the case from that of *Gillenwater* v. *Madison and Indiana Railroad Co.*, 5 Ind. 339, and also from the case of *Fitzpatrick* v. *The New Albany and Salem Railroad Company*, 7 Ind. 436. His position was of his own choosing, without any request by the plaintiffs, or direction by them, or contract by them of any kind, to carry him to and from his work on the road, nothing of that kind being alleged or shown. The act of placing himself on this car was his own voluntary act, and in the absence of negligence and want of care on the part of the plaintiffs, such as is alleged in the declaration, he is not, on any principle of law we know of, entitled to recover.

We admit, being on the cars with the plaintiffs' consent, they were bound to use due diligence to carry him safely.

The allegation in the first count is that they did not use due and proper care, safely and securely to carry and convey him, and in the second count, it is alleged that the cars were so carelessly managed and conducted, that they ran off the track, whereby his leg was broken. Now as to the proof. His own witnesses, Barr, Richardson and Wheaton, prove nothing of the kind, but a different case altogether.

Barr, who is a carpenter also, says, in my judgment there was no carelessness or negligence in the conducting or running the train, and in his opinion the accident occurred by reason of a defect in the friction plate of the car—it was too tight to allow the car to turn easily. Richardson says he was in the car at the time of the accident—went back to see how it happened and thinks he knows—he says there were no chairs where the accident happened, and there is a slight curve in the track; the appearance was that the flange of the wheels had struck the square end of the rails which had got out of place for the want of chairs—the ends not coming square together; thinks the cause of the accident was this misjoinder of the rails; he says distinctly, there was no mismanagement in running or conducting the train, and was not running as fast as usual on that day. Wheaton says he is an engineer by profession—meaning doubtless, an engine driver, and he speaks only as to the proper mode of making up trains and the safety and condition of the road; thinks it might be safe with proper attention without chairs. All the evidence given in relation to the manner of making up the train and to the condition of the road, was objected to by the plaintiffs, but admitted by the court, and it will be seen such proof makes out no such case as is stated in the declaration. All the witnesses speaking to the facts stated in the declaration, ignore them all. The facts proved, not being those alleged or of kin to them, the court should have refused the instructions given for the defendant in error, marked two and five, on this

branch of the case, and should have given the fourth instruction asked by the plaintiffs in error.

But the important question behind all these, is as to the liability at all of the plaintiffs in error, under the facts alleged in the declaration, if proved.

We have fully examined this question in another case, and all the authorities to which reference has been made in this case. *Ill. Central R. R. Co.* v. *Cox*, 21 Ill. R. 20. We have neither time nor inclination to go over the ground again.

The facts in this case abundantly show that the defendant in error was in a condition to know the condition of the road, passing over it as he did daily, in carrying out his contract with the company as one of its employees, and he must be presumed to have contracted in view of all the hazards to which he was exposed, by an insecure and imperfect road—making up trains upon it—as well as the negligence of his co-employees.

The cases decided in Indiana, 5 Ind. R. 339, and 7 ib. 436, as well as those decided by the Supreme Court of Ohio, 3 Ohio State R. 201, and 20 Ohio R. 415, are all based on the ruling of the Scotch courts, entirely ignoring the English decisions, and those of most of the courts of the United States. The Scotch case is *Dixon* v. *Ranken*, 1 Am. Railway Cases, 569. The case in 17 Ben. Monroe, 587, was the case of injury to a slave. The court there say, without questioning the propriety of the rule in *Ill. Cent. R. R. Co.* v. *Cox:* "There is manifest propriety in distinguishing between the two classes of cases, involving free persons on the one hand and slaves on the other, and in applying a different rule of law when a slave is an employee. A slave may not with impunity remind and urge a free white person, who is a co-employee, to a discharge of his duties, or reprimand him for his carelessness or neglect; nor may he, with impunity, desert his post at discretion, when danger is impending; nor quit his employment on account of the unskillfulness, bad management, inattention or neglect of others of the crew. Whatever may be the danger, by reason of any of these causes, he must stand to his post, though destruction of life or limb may be never so imminent. He is fettered by the stern bonds of slavery—necessity is upon him, and he must hold on to his employment."

The defendant in error was his own master, fettered by nothing but considerations of his own interests, and they prompted him to incur the hazards which have been so injurious to him. In law, he cannot complain. We have nothing to add to the case of Cox, *supra*, but a reference to two additional cases fortifying it. The first is the case of *Tarrant* v. *Webb*, decided at

the Middlesex sittings at Trinity Term, 1857, and the other is *Noyes* v. *Smith and Lee*, 2 Williams' Ver. R. 59.

On this branch of the case, the Circuit Court should have refused the other instructions given for the defendant in error, numbered one, three, four and six, and should have given the first three instructions asked by the defendant.

It may be well to observe here, that the special plea of plaintiffs in error amounted to the general issue, and was demurrable for that cause. All the facts stated in it, could be given in evidence under the general issue, and that is the proper door to pass them through.

The judgment of the court below, for the reasons given, is reversed.

Judgment reversed.

GEORGE STEELE *et al.*, Appellants, *v.* THOMAS R. BIGGS *et al.*, Appellees.

APPEAL FROM COOK.

Time may be of the essence of a contract, and where that is made clearly to appear, the court will enforce a forfeiture, unless there are circumstances which will relieve against it.

A payment of a considerable part of the purchase money will not excuse the purchaser for non-performance.

In contracts for the sale of land to A. B., his representatives or assigns, a covenant for the payment of money, which is broken, is assignable after the breach, and may run with the land, so as to have a forfeiture declared, if the assignee is by the contract vested with the option of so doing.

A forfeiture may be produced by a reasonable notice of the intention to do so, if a strict performance is not made.

A simple inquiry, as to whether a party will take money, is not a tender. The money must be in the power or within immediate control of the party offering it.

THIS bill charges that Orrington Lunt, of Chicago, one of the defendants hereinafter named, was, on and before the 10th of March, 1853, seized of certain real estate, to wit: Lots 20, 21 and 22, in block 62, and lots 1, 2 and 3, in block 63, in the Illinois and Michigan Canal Trustees' subdivision of lots and blocks, in the W. part of the S. W. ¼ of sec. 9, T. 39 N., of R. 14 E., old town of Chicago.

That said Lunt entered into an agreement with one George McCullough, of Cincinnati, for the sale thereof to him, which agreement was reduced to writing, and signed and sealed by

said Lunt and McCullough, and is to the effect as follows: Agreement made 10th March, 1853, between Orrington Lunt, of Chicago, and George McCullough, of Cincinnati, Ohio; that said Lunt, at the request of said McCullough, and in consideration of the money to be paid, and the covenants, as herein expressed, to be performed by said McCullough, agrees to sell to said McCullough all that certain parcel of land, situate in Chicago, described as follows, to wit: Lots 20, 21 and 22, block 62, and lots 1, 2 and 3, block 63, in the Illinois and Michigan Canal Trustees' subdivision of lots and blocks, in the W. part of the S. W. ¼ of sec. 9, T. 39 N., of R. 14 E., in old town of Chicago. Said McCullough agrees to pay to said Lunt $10,000 as follows, viz.: $2,500 at date, which is this day paid; $2,500 on March 10, 1854; $2,500 on March 10, 1855; and $2,500 on March 10, 1856; for which three last payments said McCullough has executed his notes of $2,500 each, with interest at six per cent. per annum, to be paid at Marine Bank, Chicago, and also that he will, in due season, pay all taxes and assessments for any purpose whatever, upon said premises.

