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THE

Chicago Law Journal.

EDITED BY

G. L. BARBER,

COUNSELOR AT LAW.

VOLUME I.

Containing the Decisions of the Appellate Court, in full, and important Decisions in the Supreme, Superior, Circuit and Criminal Courts of Illinois; also a few leading Cases in the United States Courts.

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JUSTICES OF THE SUPREME COURT

OF ILLINOIS,

DURING THE TIME OF THESE DECISIONS.

JOHN SCHOLFIELD, CHIEF JUSTICE.

SIDNEY BREESE,
BENJAMIN R. SHELDON,
T. LYLE DICKEY,
JOHN M. SCOTT,
ALFRED M. CRAIG,
PINKNEY H. WALKER,
} JUSTICES.

ATTORNEY-GENERAL.

JAMES K. EDSALL.

REPORTER.

NORMAN L. FREEMAN.

CLERK IN THE NORTHERN GRAND DIVISION.

CAIRO D. TRIMBLE, Ottawa.

CLERK IN THE CENTRAL GRAND DIVISION.

E. C. HAMBURGER, Springfield.

CLERK IN THE SOUTHERN GRAND DIVISION.

R. A. D. WILBANKS, Mt. Vernon.

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JUSTICES OF THE APPELLATE COURT

OF ILLINOIS,

DURING THE TIME OF THESE DECISIONS.

FIRST DISTRICT, OCTOBER TERM, 1877.

W. W. HEATON, P. J.*
T. D. MURPHEY, } JUSTICES.
G. W. PLEASANTS, }

SECOND DISTRICT, DECEMBER TERM, 1877.

EDWIN S. LELAND, P. J.
JOSEPH SIBLEY, } JUSTICES.
N. J. PILLSBURY, }

THIRD DISTRICT, NOVEMBER TERM, 1878.

C. L. HIGBEE, P. J.
O. L. DAVIS, } JUSTICES.
LYMAN LACEY, }

FOURTH DISTRICT, FEBRUARY TERM, 1878.

T. B. TANNER, P. J.
D. J. BAKER, } JUSTICES.
J. C. ALLEN, }

FIRST DISTRICT, APRIL TERM, 1878.

T. D. MURPHEY, P. J.
G. W. PLEASANTS, } JUSTICES.
J. M. BAILEY, }

* Deceased.

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TABLE OF CASES.

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The Chicago Law Journal.

Vol. I.—No. 1.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. JANUARY TERM, 1876.

WRIT OF ERROR TO THE CIRCUIT COURT OF LOGAN COUNTY; THE HON. LYMAN LACEY, JUDGE, PRESIDING.

BENJAMIN F. LOGAN *v.* MUSICK ET AL.

OPTIONS, OR TIME CONTRACTS—*Of sale of grain for future delivery not prohibited.*—The statute does not prohibit a party from buying or selling grain for future delivery; the contract is legal whether the party selling for future delivery has the grain on hand at the time of such sale or not.

THE OPTION.—A contract for the sale of grain for future delivery gives the purchaser an option to select a day within a limited time on which he will receive the grain, but not an option to buy at a future time which is prohibited by the statute. Sec. 130, Rev. Stat. 1874, p. 372.

J. H. ROWELL and BEASON & BLINN, *Attorneys for Plaintiff in Error.*
HOBLIT & FOLEY, *Attorneys for Defendants in Error.*

Justice CRAIG delivered the opinion of the court:

This action was brought by Musick and Brown against Benjamin F. Logan, to recover money paid by them to cover losses on grain purchased on the board of trade in Chicago, for the defendant, on his order.

A trial was had before a jury, which resulted in a verdict in favor of the plaintiffs for $2,206.25. The court overruled a motion for a new trial and rendered judgment on the verdict.

Several errors have been assigned upon the record, but we understand the defendant relies upon three points to reverse the judgment:

1. That the plaintiffs failed to sell grain as agreed, and on account of the failure they became indebted to the defendant in a larger sum than they advanced for him.

2. The judgment is too large, in any event, in the sum of $1,162.

3. That the advances sued for by the plaintiffs were made on account of gaming contracts in grain, are in violation of the statute, and cannot be recovered.

The plaintiffs were engaged in the commission business in Chicago; they purchased for the defendant, at his request, twenty thousand bushels of wheat for June delivery, and ten thousand for July delivery. The wheat was sold at a loss of about $3,406.25; the defendant had paid as a margin $1,200. Thus far there seems to be but little dispute in relation to the facts; but on the 24th day of May, 1875, the defendant went to Chicago, and called upon Musick,

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one of the plaintiffs, and, as he testifies, made an arrangement to have him that morning sell for him on the board of trade the twenty thousand bushels of wheat which had been purchased for June, and also "sell short" twenty thousand bushels more. This was done with the view, as wheat was then declining, to save the loss on the wheat previously bought.

The two went together to the board of trade. The defendant testifies that no restrictions were placed upon the plaintiff as to price, but he was to sell on the market. The result, however, was the sale of ten thousand bushels only, and hence the defendant claims a large loss in profits, which he would otherwise have made had the plaintiff made sale of forty thousand bushels, as he had agreed.

Musick, however, testifies that he sold ten thousand bushels at 97¼ a short time after he arrived at the board of trade, and reported the sale to the defendant, who then instructed him to sell no more at less than 98 cents, and on this account no more wheat was sold.

Here was a direct conflict in the evidence, which it was the province of the jury to settle; and while it is true there was some evidence tending to corroborate the defendant's version of the transaction, yet there was no such clear preponderance of the testimony in his favor on this point as to authorize an appellate court to disturb the verdict of a jury, who have the witnesses before them, and have many facilities for determining the degree of credit that should be given to a witness that an appellate court does not possess.

The ten thousand bushels of wheat purchased for July delivery, was sold at a loss of $1,162.50. This item formed a part of the plaintiff's judgment, and it is urged that no recovery can be had for this loss, for the reason the plaintiffs sold the wheat wrongfully on a rising market, when the purchase was fully protected by an ample margin.

This lot of wheat was purchased by the plaintiffs by the order of the defendant, sent to them through the firm of Boyden & Barrett. The position taken by the defendant is, that Boyden & Barrett put up a margin of $1,800 for him on this purchase; but the only evidence bearing upon this question is that of Mark W. Barrett; he says his firm purchased, through the plaintiffs, twenty thousand bushels of wheat for July — ten thousand for themselves, and ten thousand for the defendant. He also says that $1,800 was put up by the firm on the purchase, but what portion, if any, was put up for the defendant does not appear. While the evidence of this witness is difficult to understand, and the precise nature of the arrangement between him and the defendant is left in doubt, from his testimony, yet we cannot infer, from anything he testified, that the plaintiffs ever gave the defendant any credit for money in this transaction, or that they were ever directed or requested to do so, or that they ever had any knowledge that the funds paid them by this firm were to be used as margins for the defendant on any wheat purchased for him.

The defendant, when on the stand as a witness, did not pretend

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that he had put up any margin except the $1,200, with which he was credited on general account.

The plaintiffs testified they had only received $1,200. So far as the evidence of the plaintiffs and defendant is concerned, there is no substantial difference on this point. Neither seems to claim or pretend that any advances had been made by Logan as a margin on purchases, except the 1,200.

If it be true, as now insisted, that $1,800 had been paid for Logan to the plaintiffs to protect the purchase of the July wheat, it seems strange that he could not, in his evidence, give the jury some account of it.

In view of all the evidence we are not prepared to say the jury erred in the amount of the verdict.

It is, however, claimed by the defendant that the contracts for the purchase of the wheat were void under the statute, as gambling contracts, and for that reason the judgment cannot be sustained.

The statute declares that whoever contracts to have or give to himself or another the option to sell or to buy at a future time, any grain, etc., shall be fined in a certain sum, or confined in the county jail, etc.; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void. Rev. Stat. 1874, 372, sec. 130.

In order to determine whether the contracts in question fall within the statute, a brief reference to the evidence bearing upon this point is necessary.

The defendant, in answer to certain questions, stated:

"Tell the jury what you contracted with them to buy for you?

"No. 2 spring wheat.

"Did you, in any of your letters or dispatches, instruct them to buy the privilege of purchasing in the future?

"No, sir; I instructed them to buy No. 2 spring wheat.

"Did you, in any of your letters or telegrams, or in any instructions to Musick & Brown, instruct them to purchase for you the right to purchase in the future?

"No, sir; it was No. 2 spring wheat.

"They purchased 40,000 bushels of No. 2 spring wheat for you?

"30,000.

"You instructed this purchase to be made?

"Yes, sir.

"You contracted for No. 2 spring wheat?

"Yes, sir."

Mr. Musick, one of the plaintiffs who purchased the grain, stated that the orders given were, not to buy options, but grain, and if the grain had been called for by the defendant, it would have been forthcoming.

It is clear from this proof that the parties were not dealing in options, but that the plaintiffs were instructed to buy for the defendant a certain quantity of grain for future delivery, and actually bought it. Under the contracts made, Logan did not have the

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option to buy, but he actually purchased, and if he failed to take the grain at the time he was to receive it, he would be bound to respond in damages. So with the parties of whom the grain was bought; they did not have an option to sell, but actually sold the grain, and were bound to deliver it at the time specified, or, on failure, would be liable in damages.

The statute does not prohibit a party from selling or buying grain for future delivery; such was not the purpose of the statute; nor can it make any difference as to the legality of the contract, whether the party who sells for future delivery, at the time the sale is made, has on hand the grain; a party may sell to-day a certain quantity of grain for delivery in a week or a month hence, and then go upon the market and buy the grain to fill the contract. It is true, the defendant had the option, under the contract, to select a day within a limited time on which he would receive the grain; but such an option does not fall within the statute, for the reason that it does not render the sale optional.

We are, therefore, satisfied that the contracts did not fall within the statute, and we perceive no reason why they should not be enforced.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

EDITOR'S NOTES.

TIME CONTRACTS — OPTIONS — FUTURE DELIVERIES.

1. The form of a time contract.
2. Evidence of in Wisconsin; in Illinois.
3. A conditional contract, performance, or offer to perform requisite to create a liability.
4. Performance may be waived, a resale or a repurchase may be made, and the difference settled before maturity of the contract.
5. Necessity of.

1. The form which every time contract, made on the open board — *on change* — when completed wears, is as follows:

At the time of making it, the parties each enters on his card a memorandum, thus:

Buyer BOUGHT "Brown & Co., 250 July Pork, $16.20."
Seller SOLD "Black & Co., 250 July Pork, $16.20."

Afterward the *memoranda* are compared and checked, that there may be no misunderstanding. At the close of the session, the contract is reduced to writing, in counterparts, thus:

On the part of the buyer:

CONTRACT.

CHICAGO, April 30, 1877.

We have this day bought of Brown & Co. 250 bbls. Mess Pork, at $16.20 per bbl. regular on delivery, at seller's option, July 1877. This contract is subject in all respects to the Rules and Regulations of the Board of Trade of the city of Chicago.

BLACK & Co.

On the part of the seller:

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CONTRACT.

CHICAGO, April 30, 1877.

We have this day sold to Black & Co. 250 bbls. Mess Pork, at $16.20 per bbl. regular on delivery, at seller's option, July 1877. This contract is subject in all respects to the Rules and Regulations of the Board of Trade of the city of Chicago.

BROWN & CO.

These are then exchanged.

2. Oftentimes no other evidence of the contract is put in writing than the memorandum made *on change*. This was held, when made in Wisconsin, and no part of the price was paid, or of the property delivered, to be void under the Statute of Frauds. *Hooker* v. *Knab*, 26 Wis. 511. But in Illinois, such a contract may be in parol; even the memorandum is not essential to its validity. *Barrow* v. *Window*, 71 Ill. 214, see p. 218.

3. Such a contract is, on the part of the buyer as well as the seller, a conditional promise or agreement: the obligation to perform it by the one is made to depend upon the performance of it by the other. *Stoolfire* v. *Royse*, 71 Ill. 223.

At the maturity or close of the contract, in order to perfect the liability of the one, the other has certain things to do; the seller undertakes to deliver whenever, within the specified time, the seller chooses to tender the commodity and demand the price; hence a tender or delivery of the same must be made at the proper time in the manner prescribed by the rules and regulations of the board to entitle the seller to the price. In case this is done, and the buyer refuses to receive, then the seller has a claim against the buyer for the difference between the contract price and the market price on the day of the tender of the delivery and demand of the price; on the other hand, the buyer undertakes to pay the price whenever in the month the seller chooses to deliver; but it is necessary for the buyer, in order to create an obligation against the seller, at the maturity or close of the contract, to tender the price and demand the property according to such rules and regulations; if the seller then refuse to deliver, the buyer has a claim against the seller for the difference between the contract price and the market price on the day of the tender and demand. *Hough* v. *Rawson*, 17 Ill. 588; *Stoolfire* v. *Royse*, 71 Ill. 223; *Lyon* v. *Culbertson*, 8 Chic. Leg. News, 153.

It has been held that no rule of the board of trade can excuse these subsidiary acts. *Lyon* v. *Culbertson*, 8 Chic. Leg. News, 153.

4. But there is nothing to prevent the parties, by subsequent agreement or acts, from waiving or excusing such performance, or rendering the same unnecessary. Suppose, for example, that when the price of mess pork has declined, as it did on May 29, to $13.80, Black & Co. may not want to incur a heavier loss; in order to close the contract, they may then sell 250 barrels mess pork to Brown & Co., or anybody else, at $13.80 and pay Brown & Co. $600, the difference between the two deals. Does this second transaction, precisely like the first on principle, nullify the first? Was it the intention of either Black & Co. or Brown & Co., on

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April 30, to bet on the price of mess pork, and through the machinery of the board of trade cover their unlawful venture? Because there was no delivery of mess pork by Black & Co. to Brown & Co., and a subsequent re-delivery by Brown & Co. to Black & Co., is the transaction which resulted, taken as a whole, when complete to be regarded as a gambling contract? The Supreme Court of Illinois say that it is not, and fully sustain it as a legitimate time contract. *Pixley* v. *Boynton*, 79 Ill. 351.

A delivery at the time of the second transaction could not be enforced, in fact was not then desirable; the second transaction fixed the exact loss of Black & Co. as well as the gain of Brown & Co. at the difference between the prices named in the two contracts, which renders their further continuance, as well as the delivery and re-delivery of the pork, useless. Again, suppose that instead of a decline in price mess pork had advanced to $18.60, Black & Co. might not care to deliver the 250 barrels at a loss of $600, especially if the price bid fair to further advance. They then purchase 250 barrels mess pork of Brown & Co., pay the difference and keep the pork. In either case the one contract exactly offsets the other so far as a delivery or tender is concerned, and a settlement or payment of the difference legitimately closes the deals. *Pixley* v. *Boynton*, *supra*.

On the 30th of April, when mess pork stood at $16.20, the day the contract was made, suppose Brown & Co. had bet the difference with Black & Co. that the price of mess pork for July delivery would in the month of May decline, then on the 29th day of May the *losers* had given their promissory note for the $600 to the winners for the *wager*, no one would contend seriously for the validity of the note. *Merchants S. L. & T. Co.* v. *Goodrich*, 75 Ill. 554.

The difference in the result would be the same, but the validity or invalidity of the transactions is apparent at a glance. One is speculating or trading, the other is gambling. Contracts are made in legitimate form twice, and the difference between the two settled in the regular course of trade and commerce according to the law merchant in one case, while the other is a mere wager.

5. Chicago and Milwaukee have become the grain and provision markets of the Northwest. Cereals and provisions are, in these cities, in open market, day by day, year in and year out, bought and sold, not only for cash, but also *for future delivery*. Capital is on hand, seeking investment in just such ventures, which keeps market prices firm and steady. Grain yet to be grown, meats yet to be packed and cured, are continually the basis of such contracts of purchase and sale, called in the well-known language of the dealers *on change*, "time contracts," "options," as well as "future deliveries."

The Supreme Court of Illinois say:

"Time contracts have become necessary, and are regarded as regular and legitimate. *Pixley* v. *Boynton*, *supra*.

Such contracts should not be confounded with "puts and calls," which are also called "options." *Pickering* v. *Cease*, 79 Ill. 328.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM COOK COUNTY. OPINION FILED JANUARY 31, 1877.

CHARLES P. HOLDEN *v.* GEORGE SHERWOOD.

BANKRUPT ACT—*Revised Statutes of the United States, section 5106, construed.*—The statute prohibits the court from proceeding to final judgment until the question of a discharge shall be determined; but the fact must be pleaded or brought to the knowledge of the court in a proper manner.

MOTION—*For an order to stay proceedings, based on transcript.*—Before a justice of the peace a motion accompanied with the transcript, and based thereon, would be proper practice, as it is not a court of record, and pleadings are not required when based on the transcript alone; there must be a motion for an order to stay proceedings. That is the only means by which the court can have anything upon which to act. A court would not be authorized to enter such an order of its own motion. Such a motion should be made before the case is called for trial.

DISCHARGE—*Waiver of—suggestion and pleading of bankruptcy.*—A bankrupt may waive a discharge. The law does not compel him to rely on it, nor does it require a court to allow the discharge simply upon the fact being suggested. To defeat the action it must be pleaded in the same manner as any other defense. The suggestion of bankruptcy gives the court jurisdiction of the bankrupt's person, and the court may proceed to trial and judgment, unless he in a proper manner interposes his bankruptcy.

BILL OF EXCEPTIONS.—If a motion is properly made, and in apt time, and disallowed by the court, the motion, the transcript and all evidence on the hearing of the motion, should be embodied in a bill of exceptions, and become a part of the record in the case.

HOLDEN & MOORE, *Attorneys for Appellant.*
ALTA M. HULETT, *Attorney for Appellee.*

Justice WALKER delivered the opinion of the court:

This was an action commenced before a justice of the peace of Cook county by appellee against appellant.

A trial was had, resulting in a judgment for $100 and costs of suit. Defendant perfected an appeal to the Circuit Court of that county, and the cause was again tried by the court and a jury, resulting in a verdict for $113.50.

This latter trial was had on the 22d day of January, 1876.

On the rendition of the verdict in the Circuit Court defendant suggested that he had been decreed a bankrupt, and the court was thereupon asked leave to file a transcript of the proceedings in bankruptcy, which was granted by the court. And the court thereupon rendered judgment on the verdict. And the cause is brought to this court on appeal.

It is urged that the general bankrupt act, Revised Statutes of the United States, section 5106, prohibits all creditors from prosecuting

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their suits to a final judgment against a bankrupt until the question of the discharge of such debtor shall have been determined, and any such suit shall be stayed to await this determination of this court in bankruptcy on the question of discharge, etc.

The record contains no bill of exceptions, and it only states that appellant suggested his bankruptcy to the court, and asked leave to file the transcript of the record showing his bankruptcy. It nowhere appears that any motion was entered for a stay of proceedings until the question of his discharge should be determined. Before a justice of the peace a motion accompanied with the transcript, and based thereon, would be proper practice, as it is not a court of record, and pleadings are not required when based on the transcript alone; there must be a motion for an order to stay proceedings. That is the only means by which the court can have anything upon which to act. A court would not be authorized to enter such an order of its own motion. Nor is it the duty of the judge to make inquiry to learn whether the parties, or either of them, has become bankrupt. Nor can he act on any knowledge he may acquire until asked in an appropriate manner.

It is true the statute prohibits the court from proceeding to final judgment until the question of a discharge shall be determined. But the fact must be pleaded or brought to the knowledge of the court in a proper manner. He will say that if a defendant were to suggest that he had paid the debt for which he was sued, and ask leave to and file the receipt, it should prevent the court from proceeding to try the case.

A bankrupt may waive a discharge.

The law does not compel him to rely on it, nor does it require a court to allow the discharge simply upon the fact being suggested. To defeat the action it must be pleaded in the same manner as any other defense. The suggestion that the defendant was a bankrupt was wholly unlike the suggestion of the death of one of the parties, as in that case the court thereby loses jurisdiction of the party by his death, and the court can proceed no farther until some person is substituted to represent him. Not so with the bankrupt, as the court still continues to have jurisdiction of his person, and may proceed to trial and judgment, unless he in a proper manner interposes his bankruptcy. But even if there had been a proper motion, it came too late, as the bankruptcy had occurred some five months before the trial. If we may look into the certificate of the register, appellant should have made his motion for a stay of proceedings based on the transcript before the cause was called for trial.

He could not be permitted to lie by and permit the plaintiff to incur the expense of a trial, and when it terminated in a verdict against him, then, for the first time, to ask for a stay of proceedings.

Again, if a motion had been properly made, and in apt time, and disallowed by the court, the motion, the transcript and all evidence on the hearing of the motion, should have been embodied in a bill of exceptions, to become a part of the record in the case.

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So that in any point of view in which the case can be considered, there is no ground for reversing the judgment of the court below, and it must be affirmed. *Judgment affirmed.*

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION. JUNE TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF RICHLAND COUNTY; THE HON. J. C. ALLEN, JUDGE, PRESIDING.

HORACE HAYWARD *v.* CAROLINE GUNN.

LIMITATION—*When a trust is exempt from the bar of statute.*—To exempt a trust from the bar of the Statute of Limitations, it must, first, be a direct trust; second, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the *cestui que trust.*

Hence, where money is placed in the hands of an agent for a particular use, the surplus, if any, to be refunded by him, an action at law to recover such surplus will be barred by the Statute of Limitations, by the lapse of the statutory period after a breach of the duty resting on the agent to return the surplus.

SAME—*Effect of Married Women's Law of 1861 on statute.*—The effect of the act of 1861, investing married women with the sole control of their separate property, was, as to such property, to place them in precisely the same position, so far as the Statute of Limitations is concerned, as they would occupy if unmarried.

EVIDENCE—*Failure to render bill of items not ground for disregarding testimony of party in regard to.*—The inability or refusal of a party testifying to a demand to render an itemized account, is a circumstance that might tend to weaken the effect of his testimony, but it is not conclusive proof that the testimony is false, nor should the jury be instructed to disregard the testimony in the absence of such an account.