And said Lunt further agrees with said McCullough, that upon the performance by said McCullough, of his undertakings in this behalf, and of the payment of principal and interest of the sums above mentioned, he, said Lunt, will, without delay, execute and deliver, in person, or by attorney, a good and sufficient deed or deeds to said McCullough, to the above described premises.

It is mutually covenanted and agreed between the parties hereto, that in case default is made in any of the payments of principal or interest at the times above specified, for payment thereof, and for sixty days thereafter, this agreement, and the provisions thereof, shall be null and void, at the option of said Lunt, his representatives or assigns, and all the payments which shall then have been made hereon, or in pursuance hereof, absolutely and forever forfeited to said Lunt, or at the election of said Lunt, his representatives or assigns, the covenants and liability of said McCullough, shall remain obligatory upon said McCullough, and may be enforced, and the said money, with the interest, be collected by proper proceedings at law or equity, from said McCullough, his executors, administrators or assigns.

It is further mutually covenanted by the parties, that in case of default in the payments aforesaid, by said McCullough, or any part thereof, and the election of said Lunt, his representatives or assigns, to consider the contract at an end, and prior payments forfeited, the said McCullough, his heirs, representatives or assigns, who may have possession, or the right of possession of said premises at the time, shall be considered the

tenant or tenants at will of said Lunt, his representatives or assigns, on a rent equal to ten per cent. per annum, on the whole purchase money above specified, payable quarterly from day of default.

And after such default, and election to consider the contract at an end, the said Lunt, his representatives or assigns, shall have all the powers and remedies provided by law or equity, to collect such rents, or to remove such tenants, the same as if the relation of landlord and tenant, hereby declared, were created by an original, absolute lease, for that sole purpose, on a specified rent, payable quarterly on a tenure at will, and in such case, such tenant or tenants shall pay all taxes and assessments which shall be laid on such premises during continuancy of such tenancy, and shall not commit or suffer any waste or damage to said premises, but will keep and deliver up, on termination of such tenancy, said premises in as good repair (ordinary wear and tear, and unavoidable injury by the elements excepted) as when such tenancy commenced.

Bill shows that said agreement was acknowledged by said Lunt and McCullough before Henry W. Clark, a notary public for Cook county, and a certificate of acknowledgment was thereto appended by said Clark, and said agreement was delivered to said McCullough, and that said agreement and said certificate were filed for record on the day of date of said agreement, in recorder's office of said county.

That said McCullough entered upon said real estate under said agreement; that he made the first and second payments thereon; that he paid taxes thereon; that on the 16th June, 1853, said McCullough entered into articles of agreement with Frederick Becker, of Chicago, in which, for a price therein named, he agreed to convey to said Becker the north twenty-five feet of said lots one, two and three, in block 63; that under said agreement said Becker immediately entered upon said premises, erected a store and made other valuable improvements thereon, and said McCullough occupied the remainder of said estate, until the transfer of said agreement from said Lunt, hereinafter mentioned.

That on the 17th July, said McCullough and Calvary Morris, composing the firm of McCullough, Morris & Co., made a general assignment of all their property, real and personal, owned by them as partners, to complainant, to be disposed of by him, for the benefit of creditors of said concern.

That the interest in said real estate, nominally vested in McCullough by virtue of said agreement, was really owned by said firm of McCullough, Morris & Co., and that by said assign-

ment, the equitable interest of said firm to said real estate, passed to complainant, for benefit of creditors of said firm.

That said McCullough (the said firm joining, in order to show their assent) did, on the 19th day of August, 1854, transfer and assign in writing, the said agreement, and all title to said real estate, to complainant; that said transfer was appended to said agreement, was acknowledged and recorded; and by virtue of said assignment and transfer, all the rights of said McCullough, and of said firm, to said real estate, vested in complainant.

That immediately after said assignment, said real estate was attached as the property of said McCullough, at suit of certain creditors of the firm of McCullough, Morris & Co., and that for the purpose of protecting himself from the attachment, complainant employed counsel in Chicago, with whom he left all the papers relative to said real estate, and that he had no memoranda informing him when said payments became due on said agreement, and relied on his said counsel to inform him.

That at the time of said assignment, he was a resident of Cincinnati, Ohio, and is at present; that he was always ready and desirous to make the payments on said agreement, and that he left directions with his said counsel to inform him when said payments became due, in time for him to meet them.

That his counsel wrote to complainant's agent, at Cincinnati, January 16, 1855, requesting said agent to inform him of the payment which fell due in the spring then ensuing, and stating the day on which it fell due, and the grace reserved thereon; and said counsel afterwards, and from time to time, wrote to said agent, before grace expired, requesting immediate attention to its discharge.

That said agent, either through mistake or inadvertence, failed to inform complainant of said letters, or contents thereof; and complainant did not know that said payment had become due, until on or about the 9th May, 1855; that he thereupon telegraphed to his counsel at Chicago, authorizing him to draw on complainant at sight for amount of said payment and interest, that said dispatch arrived at its destination on said 9th May, after bank hours, and that on the morning of next day, said counsel, or some person representing the interest of complainant, called on said Lunt, and offered to pay the payment then due, and all sums of money then due to said Lunt on said agreement, and said Lunt absolutely refused to take said payment.

That said counsel immediately wrote, either to complainant or his agent at Cincinnati, informing him of Lunt's refusal to receive the payment, and requesting him to tender the same to Lunt in specie; that as soon as his business would permit, com-

plainant came to Chicago, and on the 28th of May (being the earliest day possible) called on said Lunt, and tendered to him the sum of $2,840, in current coin of the United States; that said Lunt then informed him that he would not receive said moneys; that he, said Lunt, had assigned all his interest to George Steele, one of defendants hereinafter named, and a resident of Chicago; that he then called upon said Steele, and made a tender of same money tendered to said Lunt, and said Steele refused to receive it; he then called for said notes at said Marine Bank, and was told by the note clerk that they were not there.

That on the said 9th May, 1855, after bank hours, said Lunt (his wife joining him) made a pretended sale and transfer of all his interest in said agreement and in said notes of said McCullough (collateral thereto) to said George Steele, for alleged sum of $5,685, being amount then remaining unpaid on said agreement and notes.

That at the time of said transfer, the real value of said premises was upwards of $20,000, and the said pretended transfer was made with a view of facilitating a forfeiture of said agreement, whereas the said Lunt thereby confirmed it, and the rights of complainant thereunder, and elected to waive all rights resulting from the lapse of time, and said Steele, by accepting said transfer, assented to terms thereof, and he thereby acquired no right to prevent complainant from paying the consideration money as it fell due, and from receiving deed therefor.

That on the 10th March, 1856, the last payment became due on said land, and complainant on said day, by his agent, tendered to said Lunt the sum of $5,950; that said Lunt refused to receive said money; that complainant, by his agent, then tendered the same coin to said Steele, and said Steele refused to receive it, and complainant called for said notes at said Marine Bank, on the day grace expired on last of said notes, and was told that neither of said notes were there.

That both of said sums tendered as aforesaid have been in possession of complainant since the same were tendered, subject to order of said defendants, and he now holds same subject to order of court.

That on occasion of last mentioned tender, complainant demanded a deed for said premises, and he had repeatedly requested said Lunt to perform his contract as contained in said agreement.