STATUTE OF FRAUDS—*Whether undertaking is collateral or original.*—Where a woman puts notes in the hands of an attorney to be collected, and the proceeds applied to the payment of a debt for which her husband's property has been sold, and the costs of the proceedings against her, with the agreement that when the notes are paid the certificate of purchase shall be assigned to her, such transaction on her part is an original undertaking, and not a promise to pay the debt of another, and hence not within the Statute of Frauds.

CANBY & EKEY, *Attorneys for the Appellant.*
WILSON & HUTCHINSON, *Attorneys for the Appellee.*

Justice SCHOLFIELD delivered the opinion of the court:

Appellee brought *assumpsit* against appellant, as surviving partner of the firm of Hayward & Kitchell, attorneys-at-law, for certain moneys belonging to her which she claimed they had received and failed to account for.

The declaration contains only the common consolidated money counts. Appellant pleaded, first, *non assumpsit;* second, that the

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several causes of action did not accrue within five years next before the commencement of the suit; and, third, payment and set-off. Appellee joined issue on the first plea, traversed the third, and replied, specially, to the second plea, first, that the several causes of action did accrue within five years; second, that the suit was to recover moneys, of which Hayward & Kitchell, as her attorneys, had been intrusted with the collection and custody; third, that suit was brought to recover on a contract in writing; fourth, the coverture of appellee; and, fifth, that appellant fraudulently withheld and concealed from appellee knowledge of the several causes of action. Appellant joined issue on the replication to the third plea and the first replication to the second plea, and traversed the other replications to the second plea, upon which appellee joined issue.

The jury, under the instructions of the court, returned a verdict in favor of appellee for $584. Motion for a new trial was made by appellant, whereupon appellee remitted $184 of the amount found by the verdict of the jury, and the court then overruled the motion and gave judgment for appellee for $400.

The facts proved on the trial, so far as they are material to an understanding of the questions upon which we are required to pass, are, substantially, these:

One Samuel H. Gunn, the husband of appellee, being the owner of certain lots in Olney, and at the same time largely indebted to the firm of Cummins, Seaman & Co., of New York, had executed to them a mortgage on the lots to secure the payment of his indebtedness. The mortgage had been foreclosed and the lots sold, and bid in by Cummins, Seaman & Co., who held certificates of purchase therefor. Appellee was desirous of purchasing and obtaining title in herself to a portion of these lots, and, to enable her to gratify that desire, the firm of Gunn Brothers (which did not include her husband) agreed to give her $1,500 for a claim she held in her own right on certain other lots. The legal business relating to the collection of the indebtedness of Samuel H. Gunn to Cummins, Seaman & Co., including the foreclosure, sale, etc., was intrusted by them to the law firm of Hayward & Kitchell. After some negotiation, it was agreed between Cummins, Seaman & Co. and appellee, that they would, upon her paying them $1,000 and releasing her claim to dower in the other lots for which they held certificates of purchase, assign and deliver to her the certificates of purchase to six designated lots. It is also claimed by appellant that appellee was, in addition to paying the $1,000 to Cummins, Seaman & Co., to pay all costs and attorneys' fees incurred by them in collecting or attempting to collect claims against Samuel H. Gunn. Appellee concedes that she was to pay, in addition to the $1,000, the costs and attorneys' fees incurred in the foreclosure of the mortgage, but she denies that she was to pay any other costs. Cummins, Seaman & Co. placed in the hands of Hayward & Kitchell the certificates of purchase intended for appellee, to be held by them until she complied with the agreement, and then delivered

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to her. Appellee sold to Gunn Brothers the lots they agreed to buy of her for $1,500, and they secured the payment of the same by their three promissory notes for $500 each. She placed these notes in the hands of Hayward & Kitchell, with the understanding, as she claims, that they should collect them when due, and, after paying the amount of $1,000 to Cummins, Seaman & Co. and the costs in the foreclosure suit, account to her for the balance; but appellant claims that one of the notes was assigned by her to Hayward & Kitchell for the payment of the costs, attorneys' fees, etc., which Cummins, Seaman & Co. had incurred in their efforts to collect from Samuel H. Gunn, and that the proceeds of the other two notes were to be applied when collected, in payment of the $1,000 and accruing interest, to Cummins, Seaman & Co. The notes were collected, the $1,000, and some accruing interest, paid to Cummins, Seaman & Co., and appellee relinquished her dower in the lots agreed upon to Cummins, Seaman & Co. and received the certificates of purchase to those she was to have.

It appears this all occurred as early as May, 1868, and this suit was not commenced until October 30, 1874. Appellee was divorced from her husband, as the record shows she testified, in 1869; but it is claimed, in point of fact, it was in 1871. In the view we take of the case, however, this is unimportant.

It appears, from the bill of exceptions, a receipt was given by Hayward & Kitchell for two of the notes, but what its language was does not appear. As to the third note, there does not appear to have been any writing whatever between the parties.

Appellee's claim is for the balance on the proceeds of the notes (after the payments authorized by her were made) in the hands of appellant, as surviving partner of Hayward & Kitchell.

The court, at the instance of appellee, gave to the jury several instructions to which exception is taken by the appellant. The first is as follows:

"If the jury find from the evidence that the defendant held in his hands funds which were placed there to pay certain claims, the overplus (if any) to be returned to the plaintiff, and if you further find that the defendant still has such funds in his hands, you will find for the plaintiff, and assess her damages at such sum as you find is justly her due. Such facts, if proven, will take a case out of the Statute of Limitations, and authorize a recovery, notwithstanding the lapse of time."

Appellee contends that the facts contemplated by this instruction, and upon the hypothesis of proof of which it was given, create the relation of trustees and *cestui que trust* between appellee and Hayward & Kitchell, and therefore the Statute of Limitations cannot be interposed as a bar to her claim. This, in our opinion, is a misapprehension of the law applicable to the evidence on this point. "To exempt a trust from the bar of the statute, it must be, first, a direct trust; second, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question

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must arise between the trustee and the *cestui que trust.*" Angell on Limitations, chap. 16, sec. 166; *The Governor etc.* v. *Woodworth*, 63 Ill. 254.

The second requisite is here entirely wanting. It is obvious that a court of law has been just as competent to administer relief to appellee, ever since the breach of duty of Hayward & Kitchell, if they have been guilty of such breach, as it is now. Indeed, from the evidence, it is not perceived that appellee would, at any time, have been justified in resorting to a court of equity. No discovery was necessary, and the remedy at law was adequate. See, also, *Murray* v. *Coster*, 20 Johns. 576; *Wisner* v. *Barnett*, 4 Wash. C. Ct. 631.

The third instruction is:

"The jury are not authorized to allow defendant for an account, unless the same is fully stated, so that the jury can understand for just what matter said charges are made."

This can have reference only to the evidence of appellant, in which he testified that he had appropriated the money collected, in excess of that paid Cummins, Seaman & Co., to the payment of costs and attorneys' fees. He gave no itemized account, but stated that the costs and attorneys' fees amounted to more than the amount Hayward & Kitchell had received. The effect of this instruction, as we conceive, was to direct the jury to disregard this portion of his evidence. Appellant's inability or refusal to render an account was a circumstance that might tend to weaken the effect of his testimony, but it could not, surely, be taken as conclusive proof that it was false. If the agreement of the parties was, that appellee was to pay all the costs and the attorneys' fees in the case of Cummins, Seaman & Co. *v.* Samuel H. Gunn, and it required all the money collected on the notes in the hands of Hayward & Kitchell, after paying Cummins, Seaman & Co. the $1,000 and accruing interest, to do so, and the money was thus applied, it cannot be that appellee is entitled to recover, whether appellant makes an itemized account or not. The proof of rendering an account is but one step in the evidence — if made, it might be contradicted and impeached, or, if not made, the legitimate appropriation of the money might still be proved by any competent evidence.

Appellee's fourth instruction was this:

"One party cannot be held to pay the debt of another, without an agreement in writing. The plaintiff cannot be held to pay the debt of Cummins, Seaman & Co., unless plaintiff agreed, in writing, that she would pay such debts."

This was unquestionably erroneous, and its tendency was to necessarily mislead the jury. As between appellee and appellant, this contract was in no sense collateral. It was an original undertaking, whereby appellee agreed to and did place the notes in the hands of Hayward & Kitchell, for a stipulated purpose, and in consideration whereof they agreed the notes should be applied to that purpose; but even if the question were, whether Cummins, Seaman & Co.

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could recover on this contract against Hayward & Kitchell — they having collected the notes and neglected to comply with their undertaking to that firm—we could have no doubt as to their right, notwithstanding the absence of a memorandum in writing. See *Eddy* v. *Roberts*, 17 Ill. 505; *Hite* v. *Wells*, id. 88; *Brown* v. *Strait*, 19 id. 88; *Wilson* v. *Bevans*, 58 id. 232.

Besides, it has been frequently held, a contract which, while executory, may be avoided because the formalities prescribed by the Statute of Frauds are wanting, when executed, cannot be avoided on that ground. *Swanzey* v. *Moore*, 22 Ill. 63; *James* v. *Morey*, 44 id. 352.

The fifth of appellee's instructions was:

"If the jury believe, from the evidence, that, during part of the time since the receiving of the money sued for, plaintiff was a married woman, then, for so much of said time, the Statute of Limitations will not run—that is, the Statute of Limitations could not bar plaintiff of her right, she being a married woman, unless more than five years have elapsed since the disability was removed."

By section 21, chapter 83, Revised Laws 1874, it will be observed, no exception as to the running of the Statute of Limitations against married women, in regard to their individual rights, now exists; and we are of opinion the necessary effect of the act of 1861, in vesting married women with the sole control of their separate property, was, as to such property, to place them in precisely the same position, so far as the statutes of limitation are concerned, that they would occupy if *femes sole*. When the reason ceases, the law itself ceases. The exception in favor of married women, in the old statutes of limitation, was because of their disability to sue without the consent of their husbands and the joining of their names. That being removed by the act of 1861, a married woman should be held to the same promptness, in the assertion of her rights, as any other property holder laboring under no legal disability.

But, it is insisted, even if there was error in the instructions relating to the Statute of Limitations, such error cannot affect the merits of the case, because the suit is upon a contract in writing. This view, unfortunately for appellee, has no support in the evidence. There is no written evidence of the agreement whereby appellee placed the notes in possession of Hayward & Kitchell. The receipt only embraced two of the notes; and that it did not embrace the terms of the contract, is evident from the fact that neither party has resorted to it as affording such evidence, but both have confined themselves exclusively to parol evidence of what they respectively claimed to be the contract. Moreover, the proceeds of the third note, and which was not included in the receipt, we infer from the evidence, form, in reality, the only subject of controversy. Whether, as appellant contends, that note was assigned to Hayward & Kitchell to pay attorneys' fees and costs, or was to be collected and accounted for, as appellee contends, must be determined entirely, so far as the record now discloses, from parol evidence. It is not pos-

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sible to throw this note out of the case, as the record now stands, and turn the litigation entirely upon one of the others, in any view.

With regard to the question of the suppressing of knowledge of appellee's cause of action, we need but say, the evidence before us is not sufficient to sustain the judgment on that ground, disregarding the errors we have alluded to.

It may be, as is contended by counsel for appellee, that the bill of exceptions does not, in fact, present the case fairly as it was presented to the court below; but we can indulge in no presumptions to that effect. The court below settles the bill of exceptions, and when it does so we cannot entertain any suggestions tending to impeach it, or in anywise reflecting upon the conduct of the court in settling it.

The judgment is reversed and the cause remanded.

Judgment reversed.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY. OPINION FILED FEBRUARY 9, 1877.

EDGAR S. HEATON *v.* ABRAHAM S. PRATHER ET AL.

TRUST DEED—*In the nature of a mortgage.*—When the record of a trust deed is sufficient notice to put parties on inquiry as to a sale pursuant to the terms of the power in deed.

The record of a trust deed gives notice of its existence to subsequent claimants of the equity of redemption, and points out the source of information of what might be done in pursuance of the deed, and they are bound to take notice of the proceedings thereunder.

CRAWFORD & MCCONNELL, *Solicitors for Appellant.*
MCCOY & PRATT AND FREDERIC ULLMAN, *Solicitors for Appellees.*

Justice SCHOLFIELD delivered the opinion of the court:

This was a bill by the appellant against the appellee, to redeem from a certain deed of trust in the nature of a mortgage. The court below decreed in favor of appellees, denying the prayer and dismissing the bill.

The facts involved are not controverted, and are briefly these: On the 11th of February, 1869, Henry H. Walker executed a deed of trust in the nature of a mortgage, with power of sale, to the appellee, Prather, of certain lands of which he was owner, which was duly recorded July 12, 1869. On the 25th of June, 1874, Prather sold the land, pursuant to the power, to the appellee, Matthews, and executed a deed therefor to him on the same day, but which was not recorded until the 11th day of November, 1874. On the 6th day of March, 1875, Matthews sold and conveyed a portion of the land to the appellee, Cooper, whose deed was at once recorded.

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On the 2d day of November, 1871, Henry H. Walker conveyed that portion of the property described in his deed of trust to Prather, now in controversy, to Samuel J. Walker, the deed for which was recorded the 18th of November, 1871, and on the 2d of July, 1873, Samuel J. Walker sold and conveyed the same property to Henry E. Pickett, whose deed was recorded January 21, 1874. On the 2d of July, 1873, Henry E. Pickett executed a deed of trust on the same property to John G. Rogers, to secure the payment of two promissory notes, of $14,000 each, to Samuel J. Walker. These notes Walker sold and assigned to O. B. Heaton, who purchased without notice in fact of the Prather deed of trust. On the 23d of September, 1874, Rogers, pursuant to the power in the deed to him, sold the property to the complainant, and on the same day executed a deed to him. When complainant purchased, he had no notice in fact of the Prather deed of trust, nor of the sale thereunder to Matthews.

The bill contained an allegation, the truth of which was admitted, that the records of Cook county were destroyed by fire on the 9th of October, 1871, and also that when O. B. Heaton purchased the notes from Samuel J. Walker, he had the written opinion of an attorney of excellent reputation that the title to the property conveyed by the deed of trust to Rogers was good in Henry E. Pickett, and free from all incumbrances, and that he relied on this opinion, and had no other examination made of the record; and that complainant likewise relied on this opinion when he purchased at the sale made by Rogers. These circumstances, however, we regard of no importance in the present inquiry. The constructive notice afforded by the recording of instruments entitled to record is, as we have held in a number of cases, the same where the records have been subsequently destroyed as where they remain intact; and the fact that the Heatons relied, in making their respective purchases, on the opinion of an attorney of good reputation, only goes to show that they had no knowledge in fact, as contradistinguished from constructive knowledge, of the condition of the record affecting the title to the property. This is conceded by counsel for appellees, and is not an element in the case.

It will have been observed that the sale by Rogers to complainant was after the sale by Prather to Matthews, but some time before Matthews placed his deed on record; and appellant, conceding that he purchased with constructive notice of Prather's deed of trust, insists, however, that he did not purchase with notice, either actual or constructive, of Prather's deed, resting on absolute title in Matthews, and that he is therefore entitled to treat appellees as holding the title precisely as Prather did before his sale.

It is not to be denied, as contended by counsel for appellees, that the mortgagee is not bound to take notice of the registry of deeds made subsequent to his mortgage, but that does not touch the point at issue. That such is the law is conceded by counsel for appellant, and he does not seek to deprive the mortgagee of any rights vested

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in him, as such, by the deed, but he insists that appellees have only the rights of mortgagees. Appellees, however, insist that they are not mortgagees, but purchasers in good faith, from the trustee, of the absolute title. The only question, therefore, is, was the record of the deed of trust to Prather sufficient notice to put parties on inquiry as to whether there had been a sale pursuant to the terms of the power in the deed. This precise question was before us in *Farrer* v. *Payne et al.* (September term, 1873, and again on petition for rehearing, September term, 1874), and we there held the notice was sufficient. It was said: "The record of the trust deed gave notice of its existence to subsequent claimants of the equity of redemption, and pointed out the source of information of what might be done in pursuance of the deed, and they were bound to take notice of the proceedings thereunder."

It follows that appellant was not entitled to redeem, and there is no error in the decree of the court below. It will therefore be affirmed. *Decree affirmed.*

EDITOR'S NOTE.—Crawford and McConnell have filed a petition for rehearing, citing the following authorities: 4 Kent. Com. 171, 179; 4 Scam. 249; 103 Mass. 491; 13 Johns. 471; 2 Brod. and B. 598.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY; THE HON. NATHANIEL J. PILLSBURY, JUDGE, PRESIDING.

CELESTIA L. BURCHARD *v.* AARON DUNBAR.

CONFLICT OF LAWS—*Of the right and the remedy—by what law governed.*—The law of the place where a contract is made will control in ascertaining the rights and liabilities of the parties, but no further. When these are ascertained, the law of the place where its enforcement is sought will govern as to the remedy.

Where, by the law of another state, the liability of a party to a contract, executed in that state, is of an equitable character, it can be enforced in this state only in a court of equity, although, by the laws of the state where it was executed, it could be enforced in a court of law.

G. S. ELDRIDGE, *Attorney for the Appellant.*
BONFIELD & PADDOCK, *Attorneys for the Appellee.*

This was *assumpsit*, by appellee, against appellant and her husband, Patrick H. Burchard, on an instrument in writing, of which the following is a copy:

$403.44. HAMILTON, January 1, 1866.

For value received, we, jointly and severally, promise to pay A. D. Dunbar, or bearer, $403.44, in three equal annual payments, the first payment to become due January 1, 1867, with annual interest on all sums remaining unpaid, and the whole to become due January 1, 1869.

The undersigned, Celestia L. Burchard, wife of the undersigned P. H. Burchard, for value received, further promises and agrees that her separate estate, both real

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and personal, shall be charged with the payment of the said sum of $403.44 and interest; and that the said moneys hereby agreed to be paid shall be a lien and charge upon her separate estate, and she hereby declares it to be her intention to charge, and hereby does charge, her separate estate with the payment of said sum of $403.44 and interest.

CELESTIA L. BURCHARD.
P. H. BURCHARD.

Appellant filed a separate plea, in which she avers that "the said plaintiff ought not to have or maintain his action, etc., because the several causes of action in the declaration are one and the same, viz: the note set out in the first count, and not other or different; that she, before and at the time of making said supposed promises, was the wife of her co defendant, Patrick H. Burchard, and hath so ever since been, and still is; that the sole consideration for said note was the sole and individual indebtedness of the said Patrick H. Burchard to the said plaintiff, for money due upon an account stated between them, and that she signed the said note only, in fact, as security for the said Patrick H. Burchard, her husband, and for no other cause or consideration whatever, and denies that, by the laws of the State of New York, she thereby charged her separate estate, and wherefore she prays judgment," etc.

The following stipulation between the parties was read in evidence, on the trial, without objection:

"It is hereby stipulated between the parties that, upon the trial of said cause, the parties may offer in evidence, under the pleadings upon file, any matter, or thing, or defense, or reply any matter or thing, as if any other pleas, pleadings, defenses or replications were filed therein; and it is further stipulated that the said Celestia L. Burchard was the wife of P. H. Burchard at the time said instrument in first count of plaintiff's declaration was made, and that the same was made in the State of New York; and that the printed statutes of New York and decisions of the Court of Appeals, or Commission of Appeals, may be introduced upon argument, by either party, to show what the law of New York was and is on said note and matters in dispute in said cause; and that the allegations in the plea filed herein as to said note in suit being given solely for the individual indebtedness of the said defendant Patrick H. Burchard, and signed by said Celestia L. Burchard as security for him, and for no other consideration, as in said plea alleged, is true, and if it shall become material to them that Celestia L. Burchard, at the time of the execution of said note, or at any time since then, had property, at any time before final judgment, proof thereof may be introduced as controverting the same, and either party may introduce such proof before the final determination of said cause, or next term of this court; that nothing in this stipulation shall bind either party in any other suit, trial or litigation between said parties, or either of them.

"Dated September 27, 1875.

"BONFIELD & PADDOCK, *Attorneys for Plaintiff.*
"G. S. ELDRIDGE, *Attorney for Defendants.*"

Certain statutes and decisions of courts of New York were read on the argument, but such of them as are deemed material to the

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questions arising in the case are referred to in the opinion, and therefore need no mention here.

Judgment was given for the plaintiff, against both defendants, for $465.20 and costs, and Celestia L. Burchard, after moving for a new trial, which was refused, appeals to this court.

Justice SCHOLFIELD delivered the opinion of the court:

The instrument on which suit is brought having been executed in the State of New York, we must resort to the law of that state to determine the nature of the obligation it imposes on the appellant. Prior to the enactment of recent statutes, and decisions thereunder, it is quite clear there was no substantial difference in the law, in this respect, in the State of New York and this state. Thus, it was held in *Yale* v. *Dederer*, 18 N. Y. 265, and 22 id. 454, that the signing of a promissory note by a married woman, as surety for her husband, merely, did not, even in equity, bind her separate estate, notwithstanding she, in fact, intended it to have that effect; and this ruling is referred to with approval and followed in *Carpenter* v. *Mitchell*, 50 Ill. 470; *Williams* v. *Hugunin*, 69 id. 214; *Bressler et al.* v. *Kent*, 61 id. 426. But in *Yale* v. *Dederer*, *supra*, the court went further, and held that, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself; thus, by implication, holding that a charge upon the separate estate of a married woman might be created where the intention to do so is declared in the contract which is the foundation of the charge, or the consideration is for the direct benefit of the estate itself. And in *The Corn Exchange Insurance Co.* v. *Babcock*, 42 N. Y. (Appx.) 613, the Commission of Appeals so expressly ruled, and, also, that it was unnecessary that the contract should contain a description of the property to be charged. This point has never arisen for adjudication in this court, nor is it now necessary to indicate what our conclusion would be were the question one for our determination. It is sufficient, for the present, that such is the law of the place where the contract was made. In the case last referred to, a judgment was sustained, under the New York code of procedure — in form, a judgment at law — without indicating any property out of which it was to be satisfied; and Commissioner HUNT, in the majority opinion, says, alluding to objections to the form of the proceedings: "I have considered these points with reference to our statutes. As, in my judgment, this case comes within those statutes and the form of the action, the form of the judgment and the execution upon it are to be regulated by them. They are right, in form, under the provisions of our statutes."