Prays that the agreement so made between said Lunt and said McCullough, and assigned by said McCullough to complainant, may be specifically performed, and that the said pretended transfer of said agreement by said Lunt to said Steele may be

cancelled, and that said Lunt may be decreed to make a proper and sufficient deed of said real estate to complainant, he being ready and willing, and offering specifically to perform the said agreement, in all things, on his part.

The answer of George Steele admits that Lunt was seized, etc., and entered into an agreement with McCullough, as in said bill of complainant is set forth.

That McCullough made the first and second payments thereon to Lunt.

Denies that said McCullough entered upon land and paid the taxes thereon.

Does not know whether McCullough and Morris, composing the firm of McCullough, Morris & Co., ever made any assignment.

Does not know whether the interest in said real estate, vested in said McCullough by said agreement, was really owned by said firm of McCullough, Morris & Co.; nor whether, by assignment, the same passed to said complainant for the benefit of creditors of said firm.

Admits that at the time McCullough, Morris & Co., made said assignment, said complainant was, and has continued to be, a resident of Cincinnati, but denies that complainant has been ready and desirous to make payments, but says that although complainant was repeatedly informed, several months previous to maturity of the payment of $2,500 and interest, due on 10th March, 1855, that on that day said sum would fall due, said complainant was not on that day, nor within sixty days thereafter, ready to, nor did he pay or offer to pay, to this defendant, or to said Lunt, said sum of $2,500 and interest.

Admits that on or about the 28th May, 1855, said complainant, or some other person, called upon defendant and tendered him a certain sum of money; precise sum forgotten; and this defendant refused to receive the same, for the reason that in said contract entered into between said Lunt and McCullough, it was and is provided that in case any default should be made in any of the payments of principal or interest, at the time, or any of the times specified, for the payment thereof, and for sixty days thereafter, that the said agreement should be null and void, at the option of said Lunt, his representatives or assigns, and that all payments made before such default, should be forfeited; and defendant avers that on the 10th March, 1855, there was due on said agreement to said Lunt and his assigns, $2,500, besides interest due, at that time, on unpaid purchase money on said lots; before that time, to wit: on 9th March, 1855, defendant purchased in fee, the said premises of said Lunt, and took an assignment of said contract to himself, which said assignment

and conveyance were filed for record the 10th May, 1855; and said defendant avers that default was made by said McCullough and complainant in the payment due on the 10th March, 1855, and that neither of them paid or offered to pay said sum at said time, or within sixty days thereafter, although they were respectively notified by said Lunt, that if payment was not made when due, that he, said Lunt, would declare said contract null and void.

That sixty days after said 10th March, 1855, to wit: on the 10th May, 1855, defendant being assignee of said contract, did consider it void, and that said tender alleged to have been made to defendant, was not made until long after said contract was at an end.

Denies that said tender was made to him at the earliest day possible; and admits that complainant did call at Marine Bank, but whether for the purpose of paying said notes, this defendant knows not.

Denies that on May 9, 1855, or at any other time, said Lunt, conjointly with his wife, or alone by himself, made any pretended sale of his interest in said agreement, and said notes, collateral thereto, to defendant, but says that said transfer was a real and *bona fide* one, and said defendant then and there paid to said Lunt $5,685 for said premises described in said contract, which sum was all that said Lunt asked, and denies that said sale was made to facilitate a forfeiture of said agreement.

Denies that said Lunt ever elected to waive any right accruing to him in said contract, or so resulting to him from mere lapse of time; but on the contrary, says that said Lunt repeatedly, by letter and otherwise, gave notice to complainant and McCullough, that unless payment was made at the time when due, said Lunt would declare the contract forfeited.

Avers that on or about the 29th March, 1855, John Woodbridge, Jr., of Chicago, wrote to complainant requesting him to give immediate attention to the payment then due on said contract, and that complainant received said letter, and that said complainant well knew the day on which said payment would fall due, previous thereto, and also well knew that if the same was not paid at the proper time, said Lunt and this defendant would declare the contract void, provided that default should be made for sixty days, and therefore defendant denies that said complainant was not informed when said payment became due, until 9th May, 1855.

Defendant avers that he was, before he made purchase, fully advised of the matters aforesaid, and denies that he became a party to said transfer, with a view of enabling said Lunt to defraud said complainant, or of depriving said complainant of any

benefit of said agreement, but on the contrary, said defendant purchased said premises for his own benefit, and that said payment falling due on 10th March, 1855, and not being made within sixty days thereafter, this defendant declared the same forfeited by reason of non-payment, and still insists that the same is wholly void.

Says that had complainant carried out his part of said agreement, that then this defendant would have been ready to perform the said agreement, although defendant avers that he was in no manner bound by any agreement so to do.

Says that in and by the said contract so made between said Lunt and McCullough, said McCullough agreed to pay all taxes and assessments whatever, which might be assessed on said premises; but defendant avers that after the making of said contract, and up to the time he so purchased said premises, and since, neither the said McCullough, nor any one for him, has paid all such taxes and assessments; by means whereof, and of the election of both said Lunt and defendant, and by default of said McCullough, and complainant claiming under him, in making the said payments, the said contract became wholly at an end, and no longer obligatory on said Lunt or this defendant, from and after the 10th May, 1855; and defendant insists that by reason of the premises he holds the said premises wholly discharged from said agreement so made with the said McCullough, and from any claim by reason thereof, by whomsoever the same may be interposed.

The answer of Lunt is much the same as that of Steele.

Copies of letters, written to Biggs and McCullough, by O. Lunt:

"*January* 9, 1855.

"I notice you have made an assignment to Mr. Biggs. The next payment of $2,500 is due at the Marine Bank, on the 10th day of March next, and will have to be met promptly, as I have a large note falling due about the same time, and rely on this for a part of it. Yours truly, O. LUNT."

"*January* 9, 1855.

"THOMAS R. BIGGS, ESQ.:

"*Dear Sir:*—This will notify you that there will be due, at the Marine Bank, in this city, on the 10th day of March next, on lots 20, 21 and 22, block 62, lots 1, 2 and 3, block 63, of old town of Chicago, from Geo. McCullough, and from the records here, I notice he has assigned them to you. I write to give you due notice, as I must have the payment, and unless paid on the day, said contract will be forfeited, and declared as such. Yours truly, O. LUNT."

"*Dear Sir:*—I wrote you some time since, asking if the payments on the McCullough note would be promptly met, and understood from you they would be, and I relied upon it. On the 8th instant, you wrote me it would be delayed ten days. Since that time I have heard nothing from you, and I have had much inconvenience, and obliged to lay over some of my paper in the Bank. By the delay,

the whole of the payments will become due. All I can say is, I have taken measures to declare the lots forfeited for non-payment, in accordance with the notes.

"Yours truly, O. LUNT."

Answers to O. Lunt's letters:

"CINCINNATI, January 25th, 1855.

"O. LUNT, ESQ.:

"*Dear Sir:*—Your favor of the 9th instant, was duly received, but owing to circumstances out of my control, I have been prevented from answering you as I desired, until the present. I have been unable until to-day, to see Mr. Biggs, who is to make you the next payment, and he informs me that he intends to do so by the time it is due; he has the money I know, and I think you may depend on it. I do not understand how it happened that the property was sold for taxes, as Messrs. Rees & Kerfoot promised me to pay the taxes, and they having sold a lot in the West, and had funds, I supposed it was done; indeed, they sent or drew on me for a tax bill, which was paid, for the year 1853. Whether it was all the taxes, or not, I cannot say, but if not, it should have been, and they should have paid it; and now I wish you would call on them, and make the inquiry, and get them to attend to the settling of the taxes, with the person who bought them, and they can satisfy themselves out of the payment or money which they will receive for the lot which they sold. Please get them to write me the amount of taxes on each lot, and how much they will have to pay. Yours truly, G. McCULLOUGH."

"CINCINNATI, March 8th, 1855.

"MR. O. LUNT:

"*Dear Sir:*—I received a notice of a note due you, falling due at the Banking House of Geo. Smith & Co., Chicago, on the 10th proximo. I have the funds to meet it, but there are some judgments against the property, favor of some of McCullough, Morris & Co.'s, and I want them to agree to return the money if they gain the suit. The arrangement is not entirely complete, but I think will be in ten days; then I will send you the money.

"Yours truly, T. R. BIGGS,

Assignee for Morris, McCullough & Co."

"P. S. I regret the delay very much, and will send the money as soon as the contract is signed. T. R. B."

"CHICAGO, March 29th, '55.

"ORRINGTON LUNT, ESQ.:

"*Dear Sir:*—I have written to Thomas R. Biggs, the assignee of McCullough, Morris & Company, requesting him to give immediate attention to the payment of the installment now due on the articles of agreement assigned by them, and shall hear from them in a few days. He will doubtless meet the payment at once.

"Yours, etc., JOHN WOODBRIDGE, JR."

Defendants also read the following letter:

"CHICAGO, March 28th, 1855.

"THOMAS R. BIGGS, ESQ.:

"*Dear Sir:*—I wrote you in the winter, asking if the payments on the McCullough lots would be promptly met, and understood from McC. they would be, and I relied on them, having a large amount to pay. On the 8th you wrote, saying it would be delayed ten days, the cause of which I could not see, but could as well

have been arranged before as after the 10th. Twice the length of time you named has passed, and I hear nothing from you. Had I not been advised it would come, I would have made different arrangements, and not have to have my note laying over in the bank, very much to my inconvenience. By the delay, the whole of the payment will become due. All I can say is, I have taken measures to declare the lots forfeited for non-payment, in accordance with the notes.

"Yours, ORRINGTON LUNT."

There was a decree for a specific performance, according to the prayer of the bill.

SCATES, MCALLISTER & JEWETT, for Appellants.

WILLIAMS, WOODBRIDGE & GRANT, for Appellees.

BREESE, J. There are but two questions we consider very material in this case. The first is, was time of payment of the essence of this agreement; and the other is, did the defendant, or any authorized person for him, make a legal tender of the payment in money, as required by the terms of the agreement.

The appellee denies that time was of the essence of this contract. To determine it, we must look to the agreement and its several clauses relating to this point. The clauses provide as follows:

"It is mutually covenanted and agreed between the parties hereto, that in case default is made in any of the payments of principal or interest at the times above specified, for payment thereof, and for sixty days thereafter, this agreement, and the provisions thereof, shall be null and void, at the option of said Lunt, his representatives or assigns, and all the payments which shall then have been made hereon, or in pursuance hereof, absolutely and forever forfeited to said Lunt, or, at the election of said Lunt, his representatives or assigns, the covenants and liability of said McCullough, shall remain obligatory upon said McCullough, and may be enforced, and the said money, with the interest, be collected by proper proceedings at law or equity, from said McCullough, his executors, administrators or assigns.

"It is further mutually covenanted by the parties that in case of default in the payments aforesaid, by said McCullough, or any part thereof, and the election of said Lunt, his representatives or assigns, to consider the contract at an end, and prior payments forfeited, the said McCullough, his heirs, representatives or assigns, who may have possession, or the right of possession of said premises at the time, shall be considered the tenant or tenants at will of said Lunt, his representatives or assigns, on a rent equal to ten per cent. per annum, on the whole purchase money above specified, payable quarterly from day of default.

"And after such default, and election to consider the contract at an end, the said Lunt, his representatives or assigns, shall have all the powers and remedies provided by law or equity, to collect such rents, or to remove such tenants, the same as if the relation of landlord and tenant, hereby declared, were created by an original, absolute lease, for that sole purpose, on a specified rent, payable quarterly on a tenure at will," etc.

These being the terms of the contract of the parties, it would be difficult, we think, to make more clear and explicit the intent of these parties to make time essential.

The case of *Bishop* v. *Newton*, 20 Ill. R. 180, to which the appellee has referred, in which similar provisions to these were contained in that contract then before us, does not hold, nor was it intended to hold that they do not make time material. Time was there made material by the clause declaring that "if said Bishop fails to make payment within fifteen days after the first day of January, 1856, he forfeits what he has paid, and all rights under this bond." But there was in that agreement, a precedent or concurrent condition to be performed by the vendor, in relieving the premises of an incumbrance, and which he had failed to perform, or to show any readiness to perform on his part, and for this default, the court refused to decree a forfeiture.

We have always held, that the doctrine of equity, is compensasation, not forfeiture, (*Morgan et al.* v. *Herrick*, 21 Ill. R. 497,) and in passing upon the facts and circumstances in each and every case, when the powers of this court are invoked for the enforcement of such strict legal rights, it will never disregard such facts and circumstances as excuse a strict performance at the day, to mitigate the rigor of a forfeiture, or absolve from it altogether. There may be undoubtedly, in many cases, such circumstances as should restrain the vendor from the strict enforcement of a contract; and as will entitle the purchaser to a specific performance, although he may have failed of a strict compliance at the day. Numerous cases of this kind can be found in the books.

In this point of view, part performance will have, accompanied by other circumstances, great weight, as when the vendor is himself in default in some important matter; or when he has accepted part payment after the expiration of the time fixed for full payment. Such we understand to be the general principles recognized in the case of *Brashier* v. *Gratz et al.*, 6 Wheaton, 528, cited and approved in *Bishop* v. *Newton*, and such is the case of *Murphy* v. *Lockwood*, 21 Ill. R. 611. But neither of these cases establish the principle that part performance, or a payment of a considerable part of the purchase money, will excuse the

purchaser from a strict compliance with his agreement if it be insisted upon.

We believe the general and approved rule on the subject of specific performance to be, that the parties may make the time of performance material in relation to each and every successive act to be done, if there be a series of such acts, and when parties do so, courts of equity will not relieve the party in default without a just excuse for, or acquiescence in a breach, or a waiver of the breach. *Tyler* v. *Young et al.*, 2 Scam. R. 446; *Smith* v. *Brown*, 5 Gilm. R. 314; *Glover* v. *Fisher*, 11 Ill. R. 673; *Kemp* v. *Humphreys*, 13 Ill. R. 577; *Wynkoop* v. *Cowing*, 21 Ill. R. 570.

The case of *Smith* v. *Brown*, 5 Gilm. R. 314, was a case of part performance, by payment of a considerable portion of the purchase money, yet the court placed no particular stress upon that, holding it was not a sufficient excuse for subsequent default in complying strictly with the true intention of the parties. The cases of *Bishop* v. *Newton*, 20 Ill. R. 178, and *Morgan* v. *Herrick*, 21 ib. 495, recognize the same leading principle.

The appellee, however, insists that the covenant to pay the third installment on the day, was broken before the sale and assignment by Lunt to Steele, and therefore, upon a breach, it became a personal covenant, and could not run with the land, or be transferred by an assignment of the contract.