The court below held, on the authority of this case, we infer, that the obligation of appellant was valid and binding at law in the State of New York, and consequently, that it can be enforced here as a legal undertaking.

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It would seem that the quotation we have made from the opinion of Commissioner HUNT, itself, shows that the form of the remedy in that case was approved solely because it was authorized by the New York statutes; but he again says, at page 638: "Where the proceeding was strictly one in equity, it may have been necessary that the judgment should specify the property against which the process should issue. Under our statutes, the suit, the judgment and the execution are in the ordinary manner of suits at law."

EARL, Commissioner, in his separate opinion in the same case, at page 642, says: "The position of a *feme covert*, then, in this state, in reference to her contracts, is as follows: She is bound, like a *feme sole*, by all her contracts made in her separate business, or relating to her separate estate, within the meaning of the acts of 1848, 1849, 1860 and 1862; and such contracts can be enforced in law or equity, as the case may be, just as if she were a *feme sole*. All her other contracts are void at law, and do not bind her personally, but may be enforced in equity against her separate estate, provided the intention to charge the estate be stated in the contract." He comes to the conclusion that the defendant, by her contract of indorsement, charged her separate estate, in equity, and that it might, under their statutes, be reached through the form of proceeding then before the court, first, however, amending the judgment so as to require a satisfaction out of the defendant's separate estate.

As we understand the opinion of Commissioner HUNT, he does not claim that, under the laws of that state, a married woman incurs a general indebtedness by such an instrument, but simply that she creates a charge upon her separate estate, which may be enforced by a form of proceeding like that then under consideration. The basis of the liability is, therefore, still of an equitable nature, though materially modified by statute.

In *Loomis* v. *Ruck et al.*, 56 N. Y. 462, suit was brought on an instrument having the form of an ordinary promissory note, except that it concluded by charging the amount upon the separate estate of the maker, and stating that the consideration had been incurred for the benefit thereof. The defense was interposed that the signature was obtained by duress; and, in determining whether this defense could be set up against the plaintiff, who was an assignee, the court said: "The note, so far as Mrs. Ruck was concerned, was void at common law, by reason of her coverture, and it is not helped by any of the statutes of this state in respect to married women. These statutes render valid, at law, such contracts, only, of *femes covert* as relate to their separate estates, or are made in the course of their separate business. As to the last-mentioned contracts, married women, under our statutes, stand, at law, on the same footing as if unmarried, and can, therefore, make negotiable paper, which will be governed by the law merchant, but as to other obligations, they still stand on the same footing as before the enactment of these statutes. Their contracts are void at law, but if they have separate estates, courts of equity will enforce them as against such estates. According

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to the late decisions in this state, an express charge upon the separate estate is required to be contained in the contract. The law merchant, which gives to the *bona-fide* transferee of negotiable paper greater rights than those of the transferrer, has no application to this class of obligations. They are not recognized at law, and we have been referred to no authority tending to sustain the position that the transferee of an obligation of a married woman, obtained from her by fraud or duress, and against which she had a good defense, when in the hands of the original holder, can be enforced, in equity, out of her separate estate, simply because it has passed into the hands of a *bona-fide* transferee. The rules applicable to commercial paper cannot govern this case. It must be governed by the rules of equity, which, in case of equal equities, and in the absence of sufficient grounds of estoppel, give preference to the equity which is prior in point of time."

This decision was rendered nearly four years after the announcement of the decision in *The Corn Exchange Ins. Co.* v. *Babcock*, *supra*, and was concurred in by all the members of the Court of Appeals, and must be regarded as conclusive that the liability of a married woman, in such cases is purely equitable, and that what was said in *The Corn Exchange Ins. Co.* v. *Babcock*, in regard to enforcing it as a judgment at law, had relation to the form of the remedy as provided by statute in that state, only.

But the law of the remedy is no part of the contract. *Wood et al.* v. *Child et al.*, 20 Ill. 209. "When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, the mode and the extent of the remedy." *Sherman et al.* v. *Gassett et al.*, 4 Gilm. 531; *Chenot* v. *Lefevre*, 3 id. 643.

That appellant charged her separate estate with the payment of the amount of the note, by the law of New York, is beyond question, under the authority of *The Corn Exchange Ins. Co.* v. *Babcock*, *supra*, which the Court of Appeals, in *Maxon* v. *Scott*, 55 N. Y. 251, says must now be regarded as the established law of that state. But this is in equity only; and, although by our present statutes (R. L. of 1874, p. 576,) married women may sue and be sued, either with or without joining their husbands, and defend without regard to whether the husband shall defend or not, and judgments may be recovered against them and satisfied out of their separate estates, we still preserve the distinctions between actions at law and suits in equity; and there is no authority for suing and obtaining judgments against them in actions at law on purely equitable liabilities.

The liability of the husband, here, is at law, on the promissory note. The promissory note, as to appellant, is void at law, and the only ground of proceeding against her is in equity. She has charged her estate with its payment. It is absurd, therefore, that still observing the distinctions between courts of law and courts of

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equity in administering remedies, there should be a joint judgment against them at law.

The judgment is reversed. *Judgment reversed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

APPEAL FROM CIRCUIT COURT OF WARREN COUNTY. OPINION FILED JANUARY 31, 1877.

THE PEORIA AND ROCK ISLAND RAILROAD COMPANY *v.* SYLVIA L. LANE, ADMX., ETC.

RAILROAD COMPANY.—*Liability of company for negligence of their lessees, or of other roads.*—This court has repeatedly held that a railroad holding the franchise and exclusive right to operate a road, must so use it as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road. And that if they permit another company to use their trains on and over their track, and injury, growing out of negligence of the use of the road thus authorized, the company owning the road and franchise will also be liable.

Switch.—This being true, it follows that if the switch was not properly locked or otherwise, whether by the employes of either road, and the injury was thereby occasioned, appellants would be liable. Or, if the switch was not properly constructed and maintained, appellants, as the owners of the road, would be liable.

Passenger.—A railroad company is not liable to a passenger while riding in a baggage car, unless the company were guilty of wanton or reckless misconduct on their part. When persons take such and like hazards, of their own choice, they must bear the injury. A ticket does not entitle a passenger to go into a baggage car without permission.

Evidence.—In a civil action, only a preponderance of evidence is required to establish facts, and not that the evidence shall leave no reasonable doubt on the minds of the jury.

Justice WALKER delivered the opinion of the court:

It appears that appellant was the owner of the track, right of way, and franchise of the road where this accident occurred. They had entered into an agreement to permit the Rockford, Rock Island & St. Louis Railroad Co. to run trains over their road from Rock Island to Orion. The latter road was to pay the former $31,000 per year, and half of the gross receipts for the local business between the two points.

The accident occurred by the overturning of a baggage car in a train belonging to and being operated by the Rockford, Rock Island & St. Louis Railroad Co.

It is first urged that appellant is not liable for the negligence or mismanagement of the employes of that company, whilst running on their track. That the Rockford, Rock Island & St. Louis Railroad

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Co. are alone liable for their negligence. There is no doubt but they are liable for their own acts. And some courts have held that the company owning a road is not liable for the negligence of their lessees, or of other roads using their track by arrangement or consent. But this court has repeatedly held, that a railroad holding the franchise and exclusive right to operate a road, must so use it as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road. And that if they permit another company to use their trains on and over their track, and injury growing out of negligence of the use of the road thus authorized, the company owning the road and franchise will also be liable. *Lusher* v. *The Wabash Nor. Co.*, 14 Ill. 85; *Hinds* v. *Same*, 15 Ill. 72; *Chicago, St. Paul & Fond du Lac R. R.* v. *McCarthy*, 20 Ill. 385; *Ohio & Miss. R. R.* v. *Dunbar*, ib. 623; *Sidders* v. *Riley*, 22 Ill. 109; *Ill. Cent. R. R.* v. *Finnigan*, 21 Ill. 646; *Ill. Cent. R. R.* v. *Konause*, 39 Ill. 272; *Toledo, P. & W. R. R.* v. *Bumbold*, 40 Ill. 143. These cases fully settle the rule in this court. Nor has appellant's counsel adduced reasons in argument that by any means satisfy us that a sound public policy does not require the rule. It has been adopted with a full knowledge that there are decisions of other courts, for whom we have great respect, announcing a different rule. But there are other courts of equal ability who announce the rule adopted by this court. We cannot be expected to change a rule simply to make it conform to that of some other court, arriving at a different conclusion. We have no doubt of the soundness of the rule of this court, and must therefore decline to review the conflicting decisions of the various courts. The same rule is announced by the Supreme Court of the United States in *Railroad Co.* v. *Barrow*, 5 Wal. 104; see also *Nelson* v. *Vermont C. R. R.*, 26 Vt. R. 721. This objection cannot therefore be allowed.

This being true, it follows that if the switch was not properly locked or otherwise secured, whether by the employes of either road, and the injury was thereby occasioned, appellants would be liable. Or if the switch was not properly constructed and maintained, appellants, as the owners of the road, would be liable. On this question there was a large amount of evidence which was inharmonious in its character, and which was for the jury to determine, under proper instructions. The first of appellant's instructions to which objection is made is in entire harmony with the rule above announced. And the same is true of her fifth instruction. We perceive no objection to the eighth or ninth of the series.

The sixth of appellee's instructions is objected to by appellant. It is this:

"6. The jury are further instructed that while it is true that the proper place for a passenger while riding upon a railroad train is in the passenger coach, yet, the jury are further instructed, that a passenger may rightfully be in a baggage car, and not thereby be chargeable with negligence, such as to excuse the railroad company upon whose train such passenger may then be riding, from the per-

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formance of its duties imposed upon it by law, in properly building and maintaining its road, with its curves and switches or persons operating trains of cars upon its track, with its consent, from gross negligence in the running and management of a train upon which such passenger may then be riding."

It is urged that this instruction does not state the law correctly, and the instruction misled the jury. In the case of *Galena & Chicago U. R. R.* v. *Yarwood*, 15 Ill. 468, it was held, where the passenger cars being full, and Yarwood had paid for a ticket, and on entering the cars was directed by the conductor to go into the baggage car, which he did, but afterward left that car, and whilst standing up in one of the passenger cars, it was apparently about to be thrown from the track, and he jumped off and had his leg broken, that he could not recover.

It appeared in that case that if he had remained in the baggage car, as directed, that there would have been no apparent necessity for leaping from the train, and he would not have been injured. So in this case, had deceased remained in the passenger car, where there was an abundance of room, he would not have been killed. It was by reason of his leaving his seat in the passenger car, not by direction of the conductor of the train, but for the purpose of getting a plate of iron and some other small articles in the baggage car that occasioned his death. He, as all others, knew that the baggage car is not designed for passengers. It is alone for baggage, express matter, and such articles as passengers may be permitted to place therein, as a matter of convenience, and for the use of employes on the train. Where there are large quantities of baggage piled up in that car, in case of accident persons therein would be liable to have it fall on them and produce great injury, if not death, as was done in this case. This, therefore, renders it more hazardous than in the passenger cars. They are so constructed as to be free from such or like dangers.

He must have known that the payment of his fare entitled him to a seat in a passenger car, and in consequence of that knowledge, he appears to have taken a seat therein upon entering the train. The company did not expect or intend that passengers should occupy the baggage car, and hence they had not arranged it with a view to the safety of passengers. Had they designed it for that purpose they would have arranged the baggage differently, so as to secure passengers from injury from its falling on them.

Deceased left a place of safety and sought one of danger, and thus lost his life. His doing so was not invited or directed by the company. He, in going there, was guilty of a high degree of negligence, so high, in fact, that the company are exonerated from liability unless the company were guilty of wanton or reckless misconduct on their part. Although the company may have been guilty of negligence, which we do not decide, still we do not see that it was wanton or reckless. The road at that place may not have been constructed on the very best plan, yet it was not gross negligence

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in comparison with that of deceased, and his slight. Deceased was manifestly guilty of as great negligence as the company, if not greater.

Suppose he had got on the frame in front of the engine, without being directed to do so, and had been injured, could it be contended that he might recover? Surely not, because he had sought a situation of great peril. When a person takes such and like hazards, of their own choice, they must bear the injury. Had deceased acted with ordinary prudence, and remained in the passenger car, where it was his duty to have remained, he would not have been killed; nor does it matter that the conductor testified that passengers could go into the baggage car, as when a person buys a ticket, the act implies that the company shall furnish him with a seat in a car provided for passengers, and not in a car provided for baggage. Such a ticket does not entitle the passenger to go therein, without permission. The majority of the court holds this instruction should not have been given.

All of appellant's instructions but the fourth and tenth, which were refused, are in the teeth of the decisions of this court, referred to in the former part of this opinion, and were properly refused. The fourth would have been free from objection, had the last clause, referring to negligence of the Rockford, Rock Island & St. Louis Railroad Company been omitted.

The tenth was manifestly wrong, as this was a civil action, and all know that in such cases only a preponderance of evidence is required to establish facts, and not that the evidence shall leave no reasonable doubt on the minds of the jury. We are surprised such an instruction should have been asked.

But for the error in giving the sixth of appellee's instructions, a majority of the court hold that the judgment of the court below must be reversed and the cause remanded. *Judgment reversed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. JANUARY TERM, 1877.

WRIT OF ERROR TO THE CIRCUIT COURT OF KANE COUNTY; THE HON. H. H. CODY, JUDGE, PRESIDING.

JOHN C. KRIBS *v.* THE PEOPLE OF THE STATE OF ILLINOIS.

EMBEZZLEMENT—*What constitutes.*—If money is placed in the hands of a person to be loaned for the owner for a specified time, upon a certain specified character of security, and at a stipulated rate of interest, and the person so intrusted with the money fraudulently converts the same to his own use, he will be guilty of embezzlement, under the Criminal Code.

But where one places his money in the hands of another, relying upon his honesty or responsibility for its return, with the stipulated interest, then a failure of the party to properly account for the money so received will not subject him to a criminal prosecution for embezzlement.

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EVIDENCE—*In criminal cases—as to other like offenses.*—Upon the trial of a party charged with embezzlement, by the fraudulent conversion to his own use of money placed in his hands to be loaned for the owner, it is not competent for the prosecution to prove that the defendant had collected or secured money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. The evidence should be confined to the charge set forth in the indictment.

J. F. FARNSWORTH and B. F. PARKS, *for the Plaintiff in Error.*
JAMES K. EDSALL, Attorney-General, *for the People.*

Per CURIAM: This was an indictment in the Circuit Court of Kane county, against John C. Kribs, for embezzlement. On a trial of the cause the defendant was found guilty, and sentenced to the penitentiary for one year.

It appears, from the evidence introduced on the trial of the cause, that George W. Shaver, on the 26th day of June, 1874, placed in the hands of the defendant $550, to be loaned at the rate of ten per cent for one year. A receipt was given for the money, which was as follows:

ELGIN, Ill., June 26, 1874.

Received of George W. Shaver five hundred and fifty dollars, to be loaned at ten per cent for one year from this date. JOHN C. KRIBS.

One hundred and fifty dollars was paid back to Shaver on the 9th day of November, 1874, and at the same time interest was paid on the entire amount to the 1st day of December, 1874. The balance of the money the defendant converted to his own use.

If the money was placed in the hands of the defendant to be loaned for one year, upon real estate security, at ten per cent per annum, and he fraudulently converted the same to his own use, the defendant would, no doubt, be guilty of the offense charged. If, on the other hand, Shaver placed the money in the hands of the defendant, and looked to him for a repayment, and relied upon the guaranty of the defendant for ten per cent interest from the time the money was paid over, then no conviction could be had. While we do not propose to express any opinion upon the evidence, yet, from the fact that the defendant guaranteed ten per cent interest from the date the money was received, and the subsequent payment of interest on the money to December 1, 1874, in connection with the agreement to repay the $400 on thirty days' notice, may properly raise a well founded doubt in regard to the guilt of defendant.

The proposition is too plain to admit of argument that if Shaver, when he gave the money to the defendant, relied upon his honesty or responsibility to return it, with ten per cent interest, he cannot resort to the criminal laws of the state to assist him to collect the debt.

But, aside from these considerations, the record discloses an error for which the judgment of the Circuit Court must be reversed.

On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received

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money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment the law did not require him to come prepared to meet other charges, nor does it follow, because he may have been guilty of other like offenses, that he was guilty of the offense charged in the indictment.

The evidence should have been confined strictly to the offense charged in the indictment. This was not, however, done, but improper testimony was allowed to go to the jury, which could not fail to prejudice the rights of the defendant.

For the error in the admission of improper evidence the judgment will be reversed and the cause remanded. *Judgment reversed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY; THE HON. JOSEPH E. GARY, JUDGE, PRESIDING.

BANK OF NORTH AMERICA *v.* C. D. & V. R. R. Co.

(82 Ill. 493.)

PRACTICE—*Affidavit of merits.*—Where the declaration in *assumpsit* contains a special count on a promissory note with the common counts, and an affidavit of claim, a plea denying the execution of the note verified is not equivalent to an affidavit of merits, and for the want of such an affidavit the plea was properly stricken out.

PRIVATE CORPORATION.—The county wherein a private corporation has its principal office is to all intents and purposes its residence.

E. WALKER, *Attorney for Appellant.*
MCCAGG, CULVER & BUTLER, *Attorneys for Appellee.*

Justice SCHOLFIELD delivered the opinion of the court:

Our first conclusion in the present case was that the court below erred in striking the defendant's plea from the files, and that its judgment should be reversed, and we, accordingly, so adjudged. A rehearing having been ordered, on further and more mature deliberation, we have come to the conclusion that our former judgment should be changed, and the judgment of the court below affirmed.

The form of action is *assumpsit*, and the declaration contains a special count on a promissory note of the defendant, executed by J. E. Young, its manager, bearing date July 29, 1873, payable to one S. J. Walker, four months after date, for $8,000, and by Walker assigned to the plaintiff, and also the common counts.

Annexed to the declaration was the affidavit of J. W. Culver, one of plaintiff's attorneys, that the demand of the plaintiff was for the

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whole amount due on the promissory note, which was copied in full, and that there was due from the defendant to the plaintiff, after allowing to defendant all its just credits, deductions and set-offs upon the promissory note, the full and just sum of $8,383.92, at the date of the affidavit, and that the defendant's principal office was in Cook county.

The defendant filed a plea denying the execution of the note, verified by the affidavit of its president. This plea was, on motion of plaintiff's attorney, ordered by the court to be stricken from the files for want of an affidavit of merits, and judgment was thereupon rendered in favor of the plaintiff against the defendant, by default, for $8,414.67.

Proper exceptions were taken, and the errors assigned bring these rulings of the court before us for review.

The objection that the affidavit of Culver, annexed to the declaration, was insufficient, because he was but an agent or attorney of the plaintiff, and not the plaintiff in the action, is answered by *Young* v. *Browning*, 71 Ill. 44, and *The Bank of Chicago* v. *Hall*, 74 Ill. 106, where we held an objection of the same character untenable, and we are not convinced by the arguments in the present case that we were in error in so holding.

But, it is further insisted, no affidavit of merits was required to be filed with the plea, because the defendant is a corporation organized and doing business under and by virtue of the laws of the State of Indiana, and therefore comes within the exception in the statute requiring an affidavit of merits to be filed with the plea.

The language of the statute is: "If the plaintiff, in any suit upon a contract, expressed or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, or his agent, or attorney, *if the defendant is a resident of the county in which the suit is brought*, shall file with his plea an affidavit, stating that he verily believes he has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount (according to the best of his judgment and belief)."

The affidavit annexed to the declaration alleged that the defendant's principal office was in Cook county. The citizenship (if that term may strictly be applied to a corporation) of the defendant, it will be seen, is unimportant—it will be sufficient if it is a *resident* of the county; and for the purposes of this question, we think, the well-known distinction between *citizen* and *resident*, as applicable to persons, should be observed. The rule laid down, and since recognized by this court, in *Bristol* v. *The Chicago & Aurora Railroad Co.*, 15 Ill. 436, is this: "The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is

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located where its franchises are exercised." And it was, therefore, held that the corporation, in that case, had a legal residence in any county in which it operated its road. While the citizenship of the corporation would depend upon the place of the law of its creation, its residence might, manifestly, upon the principle above stated, be in any State where it was, by comity, permitted to exercise its franchise. The defendant, therefore, having, as we must accept from the plaintiff's affidavit, its principal office in Cook county, is, to all intents and purposes, within the meaning of the act, a resident of that county, and is not within the exception.

The remaining question is, whether the affidavit that the defendant did not execute and deliver the note in manner and form, etc., is a sufficient affidavit that the defendant has a good defense to the merits of the action, within the contemplation of the statute.

We do not regard *Castle et al.* v. *Judson et al.*, 17 Ill. 381, and *Wilborn* v. *Blackstone et al.*, 41 id. 264, as sustaining plaintiff's position. In the first of these cases the affidavit was held to be more than an equivalent to that required by the statute, and in the other case the affidavit followed the language of the statute; but the objection was, that it was not entitled of the court or term to which the cause was appealed, and the court held, that being properly entitled in the case and regularly filed, it was sufficient, without specifying the court and term. What was said in *Castle et al.* v. *Judson et al.*, as to the object of the act and the rule of construction, although that was a local act, confined to Cook county, will apply as well to the act before us. It was there said: "The object of the act seems to be to facilitate and expedite the disposition and trial of causes brought there, so as to prevent unnecessary delay to suitors from the great accumulation of causes, upon frivolous defenses, as is very manifest.. . . . We should keep this object in view in interpreting the provisions of this act, and give it a liberal interpretation to accomplish that end."

It is true, also, as was said in *Wilborn* v. *Blackstone et al.*, "The statute was not designed to cut off meritorious defenses, but to prevent unjust delays in the administration of justice." And we have therefore held that the affidavit will be sufficient, although not in the precise phraseology of the statute, if, in substance, it is equivalent. *Harrison* v. *Willett*, 79 Ill. 482.

The plea puts in issue only the note as it is described in the special count, and if, therefore, the note offered in evidence should be so materially variant therefrom as to be inadmissible in evidence under that count, the plea would be sustained; and yet the plaintiff, by making proof of its execution, might recover the amount due upon it under the common counts. But again, the plea would be sustained if it should appear that Young, as manager, had no legal authority to bind the defendant by executing the note. Still, in this, he might have acted honestly and conscientiously — the defendant might have been indebted to Walker in the amount of the note, or it might have been indebted to the plaintiff in that amount, and

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the attempt to bind the defendant by the note have been for a sufficient and full valuable consideration, but unavailing only for the want of legal authority in Young. In such case, the debt would remain unaffected by the void note, and if it was originally due from the defendant to the plaintiff, or if originally due from the defendant to Walker, but the defendant, for a sufficient, valuable consideration, after the creation of the debt and upon the request or with the assent of Walker, promised to pay the debt to the plaintiff, the plaintiff would be entitled to recover the amount under the common counts.

The language of the statute and the affidavit are not, therefore, equivalent. The one requires it to be stated there is a defense upon the merits as to the whole or a part of the demand, specifying the amount; the other presents a defense which does not, necessarily, go farther than to affect the character of the evidence admissible.

The judgment is affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

PRACTICE—AFFIDAVIT OF CLAIM AS A PLEADING.
AFFIDAVIT OF MERITS.
MOTION FOR SPEEDY TRIAL.

AFFIDAVIT OF CLAIM AS A PLEADING.—The decisions relative to this affidavit, which has its origin in sec. 36 of the Practice Act, Rev. Stat. 1874, p. 779, are as follows:

The officer taking an affidavit of claim (as well as all other affidavits) must be authorized to administer oaths. *Smith* v. *Lyons*, 80 Ill. 600. It may be made by one of several plaintiffs, *Haggard* v. *Smith*, 76 Ill. 507, and refer to an annexed account (id.). It need not be made by a plaintiff, *Young* v. *Browning*, 71 Ill. 44; the affidavit of any one cognizant of the facts will do, *Wilder* v. *Arwedson*, 80 Ill. 435, be it the plaintiff, his agent or attorney, or any other person who can swear to the necessary facts. *Honore* v. *Home National Bank*, 80 Ill. 489. It need not be entitled as of the term of court (id). The presumption is that the defendant resides in the county where he is served with process (id). The residence of a private corporation is where its principal office is located. *Bank* v. *C. D. & V. R. R. Co.*, 82 Ill. 493, S. C., *supra*. An affidavit of claim may be filed either before or after suit brought. *Goldie* v. *McDonald*, 78 Ill. 605. It is a pleading, and amendable like any other pleading in the discretion of the court, *Healy* v. *Charnley*, 79 Ill. 592, and additional time for amending or filing it may be granted (id.); see, also, *Kern* v. *Strasberger*, 71 Ill. 303.

AFFIDAVIT OF MERITS.—The following decisions have thus far been made relative to this affidavit as prescribed by said section:

Where a sufficient affidavit of claim is filed with the declaration, if the defendant reside in the county, an affidavit of merits must be filed with the pleas, *Honore* v. *Home National Bank*, 80 Ill. 489, or the court will, on motion, strike them from the files. *Filkins* v.

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Byrne, 72 Ill. 101; *Young* v. *Browning*, 71 Ill. 44; *Bank of North America* v. *C. D. & V. R. R. Co.*, 82 Ill. 493, S. C., *supra*. It may be made by one only of two pleading jointly, *Smith* v. *Bateman*, 79 Ill. 531. In default of such an affidavit, when required by affidavit of claim, plaintiff is entitled to judgment. *Wilder* v. *Arwedson*, 80 Ill. 435. But the defendant may then ask for leave to file it (id.); when the court may properly require a disclosure of the nature of the defense by affidavit, that the court may see whether it be meritorious (id.). If the affidavit of merits is to only a part of the claim, which the plaintiff confesses, judgment may be entered for the remainder of the claim. *Allen* v. *Watt*, 69 Ill. 655. In *Goldie* v. *McDonald*, 78 Ill. 605, an affidavit of claim was filed with the declaration, and the defendant was allowed five full days within which to file an affidavit of merits with his plea. Upon failure to file it the plea was properly stricken out and judgment as upon default entered. *Goldie* v. *McDonald*, 78 Ill. 605. In *Haggard* v. *Smith*, 71 Ill. 226, in answer to the declaration with affidavit of claim, the defendant filed with his plea an affidavit that he had a good defense to only a portion of the demand, whereupon the plaintiff stipulated to deduct the amount from his claim, and thereupon moved to strike the plea from the files and for a rule on the defendant to plead *de novo*, which was granted: the defendant failed to comply with the rule and judgment for *nil dicit* was rendered. *Held*, that this was fully authorized by the spirit, if not by the letter, of the Practice Act. *Haggard* v. *Smith*, 71 Ill. 226. It need only be made in actions *ex contractu*. *Wayne* v. *Stern*, 75 Ill. 313.

The following form was held to be sufficient:

THOMAS J. WELLS
v.
F. A. MCCORMICK AND JOSEPH RIGBY.

Joseph Rigby, one of the above-named defendants, being first duly sworn, on his oath says, that he has a good defense to said suit upon the merits to the whole of the plaintiff's demand. JOSEPH RIGBY.

McCormick v. *Wells*, 83 Ill. 239.

In this case a rule was laid upon the defendants to file an additional affidavit, by a day fixed, setting forth in detail such facts as would satisfy the court that defendants had a meritorious defense to plaintiff's cause of action, which defendants disregarded and their default was entered. No statute has made it the duty of defendants to file such an affidavit, hence it was held that they were not bound by the rule. It is sufficient that the affidavit is in the language of the statute (id.). The affidavit of merits will not be affected because the pleas are improperly entitled in the cause (id.). If, however, a defendant attempts to state the facts of the defense, it is incumbent on him to state such as the court can see constitute a meritorious defense. *Stuber* v. *Schack*, 83 Ill. 191. The filing of a second affidavit of merits is an abandonment of the first; the first cannot then be considered (id.).

This leads us to consider briefly the following motion:

MOTION FOR SPEEDY TRIAL.—Much discussion has taken place

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relative to the "FIVE DAYS RULE" of the Superior Court of Cook county, which is as follows:

"*Ordered*, That in any case *ex contractu*, pending on an issue or issues of fact only, or only requiring the *similiter* to be added, if the plaintiff, or an attorney or agent of the plaintiff, shall make an affidavit that he or she believes that the defense is made only for delay, the plaintiff, by giving the defendant's attorney, or the defendant, if he or she do not appear by attorney, five days' previous notice, with a copy of such affidavit, that the plaintiff will bring on said case for trial at the opening of court on a day to be specified in such notice, or as soon thereafter as the court will try the same, may proceed to a trial at the time specified in said notice, unless it shall be made to appear to the court, by affidavit of facts in detail, that the defense is made in good faith, when the case will remain to be tried in its regular order on the trial calendar."

This rule is void. *Fisher* v. *National Bank of Commerce*, 73 Ill. 34.

But if a cause is submitted by consent of parties, *Humphreyville* v. *Cleaver*, 73 Ill. 485, or if the parties go to trial without objection, they will waive it. *Cleaver* v. *Webster*, 73 Ill. 607.

The delay occasioned by the crowded dockets in the courts of Cook county, especially in reaching issues for trial, demands some remedy.

Sec. 17, Rev. Stat. 1874, p. 777, prescribes that "all the causes shall be tried or otherwise disposed of in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct."

Although the Supreme Court hold that the above rule of the Superior Court is in conflict with section 29, article 6 of the Constitution, and section 36 of the Practice Act, Rev. Stat. 1874, p. 779, in providing a different rule for that court from the general practice throughout the state. *Angel* v. *Plume and A. Manufacturing Co.*, 73 Ill. 412; *Griswold* v. *Shaw*, 79 Ill. 449; *Fisher* v. *National Bank of Commerce*, 73 Ill. 34. Yet where a proper affidavit of claim has been filed under section 36 of the Practice Act it is held that the procedure prescribed in the FIVE DAYS RULE above set forth, may be pursued. *Angel* v. *Plume and Atwood Man. Co.*, 73 Ill. 412; *Smith* v. *Third National Bank of St. Louis*, 79 Ill. 118; *Lincoln* v. *Schwartz*, 70 Ill. 134. For under the Practice Act the court has power for good and sufficient cause to order an immediate or speedy trial before the cause has been reached for trial in its order on the docket, independent of any rule of court (*Smith* v. *Third National Bank of St. Louis*, 79 Ill. 118), and it rests in the sound legal discretion of the court to determine what is a good and sufficient cause for immediate trial, and unless such discretion has been flagrantly abused its action in such a matter will not be reviewed on appeal (id.).

These decisions, as a whole, seem to sanction the motion for a speedy trial on a broader basis than the rule of the Superior Court

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of Cook county ever did. That rule ignores the affidavit of claim; the statute requires it in order to a speedy trial and immediate judgment as against a sham defense.

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION. JUNE TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY; THE HON. AMOS WATTS, JUDGE, PRESIDING.

THOMAS PURCELL *v.* ALFRED PARKS.

[82 Ill. 346.]

COUNTY CLERK—*Fees and salary.*

CONSTITUTIONAL LAW—*Increasing and diminishing salary.*—The clerk, under the constitution and statute, is not entitled to appropriate to his own use any of the fees of his office, except by virtue of an order of the county board. In the absence of such order such clerk has no compensation by law whatever. Hence the fixing of such compensation by the county board did not increase or diminish his compensation, for up to that time he had *no compensation* to be increased or diminished. His compensation should have been fixed before the election.

COUNTY BOARD—*Fixing compensation.*—When the board has once acted and fixed the compensation of the county clerk, that compensation cannot be changed so as to increase or diminish the compensation to be received by him during his term.

HENRY C. GOODNOW, *Attorney for Appellant.*
TILMAN RASER and THOMAS E. MERRITT, *Attorneys for Appellee.*

Justice DICKEY delivered the opinion of the court:

By the constitution of this state, adopted in 1870, it is provided that "the fees, salary or compensation of *no municipal officer*, who is elected or appointed for any definite term of office, shall be *increased* or *diminished* during such term," sec. 11, art. 9.

A county clerk is required to be elected in each county, who shall enter upon his duties on the first Monday of December next after his election, and hold his office "for the term of four years," sec. 8, art. 10. As to all county officers who should be in office at the meeting of the first general assembly after the adoption of the constitution, it was provided by the constitution, that all laws then in force fixing their fees should terminate with the respective terms of such officers, and that the general assembly should "provide for and regulate the fees of said officers and *their successors*, so as to reduce the same to a reasonable *compensation* for services actually rendered," sec. 12, art. 10. It is also provided by the constitution, "that the county board of each county shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses; and, in all cases where fees are provided for, said compensation shall be paid only out of, and shall, in no

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instance, exceed, the fees actually collected," and that "they shall not allow either of them more per annum than" $2,000, in counties containing 20,000, and not exceeding 30,000 inhabitants: "*Provided*, that the compensation of no officer shall be increased or diminished during his term of office." "All fees or allowances by them received, in excess of their said compensation, shall be paid into the county treasury," sec. 10, art. 10.

In pursuance of the requirements of the constitution, the general assembly, by an act approved March 29, 1872, did provide for and regulate, among other fees, the fees of county clerks. Rev. Laws 1874, chap. 53, secs. 13 and 18.

In the county of Marion the county board took no action in the matter of fixing the compensation of the county clerk of that county until in March, 1874.

Purcell was elected county clerk of that county at the November election, 1873, for a term of four years from and after the first Monday of December of that year, and, on the latter day, qualified as such and entered upon the duties of his office, and charged and received fees under the act of 1872 providing for and regulating the fees of various officers.

At the March term, 1874, during the term of this officer, the county board of Marion county made and entered on record, against the protestations of this officer, an order, as follows: "*Ordered*, that the *salary* of the county clerk be one thousand dollars per year, to be in force from the first day of December, 1873, as provided by an act of the general assembly approved March 29, 1872, and in force July 1, 1872." This action was brought by the treasurer, in behalf of the county, against the county clerk, claiming to recover the excess of the amount of fees actually received by the clerk up to the day of bringing suit, over and above the amount of his salary due at that time, at the rate fixed by this order of March, 1874. The admissions of the parties at the trial show, also, that such excess amounted to the sum of $1,060.61, after deducting necessary expenses for clerk hire, stationery, fuel, and other necessary office expenses. The Circuit Court gave judgment for that sum against Purcell, the clerk. He appeals to this court.

I am instructed by the court to say that, in the opinion of a majority of the judges thereof, the clerk, under the constitution and statute, is not entitled to appropriate to his own use any of the fees of his office, except by virtue of an order of the county board. In the absence of such order, such clerk has no compensation by law whatever. Hence the fixing of such compensation by the county board, in their order of March, 1874, did not, in the sense of the constitution, either increase or diminish the compensation of such officer, for, up to that time, he had, by law, *no compensation* to be increased or diminished. It was the duty of the county board to have fixed the compensation in question before the election. Not having done so, the power remained unexhausted, and the board might have been

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compelled, either before or after the term began, to exercise the power and fix the same.

We are all of the opinion that when the board has once acted, and fixed the compensation of the county clerk, that compensation cannot be changed so as to increase or diminish the compensation to be received by him during his term. A subsequent order of the county board, increasing or diminishing the compensation of the county clerk, can operate only upon the compensation of clerks whose terms begin after the making of such order.

The judgment of the court below is, therefore, affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1876.

WRIT OF ERROR TO THE CIRCUIT COURT OF LEE COUNTY; THE HON. WILLIAM W. HEATON, JUDGE, PRESIDING.

CHARLES C. JOHNSON *v.* THE PEOPLE OF THE STATE OF ILLINOIS.

WITNESS — *Credibility not impeached by ignorance.*—The fact that a witness is ignorant on some questions, and is unable to tell in what county he resides, does not show that he is not entitled to credit for truth and veracity.

ACCESSORY—*In sale of liquors, by making change.*—A person employed in making change for parties engaged in unlawfully selling intoxicating liquors to minors, may be convicted, on indictment, for selling the liquors, as aiding and assisting in the transaction.

INTOXICATING LIQUORS—*To minors need not be by a dram-shop keeper.*—The statute making it criminal to sell intoxicating liquors to minors without the consent of their parents, etc., is not restricted to the keepers of dram-shops, and therefore it is not necessary to allege, in the indictment, that the defendant, or those for whom he acted in making such sales, was the keeper of a dram-shop.

CONSTITUTIONAL LAW — *Of the passage of laws — the title.*—The constitutional requirement that, in order to the proper passage of a bill, with an appropriate title, there must be a favorable vote by a majority of all the members elected to each house, does not apply to the adoption of a different or amended title to the act after the bill has passed. Such new title may be adopted by a majority of a mere quorum.

SAME—*Expressing object of bill in title.*—The constitution does not provide that the subject of a bill shall be specifically and exactly expressed in the title, but any expression in the title which calls attention to the subject of the bill, although in general terms, will be sufficient. The general expression of licenses in a title will embrace a bill relating to licenses for the sale of intoxicating liquors.

CRIMINAL LAW — *Sentence on conviction under several counts.*—Where a defendant is convicted under several counts of an indictment for selling intoxicating liquors, it is erroneous in the judgment to fix the day and hour when the imprisonment shall commence and end under each count. The sentence to imprisonment should be for a specified number of days under each count upon which a

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conviction is had, the imprisonment under each succeeding count to commence when it ends under the preceding one, without fixing the day and hour of any.

J. V. EUSTACE, *for the Plaintiff in Error.*
JAMES K. EDSALL, *Attorney-General, for the People.*

Justice WALKER delivered the opinion of the court:

This was an indictment against Charles C. Johnson for selling intoxicating liquor to minors at a fourth of July celebration. It contained twenty-four counts, charging sales to twelve different named persons.

The defendant pleaded not guilty, and a trial was had resulting in a verdict finding the defendant guilty, except as to the seventeenth and eighteenth counts. The defendant moved for a new trial, which was denied, and judgment rendered on the verdict.

It is first urged, that the evidence fails to sustain a verdict of guilty under the sixteenth count, and that there was no other count under which plaintiff in error could have been convicted of sales actually made by him. Barton swears that plaintiff in error sold to him two glasses of beer, one for himself and the other for one Bitner. Plaintiff in error denies that there was any such sale; that he sold none to him, nor did he sell to any other person. Barton testified that he was eighteen years old.

There was a flat contradiction between the statements of these witnesses, and it was for the jury to judge of their veracity, and having done so, their action will not be lightly disturbed. The jury had the witnesses before them, and could see their manner of testifying, and they, no doubt, in determining the truth, took into consideration all the attending circumstances of the case. Plaintiff in error was deeply interested in the event of the trial, and the prosecuting witness was not, so far as this record discloses. This, of itself, for aught we can know, may have fully warranted the jury in giving credence to the evidence of the prosecuting witness. For anything we can know, the manner of plaintiff in error, when on the stand, may have been such as to satisfy the jury that he was unworthy of belief.

It is urged that the prosecuting witness was ignorant, and hence we should not give him credit for truth and veracity. He seems not to have known in what county Knox Grove was situated. This may be true, and still the witness be entirely truthful as to what he does know. Men, with but few, if any, exceptions, are ignorant on some questions, and no one for that reason doubts their veracity. This objection was, no doubt, fully considered by the jury, and they were convinced that he spoke the truth, and we see no reason to say they were mistaken.

It is also urged, plaintiff in error was improperly convicted under the other counts—that he was simply employed to make change for the six or seven persons who were selling beer, lemonade, candy, etc. He and the others were acting in concert. They were carrying out a common purpose. He aided in making these sales if he

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gave change when the minors purchased the beer. He to that extent aided and assisted in making these sales. He thereby took an active part, and was one of the actors. It may be he was not as active as others, but nevertheless he acted conjointly with the salesmen. He made no protest against such sales, and being present, and participating in what was done, the jury were warranted in finding that he knew beer was being sold to minors, and that he aided and abetted in such sales.

It is next urged that there is no averment in the indictment that plaintiff in error, or any person with whom he was acting, was the keeper of a dram-shop. The sixth section of the dram-shop act provides that "whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, without the written order of his parent, guardian or family physician, . . . for each offense shall be fined," etc. Now, there is no reference in this section to the keeper of a dram-shop. The language is sufficiently broad to embrace all other persons, as well as the keepers of dram-shops. The manifest object of this section is to prevent the sale or giving of liquors to minors, without the consent of parents, guardians, etc. To hold that it only applied to keepers of dram-shops would do violence to the design of the general assembly in adopting this section. It is not necessary to now determine whether a person would incur the penalty of this section by giving it as an act of hospitality at his house, as that question is not before the court. The question here is, whether a person having or not having a license to keep a dram-shop may sell intoxicating drink to minors, and we think it is manifest he cannot, without incurring the penalty prescribed by the law.

It is also urged that the act under which this prosecution was conducted is void, under our fundamental law. It is claimed that whilst the body of the law was adopted on the call of the "ayes" and "noes," spread upon the journals of the senate, by a majority of all the senators elect, the title to the act only passed by a majority of a quorum. The journals show that twenty-four senators voted "aye," when it required twenty-six to be a majority of all the members elect. Does, then, the constitution require such a majority to adopt the title to a law? It is not required by the letter of the constitution. According to parliamentary usage, the title is not an essential part of a bill, although under our constitution it seems to be. Usage authorized it, and it was the custom to adopt the title to an act after its final passage.

But our constitution has worked a radical change in this usage, as it provides, art. 4, sec. 13, that "every bill shall be read at large on three different days, in each house, and the bill and all amendments thereto shall be printed before the vote is taken on its final passage; and every bill, having passed both houses, shall be signed by the speakers thereof. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." This is all of the section which seems to be important in the consideration of the question now before us.

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In the case of *Binz* v. *Weber*, 81 Ill. 288, in passing on a similar provision in the constitution of 1848, applicable to private laws, we said, that the validity of the act must depend, under such a provision, upon the title to the bill as it passed both houses, and not on the title to the law after its adoption. What we there said, we think applies to the requirements of our present constitution, as to the adoption of general laws. Hence we regard it unnecessary to further discuss this question.

Is, then, the title by which the bill was passed, sufficient to sustain the law? The title, as the bill passed the senate, was: "A bill for an act to revise the law in relation to licenses." For the bill, with this title, twenty-nine senators voted, and eleven against. After the bill had so passed the senate, on motion, the title was so changed as to read: "A bill for an act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors." The change in the title was adopted by "ayes, 24; noes, 11." As thus amended, the bill was sent to the house, where it was constitutionally passed through that body, with the title as amended in the senate, and was returned to that body, and all the requisite subsequent steps were taken for it to become a law.

On turning to the chapter entitled "License," in the Revised Statutes of 1845, we find that the first eight sections refer to licensing peddlers auctioneers and merchants. Sections from nine to twenty-one, inclusive, relate to the sale of liquors and licenses therefor. Sections from twenty-two to twenty-eight, inclusive, relate to licensing insurance companies, and for the collection of penalties incurred under the chapter, and the disposition of the money collected for forfeitures. Thus it will be seen, the law in relation to license and sale of intoxicating liquors was found in this chapter, and when the bill passed the senate, with the original title, that title certainly referred to the chapter regulating liquor licenses, and embraced such licenses, and that subject was expressed in the title. It may be that licenses to sell liquor were not specifically named in the title, but it was undoubtedly so expressed as to call the attention of every senator to the subject-matter of the bill, and we have no doubt that this general expression of the subject of the bill answers the constitutional requirement. The provision does not require that the subject of the bill shall be specifically and exactly expressed in the title, hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required.