This is true perhaps, of real covenants, but this is not of that character; it is a contract or covenant for the payment of money, and of a character, such as in equity, are assignable. The covenants on the part of McCullough, were merely money covenants and assignable as such. Whether or not, the conditional power of forfeiture at the option of the vendor, upon failure of punctual payments, was assignable before or after a breach of the condition, as a general principle of law, we do not discuss or decide, believing it to be unnecessary in this case. The contract discussed, extends to the vendor, Lunt, and "his representatives or assigns," either of whom, by the agreement itself, might exercise and declare "the option" and "consider the contract at an end, and prior payments forfeited," and he and "his representatives or assigns" were "to have all the powers and remedies provided by law or equity," for the enforcement of the vendor's rights and remedies. It is not therefore, in our judgment, a question of the legal assignability of the agreement, or of suing upon it, but a plain matter of agreement with the representatives or assigns, which empowered them to act under it. We do not conceive it material how the rights of the "assigns" arose in this case, whether by the conveyance of the land to Steele, or the assignment of the money covenant, for

both modes of transfer were adopted, and Steele became such "assigns," in the true sense of the agreement, and as such he was entitled, by the express language of the agreement, to exercise and declare the "option" or to receive the money, if the appellee had not forfeited his right to pay it. But Lunt himself made his option, and rescinded the contract so far as he was authorized to do, as vendor, by the very act of conveying the land to Steele, and Steele did the same, by refusing the money. Therefore it follows, if on such default the vendor or his "assigns" made the election to forfeit, the contract then became absolutely null, as a contract to convey, and thenceforward stood merely as a lease, according to its express provisions. *Dominick* v. *Michael*, 4 Sandford, 426; *Glover* v. *Fisher*, 11 Ill. R. 673; *Harrington* v. *Wheeler*, 4 Vesey, Jr., 689, note 2, giving the decision in *Lloyd* v. *Collet*, 4 Bro. C. C. 469.

A forfeiture may be proved by a notice from the vendor to the vendee, that he will require a strict performance at the time fixed, provided the notice be a reasonable one, under all the circumstances. 1 Sug. on Vendors, 360; Adams' Equity, 225; *Miller* v. *Chrisman*, 21 Ill. R. 227.

There is also a class of cases where time is in equity deemed to be material and a punctual performance required, though not so specified in the contract. They are adverted to by Baron Alderson in *Hipwell* v. *Knight*, 1 Younge and Collin Ex. 415. He illustrates this class by some examples, as, "If the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time, must then be literally complied with in equity as well as at law." "The cases of the sale of stocks, and of a reversion are instances of this. So also if it appears that the object of one party known to the other, was that the property should be conveyed on or before a given period, as the case of a house for a residence or the like." "I do not see, therefore, if the parties choose, even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. This is the real contract. The parties had a right to make it. Why then should a court of equity interfere to make a new contract which the parties have not made nor consented to? It seems to me, therefore, that the conclusion at which Sir Edward Sugden, in his valuable treatise on this subject, has arrived, is founded in law and good sense."

In 1 Sugden on Vendors, 359, will be found a summing up of all the authorities to this effect. Judge Story reaches the same conclusion that Baron Alderson does. 2 Story Equity Juris. § 776, note. Many other American and English authorities

might be cited to the same effect. See also Fry on Specific Performance of Contracts, Law Library, 69, page 216, and cases there cited.

Lord Roslyn said, in the case in 4 Vesey, Jr., *ante*, "the conduct of the parties, inevitable accidents, etc., might induce the court to relieve; but it was a different thing to say the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it."

Upon the other question of tenders, there does not seem much room for discussion.

The witness Woodbridge, called to prove a tender, who was neither a party in interest, but acting for the attorney of the appellee, without a dollar in his possession applicable to this payment, and, for anything shown, without the power of raising money by selling a bill on the defendant even had *he* been authorized to draw instead of the appellee's attorney, simply applied to the appellant Lunt, to know if he would take the money which the witness, or the attorney, would raise during the day. Lunt declined to have anything to do with it, upon the declared ground, that he had rescinded the contract, by selling to Steele. No application was made to Steele who then owned the land and the money covenant, if money was still due and could be paid under it. This inquiry, or offer if it may be so called, lacked several ingredients to make it a good tender, even waiving the point as to its having been within the forfeiture. In the first place, it was not made to the proper person. It was not made at the proper place, for the note was made payable at the Marine Bank in Chicago, and no tender is shown there, and the offer to Lunt on the 10th of May was not accompanied by the money—it was not in the power of the witness to produce it even if Lunt had then agreed to accept it.

A party attempting to make a tender, must be able to show that he has the money in his power or reach to perfect it, if accepted. A refusal to accept, may, under certain circumstances, dispense with the actual count of the money, but never can be received as an excuse for not having the money at command. When offered as an apology for not having the money, the refusal amounts to nothing. This court say, in the case of *Buchanan* v. *Horney*, 12 Ill. R. 336, that a tender is *stricti juris*, and must be clearly proved. The general rule is, that the money must be produced and counted—it must be in sight, and capable of immediate delivery, for great importance is attached to the production of the money, as the *sight* of it might tempt the creditor to yield and accept it. 2 Greenl. Ev. §§ 601, 2. It must be ab-

solute, and to the creditor himself, his agent, attorney, clerk or servant, and at the time the contract requires. Ib. §§ 605, 6, 7.

And, to constitute a legal tender, it is essential to prove an actual offer of the sum due, unless the actual production and offer of the money be dispensed with, by the express declaration of the creditor that he will not accept it, or by some equivalent act. Ib. 603; 3 Starkie's Ev. 1067–1070; *Sloan* v. *Petrie*, 16 Ill. R. 261; *Wynkoop* v. *Cowing*, 21 Ill. R. 587.

Again, as to the time at which it was made. The appellee claims days of grace, and would have the computation of the sixty days under the contract, begin at the end of the days of grace.

Days of grace are given in some States by statute. We have no such statute, nor has our statute on the subject of promissory notes received such a construction. But, as we do not regard what was done, as amounting to a tender, it is unnecessary to pass upon this question. No actual tender is shown for more than fifteen days after the time, allowing the days of grace. The question of days of grace can only arise upon showing a good tender, made within the days of grace, and that has not been done.

But there is another solution of the question, and grows out of the intention of the parties as to the time. Resort should not be had to technical rules of interpretation, when the common understanding, or intent, is obvious. The sixty days are purely conventional, and there is nothing in this record showing any intent to inject a strictly mercantile principle into the contract, which shall give the party bound to pay, three days more than was stipulated and agreed upon, within which to pay. The intent seems to us clearly against this gratuity.

These contracts may be hard, but of that we cannot concern ourselves. Our office is simply to interpret, not to make contracts for parties. When there is no ambiguity about them, are not against law, not unconscionable, and are made in good faith, we are bound to enforce them.

It must be remembered, too, that vendors of real estate may have the most important interests depending upon the punctual fulfillment of contracts by purchasers. Such appears to have been the case here, of which the appellee was duly and timely notified, and that a want of punctuality would compel Lunt to rescind the contract, and declare a forfeiture, to save himself from similar losses by breach of his own time contracts. Self-preservation is the first and universal law, and, viewed in this light, the rigid rule in this case may not only be just, but perfectly equitable.

The decree of the court below is reversed.

Decree reversed.