This title called attention to the chapter regulating licenses, and that chapter provided for licensing saloons, and as all the law on subject was then only found under the title of that chapter, we presume every member of the senate knew, by the title, that the bill proposed to revise the chapter, and in doing so that it would almost necessarily affect liquor licenses. Had the bill been specific, and the title had proposed to license lawyers, physicians, druggists, or some other occupation, and the bill had contained the provisions as

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it was adopted, then this requirement of the constitution would have probably rendered the law inoderative. But it was general, and expressed the subject of the bill generally, but with sufficient distinctness to answer the constitutional requirement, so that if the title must be adopted as is the bill on its final passage, a sufficient title was so adopted when the bill passed the senate. It does not matter in what manner the title was subsequently changed by the senate, so that the title thus changed called the attention of the house to the provisions of the bill, and the title under which the bill went to the house was specific and certain for that purpose. We have no hesitancy in saying that the bill was properly and constitutionally passed into a law, and must be enforced.

But the court below erred in the judgment it rendered on the verdict in this case. It fixed the day and hour when the imprisonment should commence under each count upon which plaintiff in error was found guilty. Since a *supersedeas* was granted in this case it has become impossible that the judgment of imprisonment can be carried into effect, as the time fixed by the court has elapsed and expired. Other contingences might arise which would render it impracticable to carry such a judgment into effect. The sentence to imprisonment should be for a specified number of days under each couni upon which a conviction is had, and the judgment should require that the imprisonment under each subceeding count should commence where it ends under the preceding count, without fixing the day or hour for each or either to commence or end. For this error the judgment of the court below must be reversed, and the cause remanded with directions that the court enter a proper judgment on the verdict. *Judgment reversed.*

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION. JUNE TERM, 1876.

APPEAL FROM JASPER COUNTY; THE HON. J. C. ALLEN, JUDGE, PRESIDING.

JAMES LEAMON ET AL. *v.* ROBERT G. MCCUBBIN ET AL.

(To appear in 82 Ill. 263.)

PROBATE JURISDICTION—*Descent and distribution.*—Heirs can only take title to personal estate "through due administration under the direction of the proper court" in probate.

AN ADMINISTRATOR—Of an intestate estate must be appointed and regular proceedings in administration had, and the property duly distributed by the proper court according to law.

BROWN & GIBSON, *Attorneys for Appellants.*

J. M. HONEY, *Attorney for Appellees.*

Justice DICKEY delivered the opinion of the court:

This was an action of *assumpsit*, by appellees, against appellants. Plaintiffs, in their declaration, allege that appellants made their

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promissory note in 1861, for a specified sum, payable to Phœbe McCubbin, at four months from date; that the note remained unpaid; that Phoebe McCubbin died intestate in 1870, leaving plaintiffs her only heirs-at-law; that, at her death, she was not indebted, and there were no claims against her estate, save her funeral expenses, which plaintiffs have paid, and that no administrator of the estate has been appointed.

Defendants pleaded *non assumpsit.* The trial was by the court by consent. At the trial, plaintiffs read the note in evidence, and there was no other evidence. The court found the issue for plaintiffs. Defendants excepted to the finding, but judgment went upon the finding, and defendants appeal.

The judgment cannot be sustained. It is insisted by appellees that, "under our statute the title to all property, real and personal, vests in the heirs of an intestate, after payment of just debts," and hence the appointment of an administrator was not necessary to the maintenance of an action on this note, and that the heirs may sue in their own name. The general words of our statute were never intended, and should not be construed, as changing entirely the mode of collecting and distributing the personal effects of estates of deceased persons. The statute says: "Estates, both real and personal, of proprietors dying intestate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in the manner following: First, to his or her children, . . . in equal parts." Of course the personal estate is to "descend to and be distributed" to the heirs; but in what manner is this distribution to be effected? Through due administration under the direction of the proper court. This language merely designates the ultimate rights of parties, and was never designed to interfere with the ordinary and approved mode of collecting debts due the estate through an administrator.

Even were the law as insisted upon, the proof in this case fails to make out a case. There is no proof of the allegations of the death of the payee of the note, or that she died intestate, or that the debts were all paid, or that plaintiffs were the only heirs-at-law.

The judgment is reversed. *Judgment reversed.*

Justice BREESE: I concur in the last branch of the opinion.

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION. JUNE TERM, 1876.

CAIRO & ST. LOUIS R. R. CO. *v.* MURRAY.

(To appear in 82 Ill. 76.)

JURISDICTION OF A JUSTICE OF THE PEACE—*Practice.*—Action for double damages for killing stock, against a railway company, may be brought under sec. 37, chap. 114, Rev. Stat. 1874, p. 807, before a justice of the peace; the summons may be in the usual form. See Jones' Forms, p. 510.

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PRACTICE ON APPEAL.—No exception can be taken to the form or service of the summons of a justice of the peace on appeal, but the court is to hear and determine the same according to the justice of the case. Sec. 72, Rev. Stat. 1874, 648.

SEARLS & BUTLER, *Attorneys for Appellant.*
J. B. MAYHAM and G. W. HILL, *Attorneys for Appellee.*

Justice DICKEY delivered the opinion of the court:

The horse of appellee, being on the railroad track of appellant, was run upon and killed by an engine of appellant, at a point where the track was not fenced, and where, by the statute, the railroad company was required to have the same fenced. The horse was worth fifty dollars. Appellee recovered one hundred dollars damages, the statute giving, in such case, double the amount of actual damages.

The suit was begun before a justice of the peace. The summons does not indicate the character of the action, further than to say, "for a failure to pay him (appellee) a certain sum, not exceeding two hundred dollars." It is insisted that, under this form of summons, the claim for penal damages cannot be allowed.

The statute does not specifically prescribe a different form of summons for such cases, and it is provided that, on trial of appeals from justices of the peace, "no exception shall be taken to the form or service of the summons, . . . but the court shall hear and determine the same . . . according to the justice of the case." Rev. Stat. 1874, sec. 72, chap. 79, p. 648.

It is also insisted that, by sec. 75 of chap. 114, Rev. Stat. 1874, no action can be maintained for a violation of that statute except in the name of the people. That section, by its terms, is confined to actions to recover *fines*, and has no reference to the mode of recovering *damages* under sec. 37 of the act.

It is also insisted that plaintiff cannot recover, because his horse was running at large, when, by the statute, it was unlawful for plaintiff to permit his horse to run at large. It would seem, from the proof, that this horse, at the time, was, in fact, running at large.

The statute in relation to the running at large of horses and other stock was enacted March 30, 1874. The statute in relation to the liability of railway companies for a failure to fence their roads was enacted March 31, 1874. No exception is made, in the latter act, as to horses running at large. The mere fact that stock is running at large in violation of that statute, does not relieve railroad companies from liability for stock injured, where the company fails to fence as required by statute. *Ewing* v. *Chicago, Alton & St. Louis Railroad Co.*, 72 Ill. 25. It is difficult to conceive any good to be accomplished by having the railroad fenced, unless it be to prevent roaming domestic animals from receiving injury.

It is also insisted that the proof does not show appellant guilty of negligence. The ground of recovery, under this statute, is, the fault

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of the railroad company in failing to build the fences required. No other fault, in such case, need be shown.

The judgment must be affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

JUSTICES OF THE PEACE.—We would call the attention of the profession to the following quite recent decisions relative to the jurisdiction of and practice before justices of the peace in Illinois:

IN ASSAULT AND BATTERY, on appeal from a justice of the peace the record need not show a formal plea: formal pleadings before a justice of the peace are not required. *Hennies* v. *The People*, 70 Ill. 100; see Jones' Forms, p. 493.

SUBSTANCE AND NOT FORM is regarded in proceedings before a justice of the peace. *Zuel* v. *Brown*, 78 Ill. 234. Where a defendant who was sued on a promissory note filed a plea verified by his affidavit "that he neither signed nor authorized or consented to the execution of the note" is sufficient, and *it was held* to be error to permit the note to be read without first proving its execution. *Zuel* v. *Bowen*, 78 Ill. 234; see, also, *Linn* v. *Buckingham*, 1 Scam. 451; *Archer* v. *Bogue*, 3 Scam. 526; Jones' Forms, p. 493, 496.

COMPLAINT FOR VIOLATION OF A CITY ORDINANCE may be made on information and belief. *Byars* v. *City of Mt. Vernon*, 78 Ill. 11.

MATTERS IN ABATEMENT must be stated and objections made before the justice. *Byars* v. *City of Mt. Vernon*, 77 Ill. 467. So where a party, when arrested for a violation of a city ordinance, made no objection to the sufficiency of the complaint, before the justice, it was *held* that he could not for the first time raise the question on appeal in the Circuit Court (id.). See *Conley* v. *Good*, Breese, 96; Jones' Forms, p. 392.

A JUSTICE OF THE PEACE has jurisdiction throughout his county to issue a writ, but it should be returnable to his office, which must be at a known place in his town or precinct. *Durfee* v. *Grinnell*, 69 Ill. 371. So he may take an acknowledgment or administer an oath anywhere in his county, but all trials before him must be at his office (id.). As to sum, $200 is the limit to be determined from the evidence. *Happel* v. *Brethauer*, 70 Ill. 166. If it appear that the justice has jurisdiction both of the subject-matter and the person to render a judgment, it will not be defeated by technicalities. *Bliss* v. *Harris*, 70 Ill. 343.

INDORSEMENT OF THE SUMMONS limits the amount of the plaintiff's recovery. *T. P. & W. Railway* v. *Pierce*, 71 Ill. 174; see Jones' Forms, pp. 379, 514.

AMENDMENTS to the summons and other papers may be made at any time before trial. No entry of an order is necessary on his docket. *Wadhams* v. *Hotchkiss*, 80 Ill. 437.

CONSOLIDATION OF DEMANDS: A had a note for $66.66 for part and a claim for $33.34 the remainder of a reward against B. A sued B for the $33.34, and recovered. *Held*, that he should have sued for $100, and brought forward the note, and as he did not, he had

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lost his claim on the note by the former recovery. *Mallock* v. *Krome*, 78 Ill. 110; see Jones' Forms, pp. 494, 495.

RECOUPMENT OR COUNTER CLAIM: Suit was brought by a physician and surgeon to recover for services for setting a broken arm. *Held*, that defendant might set up malpractice in defense and recoup damages sufficient to defeat the claim. *Howell* v. *Goodrich*, 69 Ill. 556.

MUST WAIT ONE HOUR FOR APPEARANCE. *First National Bank* v. *Beresford*, 78 Ill. 391.

APPEARANCE by defendant without objection waives process and defects in its service. *Bliss* v. *Harris*, 70 Ill. 343.

SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

IN CHANCERY.

NICKERSON ET AL. *v.* KIMBALL ET AL.
BARTON ET AL. *v.* KIMBALL ET AL.
COOLBAUGH ET AL. *v.* KIMBALL ET AL.
BLAIR ET AL. *v.* KIMBALL ET AL.
FAIRBANK ET AL. *v.* KIMBALL ET AL.
STURGES ET AL. *v.* KIMBALL ET AL.

TAXATION OF NATIONAL BANK STOCK.—The *stockholders* in every bank located within this state shall be assessed and taxed on the value of their shares of stock therein, whether residents or non-residents, and this tax shall be a lien upon such stock. This tax shall be levied according to "valuation" of the property to be taxed, and shall extend to persons and corporations alike. It must be "uniform" and must not "discriminate." An error in the views different men may take of values does not show want of "uniformity."

COUNTY BOARD—*Complaint.*—The county board, acting as a board of equalization, may review and correct what has not been done correctly, as shall appear to be just. Any complaint to the board shall not be acted upon until the person assessed, or his agent, shall be notified of such complaint, if a resident of the county.

CONSTRUCTION OF STATUTE—*Secs. 97 and 191, chap. 120, Rev. Stat. 873, 890 construed together.*—Any one may complain that another is assessed too low, but such complaint shall not be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof.

JURISDICTION—*Notice.*—The board cannot exercise jurisdiction without special notice to be affected thereby. This is the direction of the statute, and to disregard it is an error. The valuation or assessment, and the return by the

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assessor, is the matter that first confers jurisdiction upon those exercising the power to raise an assessment. As the law now stands, the jurisdictional question is necessary, since the court will not enjoin the collection of a tax for *mere* error or informality.

DIVIDENDS.—The *officers* of a bank must retain the *dividends* belonging to the stockholders until the tax shall have been paid, and any officer violating this rule becomes thereby personally liable.

NOTICE—*How and to whom it may be given.*—It is error in the state board of equalization to make and correct an assessment without special notice to be affected thereby. Notice is sufficient when actually brought home to the party to be affected thereby. *Knowledge* brought home to any complainant, or his agent, is sufficient. Appearance before the county board to resist the review and correction of an assessment, is notice.

PROCESS—*Notice differs from original.*—The notice required is not in every particular like an original process, which cannot, as a general thing, be served on an agent. In this matter it is only necessary that the agent be *notified*. The statute requires simple notice.

TENANT—*Notice served upon.*—A notice under the tax law served upon the tenant, of the one complaining of the tax, is not a sufficient service.

DIRECTOR—*Sufficient notice to.*—It is a general rule that notice to an individual director, who has no duty to perform in relation to the subject-matter of the notice, is not a notice to the corporation.

AGENT—*Notice to bind principal.*—It is a fundamental principle that notice served on the agent to bind the principal must be served whilst the agent is acting within the scope of his agency. The statute requires the notice to be served on the principal or his agent *only*, and this is sufficient notice to give jurisdiction of the persons of the shareholders.

BANK—*Agent of stockholders.*—The statute makes the bank the agent of the stockholder, for some purposes connected with the taxation of the shares of stock. The bank acts as *quasi* trustee in managing the business of the shareholders.

COMPLAINT—*Notification—sufficiency of.*—Any one may complain that another is assessed too low, but such complaint shall not be acted upon until the party assessed, or his agent, shall be notified of such complaint. The complaint should contain some traversable fact, and not be vague and nugatory, so that the party appearing may be informed of the matter which he is called to meet. The description "shareholders in a particular bank," held sufficient.

CERTIFICATE OF LEVY—*Time of filing.*—The 191st section of the Revenue Law cures all defects growing out of a failure to file the certificate on or before the second Tuesday in August, the day named in the 122d section. Under section 191 the failure to file the certificate in apt time does not vitiate the tax or assessment.

CONGRESS—*Provision of the act of.*—Under the act of congress the right of the states to tax all shares in the stock of the national banks clearly exists.

TECHNICAL OBJECTIONS.—Mere technical objections not affecting the justice of the tax itself, should not be regarded.

INJUNCTION—*Denial of.*—The cases presented fail to show anything that affects the substantial justice of the tax itself, and until this is shown the court cannot grant the relief sought.

CHARLES HITCHCOCK, WIRT DEXTER, SIDNEY SMITH, MELVIN W. FULLER, GEO. W. KRETZINGER, *Attorneys for Plaintiffs.*

ELLIOTT ANTHONY AND JOHN M. ROUNTREE, *Attorneys for Defendants.*

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Justice MOORE delivered the opinion of the court, May 9, 1877:

The constitution of the state provides for raising revenue by levying taxes, by or according to "valuation" of the property to be taxed; everyone shall be taxed and pay in proportion to the value of his property. This rule is extended to persons and corporations owning or using franchises and privileges. Taxes must be "uniform" in respect to persons and property; every law that imposes a tax must regard every man alike, *vide* Constitution, art. 9, secs. 1, 9, 10, Hurd's Rev. Stat., pp. 74, 75.

The law must not discriminate for or against any one. It must be uniform. The law enacted under the constitution must be enforced by men who may err in judgment, and therefore burdens may fall unequally. This will result from the different views that different men may take of values and the like, and does not show that the law imposing a tax is wanting in the principle of uniformity. This principle of uniformity must extend to every person and to every corporation.

"Personal property . . . shall be valued at its fair cash value," chap. 120, sec. 3, Hurd's Rev. Stat., p. 857.

"*The stockholders* in every bank located within this state, whether such bank has been organized under the banking laws of this state, or of the United States, shall be assessed and taxed on the value of their shares of stock therein, in the county, town, district, village or city where such bank is located, and not elsewhere, whether such stockholders reside in such place or not. . . . Taxation of such shares shall not be at a greater rate than is assessed upon any other monied capital . . . where such bank is located." In each of said banks there shall be a list of the names and residences of its stockholders, and of the number of shares held by each. This list shall be open to the inspection of the revenue officers, "and it shall be the duty of the assessor to ascertain and report to the county clerk a correct list of the names and residences of all stockholders in any such bank, with the number and assessed value of all such shares held by such stockholder," sec. 36.

"The county clerk . . . shall enter the valuation of such shares in the tax lists in the names of the respective owners of the same, and shall compute and extend taxes thereon the same as against the valuation of other property in the same locality," sec. 37.

This tax is declared to be a lien upon the respective shares of stock, sec. 38.

It is made the duty of the bank or its officers to retain the dividends belonging to the respective stockholders until the tax shall have been paid. Any officer violating this provision of the law shall thereby become liable for such tax. The collector may sell the shares of stock when the owner refuses to pay the tax, chap. 120, secs. 35, 36, 37, 38, 39 Rev. Stat., p. 864.

There can be no question but that these provisions of the law are in harmony with the constitution. The "valuation" is required, as is "uniformity," and all as provided by the constitution. The

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law makes the same provision in valuation to every one who may own the stock of the various banks in the state. If the tax imposed by this law operates unequally, it must be because the law itself is not complied with.

It was seen that the assessor must be a man, and so might fail in discharging his duty. Hence the county board, acting as a board of equalization, may review and correct what has not been done correctly. "On the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just." That is to say, if any one thinks his property has been valued too high, and so considers himself "aggrieved," he may complain, and if the board regard his complaint as well founded, then they will review and correct the assessment, by reducing the valuation; or it may be some one thinks that burdens are not equal, and so "complains that the property of another is assessed too low." It is then the duty of the board to review and correct the assessment as shall appear to be just. If the complaint is well founded, as in the former case, the assessment can be corrected only by increasing the "valuation." However, it is provided that "no complaint that another is assessed too low shall be acted upon until the person so assessed or his agent shall be notified of such complaint, if a resident of the county," chap. 120, sec. 97, sub. sec. 2, Rev. Stat., p. 873.

One other provision of the statute has been referred to in considering these cases. That provision, it is claimed, modifies the other provisions referred to materially, modifies many decisions of the Supreme Court. It is provided (*inter alia*) that "no error or informality in *the proceedings* of any of the officers connected with *the assessment*, levying or collecting of the taxes, *not affecting the substantial justice of the tax itself*, shall vitiate or in any manner affect the tax or the *assessment* thereof," chap. 120, sec. 191, Rev. Stat., p. 890. True it is, this provision is found in the middle of a section that is providing for the proper mode of rendering judgment on the delinquent tax lists; but yet there is no language or words used in any other part of the section that changes, or modifies, or limits the meaning of the provision enacted. The words would mean the same, neither more nor less, if they stood alone in a separate section, or in any other connection.

The provisions under consideration, when brought together, then, may be read in this way: "Any one may complain that another is assessed too low, but such complaint shall not be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof."

Nickerson *et al.* aver that they are shareholders of the stock of the

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First National Bank of Chicago. Barton *et al.* are shareholders of the stock of the Fifth National Bank of Chicago. Coolbaugh *et al.* are like shareholders of the stock of the Union National Bank of Chicago. Blair *et al.* are shareholders of the stock of the Merchants' National Bank of Chicago. Fairbank *et al.* are shareholders of the stock of the Commercial National Bank of Chicago; and Sturges *et al.* are the shareholders of the stock of the Northwestern National Bank of Chicago. The respective complainants make substantially the same averments. The complainants are all residents of the county of Cook, and the respective banks are located in Chicago.

In addition to other averments which are necessary to give jurisdiction, it is averred that the shares of stock of each bank were "assessed and taxed on the value of the shares;" that the assessor of the town of South Chicago, as such assessor, listed the shares of the capital stock of the respective banks for taxation, he giving the valuation thereof as fixed by himself; that this assessment so made by him was returned to the county clerk; that then it was the duty of the clerk to enter the valuation of the shares, as made by the assessor, in the tax lists, in the names of the respective owners, and compute and extend the tax therein on the valuation so made; that these things are required by the provisions of the statutes hereinbefore quoted; "that the assessor, in making the assessment for the year 1876, listed all bank shares and like property at one third of the value which in his judgment said shares were actually worth."

To this point no question is raised but that the law has been complied with. But complaint was made by persons stating that they considered themselves aggrieved, and complained that the personal property of the following named persons, firms and corporations have been assessed too low for the year 1876, to wit: *shareholders* "of the stock of the respective banks, and designating the name of the bank. This complaint was addressed to the Board of Commissioners of Cook County, and those complaining asked the board to review the assessments for 1876 of said persons, firms and corporations, and correct the same as shall appear to be just." This was the only complaint that was filed, and the only notice of this complaint was given to the presidents or cashiers of the banks.

The board did review the assessments, and corrected them by increasing the valuation very considerably; but in no case did the valuation or assessment thus increased amount to more than one third of what appears to be a fair cash market value of the respective shares of stock. It is admitted that the stock is personal property, and it is not claimed by any complainant that the shares, by either the assessor or board, were "valued at their fair cash value."

The complainants aver that the county board had no jurisdiction of the matter, or, rather, of the persons of the complainants, until the complainants or their respective agents had notice of such complaint; and they claim that neither the bank or any officer of the bank was agent of the shareholders.