Augustus L. Walker, Plaintiff in Error, *v.* George Armour, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

In an action of ejectment, where the party has the statutory right to a new trial on payment of costs, a new trial at common law will not so readily be granted in any case, and especially because of the absence of counsel.

The want of a similiter in actions of ejectment, is cured by a verdict, or the defendant may add it if he chooses, as a matter of form. The plea of not guilty is the issue.

Affidavits may be read or proof heard, to show that words have been improperly stricken from a judgment; but not to falsify a record by showing that an alteration correcting it, was improperly made.

This was an action in ejectment, in the Cook County Court of Common Pleas, 1857, claiming ownership in fee of a lot in the original town of Chicago. Plea, general issue.

Jury sworn, and verdict for plaintiff: "We, the jury, find defendant guilty, in manner and form as alleged in the plaintiff's nar., *of withholding from plaintiff the possession of the premises described* with the appurtenances."

Judgment on the verdict: "That plaintiff do have and recover of *defendant possession of the premises.* That he have a writ of possession, etc., costs, etc."

There was a motion to set aside verdict and judgment, and for a new trial at any time court might appoint, founded upon the following affidavit:

Affidavit of Arthur W. Windett, dated October 8, 1858, states that affiant, for a year past, has been defendant's attorney in this case; that he had fully prepared and was ready for trial at this time; that he was absent from the city on Saturday, to fulfill an engagement made three weeks before, and fixed for that day, on the supposition and in the belief, that before that time this case would be reached and tried. Affiant made arrangements to return to the city by the Saturday night Burlington express train; engaged a man to call him and to signal the train; that the man so engaged, neglected to provide himself with a lamp to give the signal, although affiant was ready to take the cars if they had stopped. Affiant's next means of getting back, was by the regular Monday morning train, leaving the depot at Bristol at seven in the morning, and getting back to Chicago at eleven A. M., by which affiant proposed to go back; but that train was taken off the road the day before, and was not run any more for that season. Affiant had no other means of getting back till the afternoon of Monday, the day the case was called, and tried in his absence. Affiant made every effort in his power, and in good

faith, to return to Chicago by Sunday morning, and was only prevented from doing so by accident and the misconduct of the party he employed.

States that he had fully prepared for the trial; was sole counsel, alone had the necessary papers and title deeds; that defendant has a good legal title; that the case is one of great importance, and will produce hardship if a new trial is not granted. Affiant offers to try the case at the present term of court, whenever required.

Motion to set aside verdict and judgment, overruled.

A. W. Windett, for Plaintiff in Error.

Scates, McAllister & Jewett, for Defendant in Error.

Breese, J. This was an application to grant a new trial, as at common law, in an action of ejectment, on the affidavit of the counsel in the cause, which the court denied, and exception taken and an appeal to this court. The record of the cause shows that the defendant had notice and appeared by the affiant as his attorney. The cause was tried by a jury and a verdict rendered for the plaintiff.

It might be possible, had the judgment been entered by default, the court would, on the affidavit filed, set it aside and let in the party to make his defense; but where there has been a trial on the merits, and the statute allowing a new trial as of course, if the application is made within one year after entering the verdict and judgment, on the payment of costs, we see no necessity or propriety for the application as made. Nor do we think the reasons stated in the affidavit, sufficient to authorize a new trial. They would not have continued the cause on application for that purpose. The court therefore, did right in refusing the application.

It is also objected, that the similiter was not added to the plea of not guilty before the trial. This is certainly, if at all necessary, cured by the verdict. *Waters* v. *Simpson*, 2 Gilm. R. 577. In our practice, the plea of not guilty is the issue, and so understood, and the similiter a mere form, which the defendant may add if he chooses. If the plaintiff takes action in the case, after the general issue pleaded, the want of a similiter is never considered ground of error. *Williams* v. *Brunton*, 3 Gilm. R. 625. It is objected also, that the verdict and judgment does not find the quantity of estate the successful party had in the premises recovered, whether in fee, for life, or what other estate.

The original record as filed, presents that defect, but an amended record has been filed, in which the estate found does

appear to the extent declared for, that is, a fee simple estate, and a formal judgment entered therefor.

It is objected, however, that this amended record, is not the record in the cause, and affidavits are presented to show that since the original entry of the verdict and judgment on the record book, the clerk has interlined it, by specifying the estate held by the plaintiff in the ejectment.

Was it the fact, that words specifying the estate, had been struck out of the original entry, so as to render the judgment erroneous, it would be competent, although a record imports absolute verity, to prove by witnesses, that such words were improperly struck out. *Dickson* v. *Fisher*, 1 Wm. Bl. 664; same case, 4 Barrow, 2267. If this be so, then affidavits or any other proof of that nature, could not be received to falsify the record, by showing that an alteration whereby the record was made correct, was improperly made.

We must take the record, certified to this court to be the true record, and no affidavits can be received to falsify it. We must understand, that the words supplied by interlineations by the clerk, are the words which should have been in the original entry, to make it correspond with the fact, and as the record entry had not been signed by the judge, it was competent for the clerk to make the correction according to the fact.

The judgment is affirmed.

Judgment affirmed.

Note.—The cases between the same plaintiff below, and Elizabeth Kniffen and David Buel, are affirmed.

Benjamin B. Reynolds *et al.*, Appellants, *v.* Charles Paver, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

T. L. Dickey, for Appellants.

B. C. Cook, for Appellee.

Caton, C. J. Precisely the same question arises in this case which is decided in the case of *Fleming* v. *Jencks*, *ante*, 475, and it must be decided in the same way. The order overruling the motion must be reversed, and the cause remanded, with the same directions as in that case.

Judgment reversed.

William Waddams, Appellant, *v.* Alvin Humphrey *et al.*, Appellees.

APPEAL FROM STEPHENSON.

A debtor may sell his estate although he is in debt, provided he does it fairly, for a reasonable consideration, and without fraud.

A court will exercise a more liberal discretion in awarding new trials on feigned issues, than at law.

A divorced woman is not a good witness where her former husband is a party.

This bill states that, in September, A. D. 1851, complainants recovered a judgment in the Circuit Court of Stephenson county, Illinois, for $1,014.66, and costs taxed at $20.55, against David McAusland, who, with William Waddams, late father-in-law of said McAusland, are made defendants.

That, September 15, 1851, execution issued on said judgment against said David McAusland.

That, on or about December 8, 1851, the sheriff levied on N. W. ¼ of N. E. ¼, and S. W. ¼ of N. E. ¼, and N. W. ¼ of S. E. ¼ of Sec. 17, containing 120 acres; also E. ½ N. W. ¼, and 43 acres off the east side of E. ½ of S. W. ¼ of section 8, containing 123 acres; also S. E. ¼ of N. W. ¼ of section 7, containing 40 acres—all in town 28 N., of R. 6 East of 4th P. M., in Stephenson county, Illinois.

That on December 29th, 1851, said lands were sold by said sheriff by virtue of said execution, and were struck off to said complainants for $1,075.10, and the sheriff's certificate of purchase given to said complainants therefor.

That, June 15, 1853, the sheriff of Stephenson county made to said complainants a sheriff's deed of conveyance for said lands.

That on February 22nd, A. D. 1849, David McAusland had conveyed said lands to William Waddams, without adequate consideration, for the purpose of defrauding said complainants, and preventing them from collecting the aforesaid judgment—for which, bill states, said complainants had threatened to prosecute, and did prosecute said David McAusland.