A number of authorities are referred to by the learned counsel to

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show that the question of notice is *jurisdictional.* It is perhaps by some of the counsel conceded that the county board had jurisdiction of the subject-matter, and it is claimed that the said board could have jurisdiction of the persons residing in Cook county only when they have notice. This notice is not required as to any one residing beyond the limits of Cook county. If the complainants be correct, then the fact that notice to non-residents is not required must operate as a hardship. It is not protecting all alike. It must be borne in mind that the valuation or assessment made and returned by the assessor is made by procuring the necessary information from the bank. The officer calls at the bank and makes his list, and then the valuation is made and returned. Of this fact and of the additional fact that dividends must be retained by the bank until the tax is paid, every person must take notice. This assessment and this return, it may be said, is the matter that, in the first place, confers jurisdiction or sets in motion the officers and those having jurisdiction. It has been held in our own state, "that where the board of supervisors exercise the power to revise the assessment of an individual, he must have notice, and an opportunity to be heard, before it can be legally done." *Cleghorn* v. *Posthwaite*, 43 Ill. 428; *Darling* v. *Gunn*, 50 Ill. 424; *First National Bank of Shawneetown* v. *Cook et al.*, 77 Ill. 622.

This last named decision was made under the law as it existed March 7, 1873. The provision of the law that is supposed to modify the law as it then existed, took effect July 1, 1873, and provides that no error or informality not affecting the substantial justice of the tax itself shall vitiate or affect the tax on the assessment thereof.

In the case of *Darling* v. *Gunn*, 50 Ill. 459, the court holds: "The tax, to the extent it was increased, . . . having been levied on an unauthorized assessment, made by persons having no jurisdiction of the person to make the assessment, without notice to the appellant, its collection should have been enjoined."

This case falls within the former decisions of the court, in which it is held that a court will not interfere to restrain the collection of a tax unless it is levied by persons having no authority. As the law then stood, it was incumbent on the court to find that error existed; but it was not necessary to find more than that error existed. That was all that was required. It was not necessary to pass upon the jurisdictional question. As the law now stands, this inquiry is necessary, since the court will not enjoin the collection of a tax for *mere* error or informality. It cannot be that the various officers must give notice to every one specially concerned before they can act in relation to the assessment of taxes.

In the case of the *National Bank of Shawneetown* v. *Cook*, 77 Ill. 626, the assessment had been made and corrected by the state board of equalization, and then, without notice, the valuation was increased; and the court holds: "that it is a proposition upon which there can be no doubt that the board *had no power* to make any change in the assessment without notice to appellant." By this

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language the court is understood as holding no more than that it was simply error in the board to exercise the power without special notice to be affected thereby. That was the direction of the statute, and it is still the direction of the statute, and to disregard it is an error.

In the case of *Mix* v. *People*, it was held that the levy must be made within the time prescribed by law, or it would be void. Was it necessary for the court to hold language so strong? Was it intended to decide anything more than that, as the law then existed, it was such an error as vitiated the levy of the tax? The Supreme Court afterward said: "It is also urged that the local taxes were not levied and returned to the clerk in time; and in support of the position, the case of *Mix* v. *The People*, June term, 1874, is referred to as controlling this. That tax was levied under the law of 1872, whilst this is under the statute of 1873, which amends the prior law, see sec. 191, p. 890, Rev. Stat. 1874. That section declares that no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof. This provision most effectually disposes of this question." *Buck* v. *The People*, 78 Ill. 566.

Then again it is held by the Supreme Court: "It is urged that the certificates of the levy of the local municipal taxes were not filed in the time required by the statute. The answer to this is, as was said in *Buck* v. *The People*, *supra*, that 'it is cured by the 191st section of the Revenue Law. This cures all defects growing out of the failure to file the certificate on or before the day named in the 122d section." *Chiniquy* v. *The People*, 78 Ill. 575.

In the section 122 referred to in the last-cited case, the provision is positive, and appears to be mandatory: "The authorities . . . collecting taxes . . . *shall* annually, on or before the second Tuesday in August, certify," etc., sec. 122, Rev. Stat. 878. This language is not less peremptory than the language used in section 97, Rev. Stat. 873. "No complaint that another has been assessed too low shall be acted upon until the person so assessed or his agent shall be notified of such complaint, if a resident of the county; and yet it is held that since the adoption of sec. 191, Rev. Stat., the fact that the certificate is not filed in apt time is not such an error as will vitiate either the tax or the assessment. The amendment introduced into the 191st section of the present revenue law has produced a radical change in proceedings to recover judgment for delinquent taxes, and has overruled or modified most, if not all, of our previous decisions on the questions thus arising," *vide Chiniquy* v. *The People*, *supra*.

It will be borne in mind that in all these cases the People were seeking judgments, and must show jurisdiction.

In the cases now under consideration, those denying the jurisdiction are the complainants. They must make out their respective

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cases. The People in the cases cited must show that all the officers have complied substantially with the law, or they fail. In these cases now being considered, the complainants take upon themselves to show that the county board had not jurisdiction of the persons of the complainants; and this they must do by overcoming the presumption that a lawful tribunal, in the exercise of its duties, confines itself to whatever authority has been conferred upon it. This is especially true when it is conceded that the tribunal has jurisdiction of the subject-matter of the controversy.

Can it be questioned that the law might provide for the assessment, and review of the assessment, without notice to any one? But courts cannot render a judgment until there is a service of process, either actual or constructive. A judgment without service of some kind would be void and nugatory in every land. And yet, such a rule will not be applied to any tax or revenue matter.

The fact that a man must be taxed on all that he has and that he must be so taxed every year is known to and by every one. The assessor is directed to call on him or on his agent and assess his property. He knows that must be reported, and he should take some notice of what is done in the premises thereafter. There is recognized no provision of sec. 97 that fails to require notice to the shareholder of stock not residing in Cook county. As opposed to this view the learned counsel refers to a New York case. School trustees levied a tax for school purposes. In making up the assessment roll the valuation of plaintiff's property was increased from the valuation thereof upon the town assessment roll. Before making the roll the trustees gave no notice. This assessment is an *original* assessment, made without any call upon the taxpayer: so that it might well be said there is no jurisdiction of his person until he has notice. In that case the learned chief justice reviews the authorities, and says "the authorities are not entirely in harmony and the precise question has not been passed upon by this court." The opinion concludes "that the weight of authority is that the omission to give the notice is a jurisdictional defect," *vide Jewell* v. *Van Steenburgh*, 58 N. Y. 86. These school trustees were allowed to take the assessment roll of the town assessors, and upon proper notice make such changes as to them might seem right; and then for school purposes the trustees could levy their tax. This was as truly an original assessment as that made by the town assessor. There was no original call so as to confer the jurisdiction. It is not clear that this authority is opposed to the suggestions herein made.

A well-considered New Hampshire case is referred to, and judgments that are void or only voidable, are carefully discussed.

It is found by the court that tribunals which have jurisdiction of the subject-matter are not absolutely void by reason of any irregularity or illegality of the proceedings in general, but they are avoidable by proper and timely objections. *The State* v. *Richmond*, 26 N. H. 232.

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If it still be claimed that there was no jurisdiction of the persons of the complainants until they respectively, or their agents, had notice, and that the county board could not review the assessment until such notice had been given, then it becomes an important inquiry how and to whom may such notice be given? There can be no question but that if knowledge was brought home to any of the complainants, such as had the knowledge must be regarded as having had notice. "Actual notice exists where knowledge is actually brought home to the party to be affected by it," *Bouvier's Law Dictionary*. It will be readily conceded that notice to an agent is notice to the principal. If doubted at all it must still be true in the case under consideration, since the statute requires notice to the party *or his agent*. Then, if knowledge is actually brought home to the agent of the complainants they must be regarded as having notice, even if they had, in point of fact, no knowledge that the complaint had been made to the county board that their shares of stock had been assessed too low. It is claimed by one of the counsel that notice to one of his clients, as president of the bank, was not notice to him personally. If knowledge of a fact be notice, and sometimes more than mere notice, then this position cannot be maintained. The statute does not say what kind of notice must be given. It simply requires notice. If any officer of a bank have knowledge that the complaint has been made, and he be the owner of any of the shares of stock, he cannot be allowed to say that he individually has no notice. He has more than mere notice. He has actual, positive knowledge that the complaint is made. In this view there can be no question.

In addition to such actual knowledge, it appears that some of the officers, who are complainants, actually appeared before the county board and opposed the complaint. A party appearing in a suit, with or without service, cannot afterward deny that he is properly before the court. A party appears and cross-examines a witness when giving a deposition; he cannot afterward say he did not have notice of the time and place of taking the deposition. These are familiar principles, admitted by all, and show conclusively that such as appeared before the county board, and resisted the review and correction of the assessment, will not be allowed to deny that they had notice of the complaint. What is notice to those who had no such knowledge? What is notice to such as did not appear and oppose the correction?

The notice required is not, in every particular, like unto the process to be served on a party to bring him before the court. Original process cannot, as a general thing, be served on an agent. In this matter it is only necessary that the agent be notified. The revenue law deals with shares of stock and taxes them as the personal property of each shareholder, and such a tax is not a tax on the capital or property of the bank. *State Farmer's N. Bank* v. *Cook*, 32 N. J. 349; *Van Allen* v. *Nolan*, 3 Wallace, 573.

The case of *Farmer's Bank* v. *Cook*, *supra*, does not pass upon

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the question of service of notice otherwise than as by way of argument. Counsel refers to the case of *State* v. *Drake*, 33 N. J. 194. In that case it is correctly held that a notice under the tax law, served upon the tenant of the one complaining of the tax, is not a sufficient service. There is no reason in concluding that a man's tenant is his agent. It would be more reasonable to select a man's regular attorney or solicitor, and yet it will hardly be contended that such notice might be served on such attorney or solicitor. It is held that a notice to a bank cannot be served on a director having no share in the management of the matter about which the notice is given. The directors or trustees, when assembled for the transaction of business, are the agents of the corporation, and notice to them, when thus assembled, is notice to the corporation and binding upon their successors. But notice to an individual director, who has no duty to perform in relation to the subject-matter of the notice, is not a notice to the corporation. *Powles, etc.*, v. *Page*, 3 Manning E. & S., 16; *The Fulton Bank* v. *The New York & Sharon Canal Co. et al.*, 4 Paige, 127.

This general doctrine will not be questioned, and yet in our state the statute provides that a process against a corporation may be served upon a "clerk," "cashier," "director," etc., if the president shall not be found in the county.

Again, it is held, and is certainly a fundamental principle, that notice served on the agent, in order that it may bind the principal, must be served whilst the agent is acting within the scope of his agency. *Miller* v. *Illinois Central Railroad Co.*, 24 Barbour, 331; *Loomis* v. *Bank of Rochester*, 1 Diversey, 287.

In this connection, whilst laying down general principles, it will be seen that the provision is not that notice shall be given to the principal, and may be given by delivering a copy of a notice to an agent of such principal. The language of the statute is, "no complaint . . . shall be acted upon until the person assessed, *or his agent*, shall be notified." That is to say, the principal may be notified, or, if more convenient, the agent only may be notified.

It is claimed that the bank is the agent of the shareholders of the stock. It is the duty of the corporation, by its officers, to so direct and manage its affairs as to preserve and promote the highest interest of those interested therein. It is true the officers act directly for the bank, but the bank is an artificial person and can have no interest to preserve or promote, save and only the rights and interest of the shareholders. None others can have an interest in the management. The bank owns the property, the land, the money, all the assets, the privileges and franchises; but the officers are elected by the shareholders of the stock, and they are selected for the purpose of managing well the property of the bank. The shareholders measure the value of their shares of stock by the value of the property and franchises belonging to the bank. If these be under unskillful or improvident management the amount of dividends and the value of the shares of stock are diminished. If the shares are val-

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ued and assessed at a high rate by the assessor, their productive resources are diminished to that extent. There can be no person so well qualified to determine the real productive and market value of shares of stock as the officers who manage and control the bank for the interest and benefit of the shareholders. "When shares of capital stock have any value as an article of sale, it is because the purchaser supposes that the tangible and intangible property and the franchises are sufficient, if the affairs of the company were wound up, to pay all the debts and pay a surplus in distribution to the shareholders equal to the per cent the purchaser gives." *Ottawa Glass Co.* v. *McCaleb*, 9 Leg. News, 187; *Porter et al.* v. *Rockford, Rock Island & St. Louis Railroad Co.*, 77 Ill. 561.

It is self-evident that the value of an article of sale must depend largely upon the skill put forth in the management by the officers. It will be conceded that there is none so suitable to look after all matters pertaining to the assessment and taxing the shares of stock as the officers of the bank.

By the statute it is required that the bank shall keep the list of the names of the stockholders and of the number of shares held by each, and this list is for the inspection of the officers authorized to assess property for taxation. From the bank the officer obtains the information that enables him to make and return a list to the clerk.

"*For the purpose of collecting the taxes* it shall be the duty of every *such bank*, or the managing officer or officers thereof, to retain so much of any dividend belonging to the stockholders as shall be necessary to pay any taxes levied upon the shares, until it shall appear that such taxes have been paid." Secs. 36, 37, 39 Revenue Law, Rev. Stat. 864.

It is the bank that gives the information to the officer and enables him to value the shares. It is the bank that is required to retain the dividend until the tax is paid, and it is the officer of the bank who is made liable if the dividend is not so retained. It is thus made quite clear that the statute makes the bank the agent of the stockholder for some purposes connected with the taxation of the shares of stock. In the case of *The Ottawa Glass Co.* v. *McCaleb*, 9 Leg. News, 188, it is stated that "a corporation acts as *quasi* trustees in managing the business of the shareholders, and it is competent to the general assembly to require the whole taxes to be paid by the corporation, which corporation may then require repayment of the tax on shares to be refunded by the shareholders, either by deducting the amount from dividends or otherwise."

It has been held by the Supreme Court of the United States, and by the courts of New York, New Jersey and of this state, that under the provisions of the act of congress, the right of the states to tax all shares in the stock of the national banks clearly exists. *First National Bank of Mendota* v. *Smith et al.*, 65 Ill. 44, and the various authorities there cited.

It has been held in the same case (*supra*) that the bank is the trustee of the stockholders (p. 54), "and as such possesses the lawful

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control over the rights and interests of the *cestuis que trust*, much greater than that of a *mere agent* for the loan of money.

"Certificates of stock are not securities for money, in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property, and franchises of the corporation of which he is a member." *Mechanics' Bank* v. *New York Railroad Co.*, 3 Kern. 627; *First National Bank of Mendota* v. *Smith*, 65 Ill. 55.

The banking corporation has a fixed locality where it must transact its business, and there wind up its affairs when it ceases to exist. It is the trustee of the stockholders who must come to its counter for their annual dividends, and their share of assets on final liquidation. 65 Ill. 56, *supra*.

It is thus seen that the stockholder has a title to a share in the property and franchise of the bank, that he is one of the owners of the bank, that this property and the franchises are managed and controlled by officers selected by the stockholders, that it is managed for the stockholders, that the bank is the trustee of the stockholders, that it is peculiarly and especially the duty of the bank to do and manage everything so as to make the shares of stock valuable, and so as to make them yield a dividend, and to guard against everything that may diminish the amount of dividends. The conclusion is inevitable that the bank must be the agent of the shareholder; it was only necessary to give notice to the bank. It has been seen that even original process could be served on the bank by serving on the president, cashier or director. Some of these notices were served on the president and others on the cashier. There was then sufficient notice to give jurisdiction of the persons of the shareholders. Was there a sufficient complaint? is the next question requiring attention.

The provision of the statute is, a citizen may "complain that the property of another is assessed too low. It is not stated what averments the complaint shall contain, nor is it stated whether the complaint shall be oral or written. The complaints in these cases contain nothing more than that they complain that the personal property of the shareholders of the several banks (naming them) has been assessed too low. It is objected that this is too uncertain; that no person is named, and no traversable fact is complained of, and that it is vague and general.

"To complain of an assessment set opposite to each name on the assessment list, and to ask that evidence may be heard in each and every case and every name on the assessment list, or to the value of the property therein assessed, and to change the value as may seem just, and that the valuation may be reduced or raised as may seem just and equitable," has been held to be too general and too vague and uncertain. "Such complaint states no fact and is nugatory." There should be something complained of, and the party appearing should be informed of the matters which he may be required to meet. *People* v. *Reynolds*, 28 Cal. 111, and *People* v. *Flint*, 39 Cal. 673.

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The California statute may not be like our statute in every particular, but no reason is seen why the Illinois courts should hold differently from the authorities cited.

In the complaint held to be nugatory there was no complaint of any valuation, or of any parcel of property or to any species of property. It was not complained that the valuation was too high or too low. No person or class of persons is described in the complaint. In these cases under consideration no one person, but a class of persons, is named; no one article of property is described. The averment is, the shares of stock of the shareholders of the particular bank is valued too low. The complaint and notice might have named each particular shareholder, and they might have designated the number of shares owned by each shareholder. But why? The shareholders, if named each by himself, and if told the precise number of shares owned by each, would not be the wiser for the information. The description, "shareholders in a particular bank," though not the names of persons, is so definite and certain, that no other persons can be mistaken for them. There can be no question as to who is meant. It is the stock, it is the shares of stock, that is described as assessed "too low." This can be easily understood. This would be the case even though there was nothing else in the record. But all these shares of stock had been regularly assessed to each respective owner thereof, so that the complaint and notice meant that the shares of stock belonging to each of the respective shareholders had been valued "too low." The notice and complaint must be held sufficient.

Finding the notice and complaint sufficient, it remains to inquire what wrong or what injustice has been or is about to be done to either of the complainants?

It has frequently been held that a court of equity will not entertain a bill to restrain the collection of taxes, except in cases where it has been assessed upon property not subject to taxation, or where the tax is unauthorized by law, or where the property has been fraudulently assessed at two high a rate. This doctrine has been announced so frequently, in so many cases and under such varied circumstances, and under such varied forms of expression, that it cannot be necessary to cite authority. But, for fear that a different doctrine might be insisted upon, the general assembly has enacted sec. 191 of revenue law. And now "No error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the *substantial justice of the tax* itself, shall vitiate or in any manner affect the tax or the assessment thereof." In none of these bills is it claimed that any injustice has been done. The property is clearly subject to taxation. The tax is unquestionably authorized by law. It is not in any one of the bills claimed that the property has been assessed at too high a rate. It is not shown or claimed that anything has been done that affects the substantial justice of the tax itself. It is simply averred that the assessment made and returned by the assessor

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was increased, and that it should not have been so increased. It is not claimed that the present valuation amounts to more than one third the actual cash market value of the stock. There is but one exception to this statement. The shareholders of the Union National Bank state that the bank has been taxed on its real estate, and that when the shares of stock were assessed the value of the real estate should have been deducted from the gross value of the stock. They claim that this deduction was made in the assessment of the stock of all the other banks where they owned real estate. But, unfortunately for the shareholders of the Union National Bank, they fail to show that any injustice is done.

If the value of the real estate be added to the assessed value of the stock, the aggregate value falls considerably below one half the actual cash value of the stock. They simply show that others are assessed entirely too low, whilst they are not yet assessed as high as they should be. The propriety of assessing any property below its actual cash value may well be questioned, if not designated as pernicious. If all the property in the county and state was assessed at its actual value, the grand total would be increased so much that the actual wealth and resources of the state would be known and would amount to such an enormous increase over the present assessments that the rate per cent of taxation might be much reduced.

The statute provides that personal property shall be valued at its fair cash value, and yet if this cash value is imposed in only one county or town, it would be oppressive to the people of such county or town. The rule, to be of advantage, should extend throughout the state.

In no one of these cases has it been shown that the property is made to bear more than its just burden of taxation, nor have the owners been debarred of any substantial rights secured by the law of the land. The tax on the property is just, and no valid reason is made to appear why the owners should not pay it. A careful examination of the cases presented for the consideration of the court fails to show anything that affects the substantial justice of the tax itself, and until this is shown the court cannot grant the relief sought.

"The statutes unmistakably show that it was the legislative will that mere technical objections not affecting the justice of the tax itself should not be regarded." *Beers et al.* v. *The People*, 9 Leg. News, 176; *Buck* v. *The People*, 78 Ill. 566; *Chiniquy* v. *The People*, 78 Ill. 572; *Purrington* v. *The People*, 79 Ill. 11.

The law imposing the taxes is in all its parts "uniform." It provides for the constitutional "valuation," and does not go counter to the law of congress.

The complainants fail to show that any act of injustice is about to be done to them. They do not show anything that affects the substantial justice of the tax they seek to enjoin.

The injunction asked for in each case is denied.

Injunction denied.

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SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

GEN. NO. 65,035. PENDING.

SAMUEL S. CHISHOLM ET AL. *v.* CORNELIUS MCGINNISS.

PLEADING—*Non assumpsit.*—The omission of the words *undertake or* from the plea of *non assumpsit* renders it bad on demurrer.

PRACTICE—*Amendment.*—A plea may be amended on filing an affidavit showing a good defense.

FAIRCHILD & BLACKMAN, *Attorneys for Plaintiffs.*
ROBINSON & FERRIS, *Attorneys for Defendants.*

Plaintiffs sue on account for advertising in *The American Miller.* Declaration common counts, copy of the account and affidavit of claim. Defendant filed a plea of *non assumpsit* in form as follows: "And said defendant by Robinson & Ferris, his attorneys, comes and defends the wrong and injury, when, etc., and says that he did not promise in manner and form as the plaintiffs have above thereof complained against him; and of this said defendant puts himself upon the country."

To which the plaintiffs demurred. The demurrer was disposed of at the June term, 1877, as follows:

GARY, J: Let the demurrer be sustained; the proper form is given by Mr. Chitty, and is as follows:

"And the said defendant by ——, his attorney, comes and defends the wrong and injury, when, etc., and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country," etc. 3 Ch. Pl. 908.

MR. ROBINSON: The defendant asks leave to amend.

GARY, J: You can do so on filing an affidavit showing that you have a good defense.

EDITOR'S NOTES.—Undoubtedly the learned counsel for the defendant in the above case followed the precedent given by Mr. Puterbaugh in Puter. Com. Law Pl. 166, which is the form given by Mr. Greening, Green. Forms, 237, under the rules of "Hilary Term," 4 Will. iv. Mr. Chitty, 3 Ch. Pl. 908, gives the precedent approved by Judge Gary in the above case. The same form is given in 2 Hill's Com. Law Pr. 113, and Steph. Pl. (Tyler's ed.) 170; (Herd's ed.) 153."