That said deed (from McAusland to Waddams) was filed for record in the office of the clerk of the Circuit Court of Stephenson county, on the 14th of April, 1849.

That complainant, Sarah G. L. Reed—now Sarah G. L. Humphrey by marriage with Alvin Humphrey—commenced suit against said McAusland for the claim aforesaid, *i. e.*, the claim upon which said judgment was recovered as aforesaid, in Stephenson county Circuit Court, Illinois. The suit in Wisconsin

was dismissed for want of jurisdiction in the court, all of which was prior to McAusland's sale to Waddams, and of which Waddams had notice.

Bill further alleges, that complainant, Sarah G. L. Humphrey, while she was Sarah G. L. Reed, furnished to McAusland all the money wherewith to enter said lands from the United States, with the understanding that said McAusland should enter said lands in her name, and that part of the money included in said judgment is for the entry money so furnished as aforesaid.

That said McAusland did not enter said lands in the name of complainant, Sarah G. L., but entered them in his own name, and then, further to defraud said Sarah G. L., sold said lands to said Waddams; that said complainants believe that McAusland was the true and rightful owner of said lands at the time of the sheriff's sale above mentioned.

That McAusland falsely and fraudulently transferred said lands to Waddams, by a deed bearing date February 22, 1849.

That at the time of making said conveyance, said McAusland was in good circumstances, owning and possessing the lands aforesaid, of the value of $2,500, or more; and that Waddams was unable to purchase and pay for said lands; and that Waddams, fraudulently and deceitfully combining with McAusland, fraudulently and deceitfully purchased said lands, and fraudulently holds the same from the creditors of McAusland, and particularly from complainants.

Bill charges that Waddams fraudulently holds possession of a large amount of lands and personal property belonging to McAusland.

Further shows that Waddams, before he purchased of McAusland, knew that complainant, Sarah G. L., had furnished the money wherewith to enter said lands, and also that Sarah G. L. had been trying, and was still trying, to collect her claim in Wisconsin aforesaid, against McAusland; that Waddams had notice of this before he received the deed from McAusland.

General charge of combining and confederating.

Bill waives necessity of answer being under oath.

Bill prays that said lands be decreed to be held in trust for said Sarah G. L. Humphrey by defendants, McAusland and Waddams, and that the sale from McAusland to Waddams be annulled and set aside, so as to enable complainants' title under said sheriff's deed to be perfected, good and sufficient in law, or that said pretended sale from McAusland to Waddams be so far set aside as to enable complainants to make their aforesaid judgment out of said lands.

Prayer for general relief.

The answer of defendant Waddams—not under oath—denies all the material allegations and charges in the bill.

General replication filed to answer of defendant Waddams.

Bill taken *pro confesso* as to McAusland.

Complainants file feigned issue.

Defendant Waddams files his plea in the feigned issue, denying fraud on his part in the execution and delivery of the deed from McAusland to him.

On the trial of the feigned issue there was a verdict for complainants, and a decree upon the verdict setting aside conveyance to Waddams.

There was a motion to suppress the deposition and testimony of witness, Alethea Vail, for the reason that said witness had been the wife of defendant, McAusland. Motion sustained and excepted to.

Leland & Leland, for Appellant.

B. C. Cook, for Appellees.

Breese, J. We are not aware of any rule of law requiring a debtor to hold on to his real or personal estate, until a creditor can sue him and obtain judgment and execution. Such a law would produce disastrous effects, by fettering the free transfer and sale of property from one to another. But in all sales good faith must be observed, and they must be so conducted as to bear on their face no evidences of fraud whatever. No matter how much a man may be indebted, he may sell his property for a fair price, or even for a price below its market value, if done honestly and with no view to delay, hinder or defraud his creditors of their just dues, or being in failing circumstances, he has a right to prefer one creditor over all others, even if the preference exhausts his whole estate, and from the honest exercise of this right no court or law, has ever sought to deprive a debtor. A debtor can sell his property for a fair price, even if he sells it with the avowed intention of defeating an honest claim, if no lien exists to forbid it.

Such we understand to be the rights and powers of a debtor. But the sale must be fair and for a valuable consideration, and the parties intending or practicing no fraud.

The evidence before the jury on the trial of the feigned issue, was not, in our judgment, sufficient to satisfy the conscience of the chancellor, of fraud in the sale of these lands. The weight of evidence appears to us decidedly against the finding, and as on trials of feigned issues the same strictness is not required as in suits at law regularly brought to issue, and do not settle

and bind the rights of the parties, the chancellor will order new trials, until he is satisfied or will assume the responsibility of deciding the cause against the verdict. *Williams* v. *Bishop*, 15 Ill. R. 555.

We are of opinion the court decided correctly, in rejecting the testimony offered, of the divorced wife of McAusland, on principles long established.

We think the purposes of justice can be best promoted by a re-hearing of this cause, and for that purpose reverse the judgment and remand the cause.

Judgment reversed.

James Campbell *v.* Thomas J. Campbell. *

The Supreme Court has not jurisdiction to issue writs of injunction. The justices of this court will not award such writs, except under extraordinary circumstances.

This was an application to the court for an injunction.

The bill in this cause was prepared to be filed in the Hancock Circuit Court, to enjoin the collection of taxes levied for railroad purposes, upon the ground of fraud upon the people of Hancock county in the submission of a proposition to take stock in two *roads* by one vote, and that the bonds issued were payable at the American Exchange Bank, in the city of New York.

G. Edmunds, for the Application.

Per Curiam. We have examined this question carefully, as to our power in this matter, and we are satisfied it does not extend to applications of this character.

The constitution, article five, section five, provides that, "The Supreme Court may have original jurisdiction in cases relative to the revenue, in cases of *mandamus*, *habeas corpus*, and in such cases of impeachment as may be, by law, directed to be tried before it, and shall have appellate jurisdiction in all other cases." (Scates' Comp., "Organic Laws," 66.)

Here are expressed all the cases in which this court may have original jurisdiction, granting injunctions not being one of them. If this court may have original jurisdiction in cases relating to mandamus, and habeas corpus, and in the others indicated, it

* This and the followiug decision were made at Springfield, at January term 1860.

may not have it in cases not specified, but in all cases not specified, of every kind and description, it "shall have appellate jurisdiction only."

Now unless it can be shown that original applications for injunctions, is an exercise of the appellate jurisdiction of this court, we cannot act. That it is not such an exercise no one will deny. Emphatically this is an appellate court only, having original jurisdiction in a few specified cases.

But it is said the act of Assembly gives this power to the court. The act to which reference is made, entitled "Ne Exeat and Injunctions," sec. 8, (Scates' Comp. 147,) does provide that "the Supreme and Circuit Courts, in term time, and any judge thereof, in vacation, shall have power to grant writs of *ne exeat* and injunction," but as it is not an exercise of the appellate jurisdiction of this court, nor so declared to be, but original jurisdiction in a new case, the power cannot be conferred by statute upon this court. As a court we exercise appellate jurisdiction only, save in the few cases specially enumerated.

This grant, the legislature can neither limit, abridge or enlarge, or interfere with in any manner. When, except in the specified cases, the inferior courts of original jurisdiction have acted, then, and then only, can the power of this court be called into exercise. These powers and duties confided and imposed by the constitution, we are bound by our sacred oaths of office to exercise and perform, and for the performance of which, compensation is provided in the form of salary. As a court we say, we cannot be called upon to perform any duty or exercise any power not specified in the constitution. The legislature may doubtless confer upon the judges of this court the power to perform certain duties at chambers, but the constitution not imposing the duties, their performance might be declined. It would be in the power of the legislature to confer such jurisdiction upon individuals not connected with the administration of justice, or upon the judges of the Circuit Court.