Judge Cowen in his valuable treatise, 2 Cow. Tr. 140, prescribes the form with the words, "did not undertake and promise," which are also to be found in many of the old form books. Both forms are given in Jones' Form Book, pp. 185–230; we are informed that Judge Gary holds such form demurrable.

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APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM THE CRIMINAL COURT OF COOK COUNTY. OPINION FILED NOVEMBER 8, 1877.

THE VILLAGE OF SOUTH EVANSTON *v.* JAMES LYNCH.

PRACTICE—*Instruction.*—An instruction which is not predicated on the evidence, though it may announce a correct principle of law, if it be calculated to mislead the jury, is erroneous.

E. B. PAYNE, *Attorney for Appellant.*
CHESTER KINNEY, *Attorney for Appellee.*

Justice MURPHY delivered the opinion of the court:

This was an action of debt commenced originally before a justice of the peace to recover the penalty for violating section four, of article one, of an ordinance of said appellant, entitled, "An ordinance concerning misdemeanors."

The trial before the justice resulted in a judgment against the defendant for $100 and costs, from which an appeal was taken by the defendant to the Criminal Court of Cook county. At the September term of that court, 1877, the case was again tried by the court and a jury, which resulted in a verdict for the defendant.

To reverse this judgment the appellant brings the record to this court, and assigns as error the giving of the following instruction by the court on behalf of the defendant, to wit: "The court instructs the jury that if they believe from the evidence that the village of South Evanston, by its agent or agents, procured the defendant to violate the ordinance in question in the manner complained of, then the law is for the defendant and the plaintiff cannot recover in this action."

We have carefully examined the record in this case, and find no evidence tending to show that the appellant, by its agents or otherwise, had procured or attempted to procure the violation of said ordinance by said defendant.

We think there is no evidence in the case on which to predicate such an instruction, even though we consider it the annunciation of a correct principle of law, in respect to which we forbear the expression of any opinion. Upon the facts as shown by the record it is believed to be error on the part of the court below to give the instruction, which, to say the least, was calculated to mislead the jury, for which the judgment is reversed and the cause remanded.

The next case, No. 3, on the docket between the same parties, submitted at the same time, is for the same cause reversed and remanded. *Reversed and remanded.*

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APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM CRIMINAL COURT OF COOK COUNTY. ORAL OPINION DELIVERED NOVEMBER 8, 1877.

THE VILLAGE OF SOUTH EVANSTON *v.* ADAM MARES.

INTOXICATING LIQUORS.—An instruction to the jury, in an action of debt for a penalty under a village ordinance, "that they must, from the evidence, find that the defendant sold intoxicating liquors, and the fact must be proved to the satisfaction of the jury that the article sold was intoxicating, otherwise they should find for the defendant; the jury are not at liberty to guess at what was sold, but must be governed by the evidence," was held to be proper.

E. B. PAYNE, *Attorney for Appellant.*
CHESTER KINNEY, *Attorney for Appellee.*

Justice PLEASANTS delivered the opinion of the court:

This was an action of debt originally brought by appellant before a justice of the peace to recover a penalty for an alleged violation of an ordinance of the village of South Evanston which prohibited the sale in said village of certain specified liquors, including whiskey or any other vinous, spirituous, malt, fermented, mixed or intoxicating liquors, or any mixture, part of which is any of said liquors, in less quantity than four gallons.

The defendant, appellee, was found guilty and a fine assessed. An appeal was taken by him to the Criminal Court of Cook county and a trial *de novo* there resulted in a verdict of not guilty. A motion for a new trial was overruled and judgment entered on the verdict for defendant for his costs; from which judgment the plaintiff appealed to this court.

The bill of exceptions shows that, except the ordinance, all the evidence in the case was the testimony of one witness, who was introduced by the plaintiff, and stated that defendant kept a restaurant in the village of South Evanston; that in the course of the summer or fall of 1876, on three several occasions, witness bought of defendant and drank in said restaurant what he called "something" in small glasses, and paid for the first drink eight cents and for the others, each, ten; that it tasted and smelt like whiskey; that it was not like whiskey he used to drink down east; that it was not pure whiskey; that it did not intoxicate him; that he did not know what it was; that he would not swear it was not whiskey, and he would not swear it was whiskey.

Of course we appreciate the suspicions that may often attach to testimony of that character and the varying dispositions of jurors toward it. To some minds it would be convincing beyond a reasonable doubt that the article was whiskey, while to others it would be wholly insufficient to prove what it was. Its effect would depend to some extent upon what may be called the prejudices of the juror,

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and the appearance and manner of the witness. Of these we know nothing. The witness was not asked what he called for, and whether he was a willing or unwilling or a candid witness we cannot determine so well as the judge and jury before whom he testified.

Upon this testimony the court, at the request of the defendant, instructed the jury "that they must, from the evidence, find that the defendant sold intoxicating liquors, and the fact must be proved to the satisfaction of the jury that the article sold was intoxicating, otherwise they should find for the defendant; the jury are not at liberty to guess at what was sold, but must be governed by the evidence."

The errors assigned are, that this instruction was erroneous and misled the jury to a verdict against the evidence, and the argument of counsel is, that since the ordinance prohibited the sale of whiskey by name it was not necessary to prove that it was intoxicating. He cites the case of *Kettering* v. *The City of Jacksonville*, 50 Ill. 39.

But this *assumes* that the article sold was whiskey. The case cited is not an authority for that. The court did not instruct the jury that they must find that whiskey was intoxicating, but that the article sold was intoxicating liquor. He had already instructed them, at the instance of the plaintiff, that if they believed from the evidence that it was whiskey, or any one of the other liquors specified in the ordinance, they should find for the plaintiff; unless, therefore, he would have been justified in assuming that it was whiskey or some other of said liquors, it would have been error to refuse the instruction complained of. It was for the plaintiff to prove what the article was, and that it was one of those specifically named in the ordinance, or that it was intoxicating, and for the jury to determine whether such proof was made. We think the court would not have been justified in such an assumption, and hence that the instruction in question was properly given.

The judgment of the Criminal Court is affirmed.

Judgment affirmed.

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. OPINION FILED NOVEMBER 12, 1877.

E. L. DAVISON AND F. G. WELCH, IMPLEADED WITH L. S. DAVISON AND THOMAS J. KERR v. THOMAS A. HILL.

PLEADINGS—*Allegations and proof—plea verified by affidavit—misjoinder—statute.* The proofs and allegations must always agree, and to recover in actions *ex contractu* a cause of action must be averred and proved against all the defendants or there can be no recovery against any. Where it appears, as in this case, from the plaintiff's testimony, that parties are made defendants against whom it

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affirmatively appears that there is no cause of action made out, then no such plea as is required by the Practice Act, sec. 36, is necessary from the defendants to enable them to avail themselves of the misjoinder at the trial; and that in such case the statute has no application.

CONTRACT—*Recision of.*—A party seeking to rescind a contract should be in a condition to enable him to do so, or he cannot recover the money paid thereon.

F. W. S. BROWLEY, *Attorney for Appellant.*

SPRINGER & SCOVEL, *Attorneys for Appellee.*

Justice MURPHY delivered the opinion of the court:

This is an action of *assumpsit* upon the common counts brought by the purchaser of real estate to recover back money which he had paid the vendor, and the case was this. On the 29th day of March, 1873, the following agreement, in writing, was made and entered into between E. L. Davison, by Kerr, Welch & Davison, his agents, and Thomas A. Hill, appellee:

Memorandum of an agreement, entered into this day, between E. L. Davison, of Washington county, Kentucky, and Thomas A. Hill, of the city of Chicago, Illinois, is as follows:

Said Davison hereby agrees to sell and convey by deed of general warranty the northwest quarter of section twenty (20), in township thirty-eight (38) north, of range thirteen (13) east of third (3d) P. M., in Cook county, Illinois, for the sum of thirty-two thousand dollars ($32,000), to be paid as follows: Five hundred dollars in hand to bind this contract; seven thousand five hundred dollars twenty days from this date, to assume an incumbrance now on said premises, of fifteen thousand dollars evidenced by trust deeds or mortgages; two thousand dollars October 1, 1873, with ten per cent interest, and the balance in one, two and three years from this date, with eight per cent interest, payable annually. Said Davison agrees to furnish abstract for examination, and if it shows a satisfactory title to said Hill, then he, the said Hill, hereby agrees to pay the above mentioned sum of money, seven thousand five hundred dollars, and execute his notes and trust deeds for the deferred payments, but if the title should not prove good, then the five hundred dollars now paid shall be returned to said Hill; but if said title proves good, then said Hill shall forfeit said five hundred dollars as damages, unless he carries out the provisions of this contract. It is further agreed that if said Hill should elect to take the following terms instead of the foregoing, he shall have the privilege so to do: to pay nine thousand five hundred in twenty days, as same as before stated, and give his notes and trust deeds, payable in sixteen, twenty-four and thirty-six months from this date.

It is further agreed that the abstract shall be brought down to date, also that part of the abstract that is placed with the loan of eight thousand dollars ($8,000) shall be returned to Fourth National Bank after the examination, but the continuance from August 6, 1872, to date shall be given to said Hill.

In witness whereof, the parties hereunto set their hands and seals this 29th day of March, A.D. 1873.

E. L. DAVISON, [SEAL]
By KERR, DAVISON & WELCH, agents, [SEAL]
THOS. A. HILL. [SEAL]

To recover back the $500 mentioned in the foregoing agreement as having been paid to "bind the contract," was the object of this suit in the court below, upon the claim or assumption of the appellee that he had rescinded said contract, as under the circumstances of the case he lawfully might do. In that court the parties waived a jury, and the cause was tried by the court, which resulted in a judgment in favor of the appellee for $500. To reverse which, this appeal is prosecuted.

The first and second assignments of error present substantially the

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same questions that, under the evidence submitted at the trial, the judgment should have been for the appellants.

Under the view taken of the case by the court, the consideration of the third and fourth assignments of error will be unnecessary.

In support of these alleged errors it is insisted by the appellants that there is a misjoinder of parties defendants, which is fatal to the action. By the contract put in evidence by the appellee it will be seen that it purports in express terms to be a contract between E. L. Davison of the one part and Thomas A. Hill of the other, Davison's name being signed thereto "by Kerr, Davison & Welch, his agent"; and still we find these agents made defendants to the suit, along with E. L. Davison, and upon the written contract thus executed as the only evidence in this record of any contract between the parties, judgment is rendered against them in the court below. This we think was error.

It is an elementary principle of procedure, that the proofs and allegations must always agree, and that to recover in actions *ex contractu*, a cause of action must be established against all the defendants or there can be no recovery against any. This is a doctrine taught by all the text writers who treat of the subject, and seems to be followed by all the adjudicated cases to which we have been referred. *Wells* v. *Reynolds*, 3 Scam. 191; *Griffith* v. *Fury*, 30 Ill. 251; *McLean* v. *Griswold*, 22 Ill. 219.

The latest case in our own court seems to be the case of *Gait* v. *Joice*, 61 Ill. 489, all holding that to recover against any one of the defendants a cause of action must be averred and proved against all of them. But it is claimed by the appellee that by section 36 of the Practice Act, of our statute, in force July 1, 1872, the rule of the common law in this regard has been changed, and that unless in actions against two or more defendants they file a plea verified by affidavit denying the joint liability, judgment must go against all if any, notwithstanding the plaintiff's own evidence discloses the fact, in the first instance, that certain of the defendants are not liable at all.

We think this statute sufficiently radical in its innovations upon well-established principles without according to it so broad a scope as that, and are of opinion that where it appears, as in this case, from the plaintiff's testimony, that parties are made defendants against whom it affirmatively appears that there is no cause of action made out, then no such plea is necessary from the defendants to enable them to avail themselves of the misjoinder at the trial; and that, in such case, the statute has no application.

The remaining question is, whether appellant was so in default as to authorize the appellee to rescind the contract and recover back the money paid thereon. We think not. From the facts, as shown by this record, it will be observed that there is no time expressly fixed by the contract within which Davison was to convey the land, but twenty days being fixed for the payment of $7,500, on the purchase price by Hill, at which time he was to assume certain incumbrances then on the property to the amount of $1,500, and secure

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the balance of the price on the promises by mortgage. We infer that the intention of the parties was that the conveyance should be then made if the title was found good.

From the evidence it appears that on the nineteenth or twentieth day from the date of the contract the appellee handed L. S. Davison, the agent of E. L. Davison, the opinion of his (Hill's) attorneys, noting that the title of E. L. Davison to the land was good, subject to certain incumbrances, to wit, the release of two mortgages, defective as they claimed; two trust deeds, both of which by the terms of the contract Hill was to assume and pay, and that if living, Mrs. Jared Arnold might have right of dower. The agent, L. S. Davison, testified that at that time he had in his possession releases of the mortgages, perfectly executed. He also testifies that he showed them to Hill, and asked him (Hill) to whom he would have the deed made; that Hill replied to him that he did not want the land at all. Appellee did not make the point of objection, that Mrs. Arnold might have dower in the property; if he had, appellant might have promptly removed the objection to his (Hill's) entire satisfaction. *Bostwick* v. *Williams*, 36 Ill. 65. But, on the contrary, informed the agent of the appellant, E. L. Davison, "that he did not want the land at all," and tendered a quit-claim deed reconveying to E. L. Davison any rights he might have acquired under the contract. We think to rescind the contract, he should at least have been able and willing to pay the $7,500, and offered in good faith to do so, and demanded from Davison a deed of the premises which if he had then declined to give, he (Hill) might have rescinded the contract; but, as it was, we think he was not in condition to enable him to do so, and, as a consequence, could have no recovery of the money paid. The learned judge who presided at the trial below took a different view, and held the contract rescinded, which we think was error.

For these reasons the judgment of the court below is reversed and cause remanded.

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY. ORAL OPINION RENDERED NOVEMBER 14, 1877.

THE GERMANIA INSURANCE COMPANY *v.* HUTCHBERGER ET AL.

PRACTICE—*New trial.*—The question of the credibility of witness is peculiarly within the province of the jury, and where the testimony is conflicting and there is enough evidence in the record to sustain the verdict, it will not be disturbed, especially if supported by the testimony of two witnesses.

ESTOPPEL.—A private corporation is estopped from setting up its own unlawful act or wrong as a defense against an obligation which it has voluntarily entered into.

S. K. DOW, *Attorney for Appellant.*
BARKER & BUELL, *Attorneys for Appellee.*

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Justice MURPHY delivered the opinion of the court:

This record presents two questions for the consideration of the court, one of fact and one of law. The first we have alone considered to be seriously presented. By a careful comparison of the testimony of all the witnesses who swore upon the trial below, we find evidence which we think justifies the jury in finding as they did. It is true that the main fact at issue, to wit, the authority of Guentzer as agent to bind this company, was involved in some doubt, and upon which there was a contrariety of testimony.

But the testimony of at least two witnesses, we think, justified the jury in the conclusion they have reached, and the question of credibility being one peculiarly within the province of the jury, we do not feel called upon, if at liberty, to interfere with the finding, not having an opportunity, as they did, to observe the demeanor and character of the witnesses upon the stand upon the trial. Suffice it to say, that we think that there is enough of evidence in the record to sustain the verdict, and upon that question the opinion of the court is against the appellant.

Upon the other question of law presented by the record, and insisted upon by the appellant, that because the company was, as is claimed by it doing, a business forbidden by the statute at the time and in violation of the laws of Illinois, was not bound by its contract of insurance in this case even though it made it. Upon this question it seems to us that upon every principle of law and justice the company is estopped from setting up its own unlawful act or wrong as a defense against an obligation which it voluntarily entered into. This is a question which we do not regard as involved in doubt, and a clear conclusion of law; hence the judgment below is affirmed.

Judgment affirmed.

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

WRIT OF ERROR TO THE CIRCUIT COURT OF COOK COUNTY. ORAL OPINION RENDERED NOVEMBER 14, 1877.

THE VICTOR SEWING MACHINE CO. *v.* MARGARET HARDUS.

TROVER.—*Right to property at the time of the alleged conversion.*

FRAUD.—Fraud vitiates all contracts, and to hold a paper in the nature of a lease or conditional sale to be conclusive, would be, under the circumstances of its execution and as between the parties to this case, to sanction the perpetration of a fraud upon the party seeking to avoid it.

EVIDENCE.—Parol evidence is admissible to show these circumstances, and in this case was sufficient to sustain the finding.

NOTICE.—A statement conspicuously printed in red ink across the lines of such a paper that "any contract made with any canvasser or agent, differing in any respect from the terms of this lease, will not be binding upon the Victor Sewing

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Machine Co. under any circumstances," could not have the effect of a notice under the facts of this case.

NEGLIGENCE.—The failure of the appellee to acquire knowledge of the terms and meaning of such lease and notice was not such negligence, under the facts in this case, as should hold her responsible for the consequences of her ignorance of their contents.

Justice PLEASANTS delivered the opinion of the court:

This was an action of trover, brought by defendant in error to recover the value of a sewing machine, and tried by the court below without a jury, on appeal from a justice of the peace. It was admitted that she had possession of the machine and that the company took it. The only issue was upon her right to the property at the time of the alleged conversion.

She claimed that there had been a sale and delivery of it to her by the defendant. They, on the contrary, asserted that it was only a lease, or at most a conditional sale, and that for non-payment of the rent or of the installments of the price, whichever it might be, they retook possession, according to the terms of the agreement, as they lawfully might; and, further, that she voluntarily surrendered it.

On the trial, a paper was produced, signed by her, by which, in terms, it was acknowledged that she hired the machine and agreed to pay, as rent for its use, monthly in advance, the sums of money respectively therein specified, amounting, in all, to $85, which was its estimated value. The plaintiff in error insists that this paper is the only evidence of the contract, and complains that the court below admitted parol testimony to vary it.

There is no rule of more universal application than that fraud vitiates all contracts; and we understand it to be well settled that wherever to hold a paper so in question to be conclusive, would be, under the circumstances of its execution and as between the parties, to sanction the perpetration of a fraud upon the one seeking to avoid it, parol evidence is admissible to show these circumstances.

The effect of it, in such a case, is not to vary the terms of a written contract, but to determine whether any contract was really made, and, if any, what it was.

Here it was alleged by the plaintiff below that, although the paper may have been truly read to her by the defendant's agent before she signed it, yet in fact she did not understand it; that she was a Norwegian and unable to read English; that she spoke and understood it in ordinary conversation very imperfectly; that she told the agent she did not understand it as read by him; that she called in a neighbor woman, who was also a Norwegian, to talk for her and interpret his verbal explanations; that, as she understood at the time, both from him and from the interpreter, he explained that it was a contract of sale, and that she might pay the remaining installments of the price in work for the company, which it would furnish; that with this understanding distinctly had she signed it, and that she had always since been ready to do this work, and applied for it, but the company had failed to furnish it.

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If these allegations were true, to have permitted the terms of this paper to be enforced against her would have been to permit a fraud upon her, to her injury and at the instance and to the advantage of the party who committed it. The admission of parol evidence to prove them was therefore proper; and it is enough to say, without particularly discussing the weight of it as compared with that produced by the defendant to contradict it, that we regard it as sufficient to sustain the finding.

But there appeared conspicuously printed, in red ink, across the lines of the paper, a statement that "any contract made with any canvasser or agent differing in any respect from the terms of this lease will not be binding upon the Victor Sewing Machine Co. under any circumstances," and it is urged that this was notice to the plaintiff of the limitation of the agent's authority, and estopped her from setting up any different contract.

His possession or control of the machines of the company, with authority to dispose of them at all, would carry with it a presumption, in the absence of other proof, that he was authorized to dispose of them upon any terms not unusual or unreasonable. Doubtless it was competent for the company to limit his authority as against parties dealing with him, by proper notice. It seems, however, that the lease was not complete in its terms when this statement was printed across it. There were blanks which might have been consistently filled with the very terms which the plaintiff understood she made. For that reason the statement could have no effect as notice. And further, it is admitted that the agent took, and the company accepted, an old machine in lieu of money for the first payment — as palpable a difference from the terms of the lease as would be an agreement to take work in lieu of money for the others. But the conclusive answer to this point is that the statement was not public and general, such as all persons dealing with the agent would be required to take notice of, nor was it actually brought to the knowledge of the plaintiff.

Counsel contended that she failed to use due diligence to acquire knowledge of the terms and meaning of the lease and notice, and therefore should be responsible for the consequences of her ignorance, as of her own negligence; citing *Swannell* v. *Watson*, 71 Ill. 456; *Fuller* v. *The Madison Mutual Ins. Co.*, 36 Wis. 603, and *Philip* v. *Gallant*, 1 Hun. (N. Y.) 528.

Each of these cases differs materially from the one at bar. In the first it was commercial paper — a promissory note — and the maker attempted to set up misrepresentations by the payee as a defense against an indorsee for value and as innocent as himself; and as to him the court held that there had not been due diligence. Against the payee, who made the misrepresentations, they would have been a good bar, and no greater diligence than was used would have been required. But when one of two innocent parties must suffer, the one whose act has occasioned the necessity must bear the loss.

In the second, where it was sought on behalf of a German to avoid

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a certain provision in his policy because he was unable to read the language, the court did say that his want of knowledge of English was no excuse; but they further say that "there was no pretense that he was overreached or deceived otherwise than in the fact that he could not and did not read the policy." It appeared that he fully understood the application for it, and that he had been insured in that company before, and, on a loss suffered, received his insurance. He was, therefore, fairly presumed to know the provisions and meaning of the policy in question, which was in the usual form issued by the company. At any rate there was no fraud or misrepresentation on the part of the company or its agent.

In the last, the instrument was twice carefully read over by the scrivener's clerk, and executed by both parties in the utmost good faith. The complainant, if deceived at all, was deceived solely by reason of the incompetency of his own chosen translator, for which the other contracting party was in no wise responsible.