The legislature has provided the most ample facilities by establishing circuit and other courts and providing functionaries throughout the State, to whom applications of this kind can be made, and we take occasion to say, that such is the press of business upon us individually, in the exercise of the original and appellate jurisdiction of this court, that we will not in vacation, award such writs, except under extraordinary circumstances, to be judged of by the member of the court to whom the application may be made. The application is refused.

Application refused.

Reuben Coon, Plaintiff in Error, *v.* Mason County, Defendant in Error.

ERROR TO MASON.

The decision of the Circuit Court under the 38th section of the Road Law in the Revised Statutes, is final.

The County Court of Mason county ordered a road to be opened, and refused to allow the plaintiff in error any damages for crossing his land; from that decision he appealed to the Circuit Court, which affirmed the order of the County Court. The plaintiff in error then prosecuted his writ of error in this court.

The defendant in error moved to dismiss the cause from this court because the decision of the Circuit Court was final.

James Roberts, for Plaintiff in Error.

Lyman Lacey, and Goudy & Waite, for Defendant in Error.

Per Curiam. This proceeding was under the thirty-eighth section of the chapter entitled "Roads," (Rev. Laws, 1845, Sec. 38,) which provides that the decision of the Circuit Court shall be final. We are of the opinion that the legislature intended to prohibit the prosecution of a writ of error as well as an appeal.

The point made on this motion, was not considered by this court, in the cases of *Hutchins* v. *De Witt County*, 1 Gilm. R. 345, and *The County of Sangamon* v. *Brown et al.*, 13 Ill. R. 207.

The motion is sustained.

Motion sustained.

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AFFIDAVIT.

5. Where A. and B. cultivate a farm jointly, A. furnishing a horse, harness, etc., and B. a horse, for their joint use, and B., on being arrested on a criminal charge, tells A. to take his horse home, that he, B., would be back in a few days, and A. does so, afterwards using and claiming the horse as his own; this is a sufficient delivery from B. to A. to enable the former to keep the horse, as against other creditors of B. *Parsons* v. *Overmire*, 48.
6. Where a party sold merchandise, receiving part pay in real estate, the residue to be paid by indorsed notes, if the vendor takes notes without an indorsement, and expresses satisfaction with them, the vendor cannot afterwards recover of the purchaser the amount paid by said notes. *Stevens* v. *Bradley*, 244.
7. If any recovery could be had, it would only be upon a cancellation of or return to the purchaser, at or before trial, of the notes given; the return after the trial would be too late. Ibid. 244.
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BILL OF EXCHANGE.

The question of fairness in the purchase of bills of exchange, as to whether the transaction was one of fair business, or designed as a cloak for usury, having been left to the jury, under proper instructions, their finding will not be interfered with. *Earll, etc.* v. *Mitchell et al.* 530.

See ACCEPTOR. PROMISSORY NOTE.

BILL OF EXCEPTIONS.

1. The judgments and orders of court and pleadings, should be embraced in the record; and if they are copied into the bill of exceptions, it will be at the expense of the party who has it done. *Safford et al.* v. *Vail*, 327.
2. Where a bill of exceptions does not state that it contains all the evidence, the presumption is in favor of the verdict. *Warner* v. *Carlton*, 415.

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BILL OF REVIEW.

A bill of review only authorizes the court to decide from a recitation of facts, that the law was misapplied to them. The sufficiency of the evidence to establish the facts as found, cannot be questioned. An improper determination of law may be examined into. *Garrett et al.* v. *Moss et al.* 363.

BONDS.

1. A declaration upon an appeal bond is sufficient, which avers that the appeal was not prosecuted, and that the judgment appealed from was not paid, and that the judgment was affirmed. It need not be averred that the order dismissing the appeal, was filed in the court from which it was taken. *Sutherland* v. *Phelps*, 91.
2. The dismissal of an appeal is equivalent to an affirmance of the judgment. Ibid. 91.
3. An averment that the judgment appealed from was final, or that the judge of the court from whence the appeal was taken approved the bond, is unnecessary. Ibid. 91.
4. If the complainant to a bill upon which an injunction has been granted, is corruptly induced to dismiss his bill, so that the sureties in the injunction bond may become liable, an action against them on the bond, will not be sustained. *Boynton* v. *Robb et al.* 525.
5. A party who has executed a bond as surety, declaring that the principal in it, who was coroner, had succeeded to the office of sheriff, cannot gainsay the fact, so as to release himself from liability. *Allbee* v. *People*, 533.

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GIFT.

1. A verbal gift without delivery may be resumed. Not so if the gift is evidenced by a writing. *Cranz* v. *Kroger*, 74.
2. A parent may resume property given to an infant child, without the consent of the child. Ibid. 74.

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See SURETY.

HIGHWAYS AND STREETS.

1. Supervisors in the matter of opening a road, when they dismiss an appeal and adjourn, without any intention of further action, cannot resume the subject, unless notice of the time and place of a future meeting is served on the commissioners of highways, and on the three petitioners before served. Without these, the action of the supervisors is void. *Keech* v. *The People*, 478.
2. When a road is located on a dividing line between townships, the commissioners of the towns must create road districts, and allot the expense, etc., of keeping up the road among the districts, as nearly equal as possible, giving each town an equal number of districts, each road district to be attached to the town in which it lies. Without such an allotment, the road cannot be opened; neither of the towns having power to act. Ibid. 478.
3. The decision of the Circuit Court under the 38th section of the road law in the Revised Statutes, is final. *Coon* v. *Mason County*, 666.

See TOWNSHIP ORGANIZATION.

HUSBAND AND WIFE.

1. Where a subpœna in chancery is served upon husband and wife, by leaving a copy for the wife with the husband, at her place of residence, etc., it will be presumed, in the absence of proof to the contrary, that the residence of the parties is identical. *Prieto et al.* v. *Duncan*, 26.
2. The wife of a defendant in execution is not a competent witness on a trial of right of property. *Dexter* v. *Parkins*, 143.

See DIVORCE. HEIRS. JUDGMENT DEBTOR AND CREDITOR.

INDICTMENT.

1. A conspiracy to obtain goods by false pretenses, is an indictable offense. *Johnson* v. *The People*, 314.
2. If a person indicted for a misdemeanor is put on trial, the right to a final judgment on the demurrer, is supposed to have been waived. Ibid. 314.
3. On an indictment for a misdemeanor, the plea of not guilty must be entered by counsel or the accused without an arraignment. Without an issue there is nothing to be tried, and if this is not shown, it is error to sentence. Ibid. 314.
4. If the record shows a trial by consent, the defect may be held to be cured; or the omission to enter the plea may be obviated by an order of the court. Ibid. 314.
5. The awarding of a separate trial in criminal cases, is a matter of discretion, not assignable for error. Ibid. 314.

INDORSER AND INDORSEE.

1. A party who attempts to plead that another had property, etc., sufficient to satisfy an execution, etc., must set out that such property was subject to the execution, or it will be bad on demurrer. *Hamlin* v. *Reynolds*, 207.
2. In an action against an indorser, if he pleads that the maker had property liable to execution, which was known to the judgment creditor and the sheriff,

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