Some authorities on the subject of disaffirmance of contracts were also referred to, but we regard them as inapplicable. The plaintiff below has not attempted to disaffirm. She simply denied the binding force of a paper which the defendant claimed was the exclusive evidence of her contract, on the ground of fraud, and asserted another and different contract as the one which she really made. She is satisfied with the agreement which she claims was made, and by her suit affirms it.

In respect to the alleged voluntary surrender by plaintiff of the possession of the machine, we are satisfied that she merely pointed it out to the defendant's collector and permitted him to take it, but at the peril of the company. And, further, that whatever she did in that regard was done under duress by threats of arrest and imprisonment.

The only remaining complaint by plaintiff in error is that, after the testimony was closed, and while the judge was announcing his finding, upon a dispute arising between counsel as to what plaintiff had testified in relation to the supposed surrender, he recalled and interrogated her on that subject. That was demanded of the judge if his mind was at all in doubt, and not at all improper if he chose to do it only in deference to the doubt of counsel.

We discover no error in the proceedings of the court below, and its judgment is therefore affirmed. *Judgment affirmed.*

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY. OPINION FILED NOVEMBER 22, 1877.

JOHN A. BROWN *v.* FREDERICK H. LUEHRS.

EVIDENCE—*Admissibility of.*—Evidence of character at a former period "as a distinct and independent proposition," that is, without regard to its tendency, or

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want of tendency, to prove that character at the time the witness testified, is inadmissible. In this case Pulsifier in substance testified that he was acquainted with the general reputation of Cowles, for truth and veracity, among his associates and acquaintances in the neighborhood where he then resided, which was some three years or less before his deposition was taken. He was then asked the question, "Was that reputation good or bad?" to which the court sustained an objection. Under the circumstances this was error.

EVIDENCE—*Impeachment—general reputation.*—The object of impeaching testimony is to aid the jury in ascertaining the degree of credit due to the witness in question, so far as it may depend on his character for truth. In reason, it must be his character at the time of giving his testimony. If it were certainly made known that at the moment of testifying it was good or otherwise, it would be wholly immaterial to inquire what it was at any time before or after. The issue therefore relates to that precise time, and hence the form of the question, as a rule, relates to it and to the neighborhood where he then resided. That form generally bears most directly upon the issue, since impeaching witnesses generally in fact testify at the same trial, which is practically at the same time, with the witness sought to be impeached, and in the neighborhood where he then resides, and has whatever reputation he does have. But in some cases that reason of the rule fails, and therefore the rule, as to the form of the question, is not inflexible. He may have no actual reputation at the time of testifying in the neighborhood where he then resided, and yet have had a very marked reputation in another neighborhood where he formerly resided. The question must be such in form as calls for an answer relevant to the issue. General reputation at a former period and in another neighborhood may or may not tend to prove that issue, according to the remoteness of the time and place and other circumstances. Ordinarily these will affect the weight but not the competency of the matter. Every witness testifying to the reputation of another from what he knows of the speech of people, must necessarily refer to a past time. It has often been said, and with no little force, that it ought to be a time anterior to the controversy. The subject is necessarily within the sound legal discretion of the court, and no time or place can be fixed as a limit to the inquiry.

H. C. WHITNEY, *Attorney for Appellant.*
BARNUM & VAN SCHAACK, *Attorneys for Appellee.*

Justice PLEASANTS delivered the opinion of the court:

Appellee brought this suit to recover money alleged to have been inadvertently overpaid to appellant, then his creditor, under circumstances not necessary to be here detailed, except that it was claimed to have been left by him, in the fall of 1870, with the firm of Moeller & Busch, or one of them, at their store in Chicago, and by them or him, on the next day, according to direction, delivered or caused to be delivered to appellant. The cause was tried early in September last, and there was a verdict for the plaintiff for $607.45.

On a former trial it was for the defendant, on his plea of set-off for the amount therein claimed, which necessarily involved a finding against the alleged payment through Moeller & Busch. The material testimony on that trial was given by said Moeller & Busch on behalf of the plaintiff, admitting the receipt by them, or one of them, of the sum of one thousand dollars in question for that pur-

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pose, and tending to show its payment over to the defendant, and by the defendant, in his own behalf, denying such payment over.

Upon bill filed, alleging newly-discovered evidence of one M. G. Cowles, a book-keeper of Moeller & Busch at the time, and the person who, it was averred, delivered the money to the defendant, and his deposition in support of said bill taken at Dubuque, Iowa, where he then resided, in March, 1875, that verdict was set aside and a new trial awarded.

On the second trial this deposition was offered and read in evidence by the plaintiff, and is conceded to be decisive unless the deponent can be generally impeached.

With a view to such impeachment the defendant called C. A. Pulsifer, who testified that he was a commission merchant, resident in Chicago for the last ten years; had known Cowles probably three years; two or three in 1871 or 1872; employed him as book-keeper from January to May, 1872; had not seen him since 1872 or 1873; knew his acquaintances and associates, business men with whom he came in contact, and his general reputation for truth and veracity among them. He was then asked the question: "Was that reputation good or bad?" to which objection was made on the ground that a proper foundation for it had not been laid and because it did not relate to the time when and the place where the deposition was taken. The court sustained the objection, stating that "the impeaching testimony ought to relate to the character of the witness for truth and veracity at the place where he lived when he gave his deposition, and among those he was in the habit of associating with." To this ruling exception was duly taken, and the trial proceeded to verdict as above stated. A motion by the defendant for a new trial was overruled, judgment entered on the verdict and appeal taken.

We are of opinion that the Superior Court erred in excluding the question put to the witness Pulsifer, under the circumstances.

The object of impeaching testimony is to aid the jury in ascertaining the degree of credit due to the witness in question, so far as it may depend on his character for truth. In reason, it must be his character at the time of giving his testimony. If it were certainly made known that at the moment of testifying it was good or otherwise, it would be wholly immaterial to inquire what it was at any time before or after. The issue therefore relates to that precise time, and hence the form of the question, as a rule, relates to it and to the neighborhood where he then resided. That form generally bears most directly upon the issue, since impeaching witnesses generally in fact testify at the same trial, which is practically at the same time, with the witness sought to be impeached, and in the neighborhood where he then resides, and has whatever reputation he does have. But in some cases that reason of the rule fails, and therefore the rule, as to the form of the question, is not inflexible. He may have no actual reputation at the time of testifying in the neighborhood where he then resided, and yet have had a very

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marked reputation in another neighborhood where he formerly resided. The question must be such in form as calls for an answer relevant to the issue.

General reputation at a former period and in another neighborhood may or may not tend to prove that issue, according to the remoteness of the time and place and other circumstances. Ordinarily these will affect the weight but not the competency of the matter. Every witness testifying to the reputation of another from what he knows of the speech of people, must necessarily refer to a past time. It has often been said, and with no little force, that it ought to be a time anterior to the controversy. The subject is necessarily within the sound legal discretion of the court, and no time or place can be fixed as a limit to the inquiry.

It was well said in *Willard* v. *Goodenough*, 30 Vt. 393, that evidence of character at a former period, "as a distinct and independent proposition," that is, as we understand it, without regard to its tendency, or want of tendency, to prove that character at the time the witness testified, is inadmissible. And this explains the cases, cited by counsel, in which the courts have excluded such evidence. It was offered to prove that fact as a distinct and independent proposition; or the time was so remote as under the circumstances to warrant the court, in the exercise of a sound legal discretion, in regarding it as having no tendency to prove the character of the witness at the time he testified.

These views seem to us to be sustained by reason and authority. *Teese* v. *Huntingdon*, 23 How. 14; *Holmes* v. *Stateler*, 17 Ill. 453.

In the case at bar, while the foundation for the question under consideration was not laid with the nicest care, it was sufficient. Pulsifer in substance stated that he was acquainted with the general reputation of Cowles, for truth and veracity, among his associates and acquaintances in the neighborhood where he then resided, which was some three years or less before his deposition was taken. That neighborhood was the one in which the trial was pending. The record does not show where Cowles resided between the time of his removal from Chicago, in September, 1872, and a time shortly before his deposition was taken, in March, 1875. When he so removed he was upward of thirty years of age, and his character may be fairly presumed, in the absence of proof to the contrary, to have become well fixed. Under these circumstances we think that evidence of his general character at that time legally tended to show what it was when his deposition was taken, and ought to have been admitted. For its exclusion, which we deem error, the judgment will be reversed and the case remanded.

Reversed and remanded.

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APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY. OPINION FILED NOVEMBER 22, 1877.

JOHN KILDERHOUSE *v.* ZACHARIAS SAVELAND.

PLEADING—*Allegations and proof.*—The allegations and proof in actions upon special contracts must agree, or no recovery can be had.

CONTRACT—*Executory—damages—interest.*—On a recovery for a breach of an executory contract, sounding in damages only, no interest can be allowed under our statute.

EVIDENCE—*Admission of.*—The admission of the statutes of Wisconsin, the proceedings before the board of arbitrators of the Chamber of Commerce of Milwaukee, and the award of such board was error, because there was no legitimate purpose for the introduction of such proof, which tended to fix in the minds of the jury the exact amount of plaintiff's recovery.

GARDNER & SCHUYLER, *Attorneys for Appellant.*
F. C. HALL, *Attorney for Appellee.*

Chief Justice HEATON delivered the opinion of the court:

This was an action of *assumpsit*, brought by appellee against appellant in the Superior Court of Cook county. The declaration contains a special count on a contract alleged to have been made between the parties, and commences with a recital in substance that the plaintiff, as agent of defendant, but in his own name, contracted with Geo. I. Jones & Company, of Milwaukee, to charter to said Jones & Co. the defendant's vessel, the B. F. Bruce, to carry a load of 45,000 bushels of wheat from Milwaukee to Buffalo at 10 cents per bushel; that said defendant was fully advised of the terms of said agreement, and being so advised did, on the 30th day of August, 1873, promise and agree to and with the plaintiff, that the said vessel should be in Milwaukee to take such load of wheat on, to wit, the 10th day of September, 1873; that said vessel did not go to Milwaukee; that said Jones & Co. were, on said 10th day of September, and for several days thereafter, ready, willing and offered to furnish said cargo of wheat to be carried from Milwaukee to Buffalo and to pay according to agreement; but the defendant, not regarding such agreement, neglected to furnish said vessel, and in consequence of such neglect plaintiff became liable to said Jones & Co. upon his contract so made with them; that said Jones & Co. had to, and did, charter another vessel, and had to pay an increased rate of 4¼ cents per bushel to carry the said wheat; that plaintiff had suffered the amount of such increase of rate in damages for and on account of defendant's failure to keep his said contract with plaintiff.

The declaration also contains the common counts. The plea was the general issue. Cause tried by a jury; damages assessed in favor of plaintiff. Motion for a new trial and in arrest. Motions overruled

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and judgment on the verdict and for costs. The bill of exceptions purports to set forth all the evidence, but we fail to find the contract alleged to have been made with Geo. I. Jones & Co. by plaintiff, and the telegram alleged to have been first sent by one Bone to plaintiff.

On the trial of the cause the plaintiff offered in evidence a statute of Wisconsin incorporating the Chamber of Commerce of Milwaukee, also certain proceedings before the committee of arbitration of said Chamber of Commerce, between the plaintiff and said Jones & Co., in regard to the aforesaid contract between them in respect to the B. F. Bruce, and the award of the said arbitrators fixing the amount of said Jones & Co.'s damages for the alleged breach of said plaintiff's contract with them.

It also appears that the court instructed the jury that plaintiff was entitled to recover interest on the amount of damages paid Geo. I. Jones & Co., by plaintiff, from the time of such payment, if such was the true amount of damages suffered by plaintiff.

The first point we notice is, Was the averment in the declaration, that the defendant had full knowledge of the terms of plaintiff's contract with said Jones & Co., and the further averment, that the B. F. Bruce was, by the terms of the contract between plaintiff and defendant, to be at Milwaukee on the 10th of September to receive said load of wheat, proven? We fail to find such proof in the record. It was not proved by the telegram, "Bruce is chartered, 10 cents to arrive," without further proof of some trade meaning attached to those words. The question, "When will she be here?" seems not to have been answered and no time fixed, and no further knowledge upon the subject of plaintiff's contract with Jones & Co. is shown to have been had by defendant; as to what in fact were the terms of that contract does not appear. If the words used in the telegrams had any definite meaning as to time, by the custom of the trade, such meaning should have been proven. We think these allegations in the declaration material and should have been proved; that the allegations and proof in actions upon special contracts must agree or no recovery can be had.

The second point we notice is, that a recovery, if had in this case, must be for a breach of an executory contract, sounding in damages only, and on such a recovery no interest can be allowed under our statute. The payment by plaintiff to Jones & Co. of the amount of the award, whether in fact the true amount of plaintiff's damages or not, did not, as between plaintiff and defendant in this case, make such amount liquidated damages. The same could not be recovered as liquidated damages upon the money counts, as so much money advanced by plaintiff to defendant's use, and we think such right to recover upon the money counts a good test, in this case, of plaintiff's right to recover interest. We therefore think the giving of the instruction was error.

The third point we notice is, the admission of the statutes of Wisconsin, the proceedings before the board of arbitrators of the

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Chamber of Commerce of Milwaukee, and the award of such board, in evidence. We are unable to discover any legitimate purpose for the introduction of such proof. It was admitted by the court against defendant's objection. We think it tended to, and probably did, fix in the minds of the jury the exact amount of plaintiff's recovery. We cannot say under all the proof in this case that it did no harm to defendant. We therefore think the admission of such evidence error, and that for these errors the judgment should be reversed and the cause remanded. *Judgment reversed and remanded.*

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY. ORAL OPINION RENDERED NOVEMBER 22, 1877.

D. CULLEN CLARK *v.* ELNATHAN D. ELDREDGE.

PRACTICE—*Affidavit of plaintiff's claim—non-resident.*—It is not required by the express terms of the statute that the affidavit of the plaintiff, in addition to the usual statement of the amount of the indebtedness, should have stated that the defendant was a resident of Cook county; and although it is true that the defendant would not be required to file his affidavit with his plea if he was a non-resident, yet, by the statute itself, in its terms, the onus is thrown upon the defendant to raise that question, if defendant is a resident.

M. BRYANT, *Attorney for Appellant.*
Attorney for Appellee.

Chief Justice HEATON delivered the opinion of the court:

I believe there is no question in the record except that presented under the Practice Act. In this case the plaintiff filed the usual affidavit with his declaration, so as to put the defendant upon filing an affidavit of merits if he did not wish judgment taken against him by default. The point taken is that the affidavit of the plaintiff, in addition to the usual statement of the amount of indebtedness, should have stated that the defendant was a resident of Cook county. Such has not been the practice under the law. It is not required by the express terms of the statute; and although it is true that the defendant would not be bound to file his affidavit with his plea if he was not a resident, we think that by the statute itself, in its terms, the onus is thrown upon the defendant to raise that question, especially if the record shows that the defendant was a resident. That is, when service is had in the county where the suit is pending, the fair presumption is that he was a resident of the county, unless he made it appear that he was not. He could affirmatively make it appear that he was not, and thus not be compelled to file an affidavit of merits.

We think the practice, as it has been pretty well established by the courts, is in accordance with the statute, and the judgment will be affirmed. *Judgment affirmed.*

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APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

WRIT OF ERROR TO THE SUPERIOR COURT OF COOK COUNTY. ORAL OPINION RENDERED NOVEMBER 22, 1877.

JAMES K. FISHER ET AL. *v.* WILSON T. KEENAN.

JUDGMENT—*Rendered after the adjudication in bankruptcy and before the final discharge upon a debt existing prior to the adjudication.*—Upon the question as to whether a judgment that was rendered after the adjudication in bankruptcy and before the final discharge upon a debt existing prior to the adjudication could be proved under the bankrupt law, and if so, whether the judgment was discharged by the final action of the bankrupt court, the law is that the debt could have been proved after as well as before the judgment. The rendition of the judgment did not prevent the party from proving the debt the same as he could have proved it in the bankrupt court before it became merged in a judgment, and the judgment was discharged by the discharge of the bankrupt. The better rule of law would be to allow the judgment to be proved, and hold that the bankrupt was discharged therefrom.

LACHES.—The party was not bound to use any greater diligence than he did under the circumstances. The laches in not appearing and asking the court to continue the case until a final discharge in bankruptcy was had was not such laches under the evidence as ought to deprive him of the right to take advantage of his discharge. The statute only authorizes a suspension of proceedings in the court below until the final adjudication.

CHARLES L. EASTON, *Attorney for Plaintiffs in Error.*
BAKER, OSGOOD & KEENAN, *Attorneys for Defendant in Error.*

Mr. Easton argued the case orally, citing the following cases: Bankrupt Act, secs. 5115, 5106; 13 N. B. R. 546, 15 N. B. R. 377; *Holden* v. *Sherwood*, 1 Chi. L. J. 7; 78 Ill. 206; 57 M. E. 26; 3 McLean, 281; 15 Mo. 303; 11 N. B. R. 448; 115 Mass. 27; 4 Bump, 378; 38 N. Y. 253; 35 Texas, 171; 39 Ind. 284; 1 Sch. and Lef. 204; 39 Cal. 559; 33 ib. 478; 15 N. B. R. 468; 7 W. Va. 532; 11 Mo. 192; 10 id. 392; 8 Mo. 686; 62 Mo. 504; 102 Mass. 472; 3 Am. R. 483; 2 B. R. 229; 3 A. L. Reg. 374; 5 B. R. 353; 6 B. R. 388; 15 N. B. R. 468; 35 Ill. 152; 3 Barb. Ch. 634; 6 Hill, 246–254; 1 Cow. 42; 2 Cai. 102; 1 Johns. Cas. 133; 46 N. Y. 200; 36 Me. 15; 32 Me. 418; 115 Mass. 27; Freeman on Judgments, chap. 11, secs. 215, 216, 217.

Mr. Baker argued the case orally, citing the following cases: Bankrupt Act, secs. 5115, 5119; Bump Bankruptcy, ed. 1877, 82; 12 Bank. R. 526; 3 B. R. 584, 696, 698, 706; 4 B. R. 367; 8 B. R. 509; 50 N. Y. 593; S. C. 6 Lansing, 256; 63 Me. 118; 5 Stat. at Large, 444; 5 Ala. 810; 2 Swan. 632; 3 Barb. Ch. 360; 30 Miss. 389–95; 3 N. Y. 216; 20 Vt. 293; 26 Vt. 400; 9 Barb. 498; 1 La. An. 161; 34 N. J. 306; 51 Ala. 598; 1 Manning, 35; 13 B.

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Mon. 255; 3 Bloc. Com. 406; Grah. Pr. 450; 10 B. R. 200; 14 Pet. 32; 48 Ill. 567; 3 Pen. and Watts, 490; 3 Otto, 355, 364.

The facts as they appear in the record are substantially as follows:

In October, 1873, a petition in bankruptcy was filed against defendant in error and others in the U. S. District Court for the Eastern District of Missouri. January 6, 1874, plaintiffs in error brought their suit in the court below for a debt which might have been proved in bankruptcy.

In apt time defendant in error retained attorneys to defend said suit, and advised his attorneys that he had been adjudged a bankrupt, and his attorneys appeared in said suit and filed a plea.

In May, 1874, one Clark, an attorney-at-law, was duly chosen assignee in bankruptcy of said defendant, and in July following informed defendant that he, as said assignee, would assume the defense of said suit, and discharged the attorneys whom defendant had retained, and informed defendant that he had employed other counsel to defend said suit, and defendant believed he had done so.

There was some mistake or misunderstanding between Clark and the attorney to whom he spoke about defending said suit, and he paid no attention to it; and on October 7, 1874, the case was tried, and no one appearing for defendant a judgment was rendered against him.

In March, 1875, a discharge in bankruptcy was duly issued to defendant in error.

Defendant in error supposed that the suit had been properly defended, and knew nothing about the judgment until June, 1877, when an execution was issued upon the judgment and demand made upon him. He then moved in the court below to quash and recall said execution, and for a perpetual stay of execution, and with his motion filed his discharge in bankruptcy and affidavits setting forth the facts. The court below granted his motion, and the granting of such motion is the error assigned here.

Chief Justice Heaton delivered the opinion of the court:

This was a suit involving the question where a certain judgment was rendered against a party who had been discharged under the bankrupt law. There was an application made to the Superior Court for the purpose of setting aside an execution issued in that case, and making a permanent order staying the proceedings under the judgment on the ground that it was discharged under the bankrupt law. The Superior Court heard certain reasons why the party was not supposed to be guilty of laches at the proper time for making his application to stay the proceedings in the Superior Court, and the court below made an order staying the execution.

The questions presented by the record are, first, whether there has been any laches by the defendant that affect his rights, and the next is, whether the judgment that was rendered after the adjudica-

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tion in bankruptcy and before the final discharge upon a debt existing prior to the adjudication could be proved under the bankrupt law, and if so whether the judgment was discharged by the final action of the bankrupt court.

We think upon that question that the law is that the debt could have been proved after as well as before the judgment. We think that the rendition of the judgment did not prevent the party from proving the debt the same as he could have proved it in the bankrupt court before it became merged in a judgment, and that the judgment was discharged by the discharge of the bankrupt. The authorities are somewhat conflicting upon that subject, but we think the better rule would be to allow the judgment to be proved and hold that the bankrupt was discharged therefrom, and in addition to that we think the party was not bound to use any greater diligence than he did under the circumstances. We think the laches in not appearing and asking the court to continue the case until a final discharge in bankruptcy was had was not such laches under the evidence as ought to deprive him of the right to take advantage of his discharge. It was a matter of but small consequence, for had he appeared in the court below he could only have had his case continued. He could neither have got his suit abated nor plead in bar, and the statute only authorizes a suspension of proceedings in the court below until the final adjudication. He does show some reasons possibly why he did not appear, but whether he did or did not we think that if the bankrupt law itself discharges the judgment that it would make but little difference whether he was guilty of laches or not in that particular.

The judgment of the court below is affirmed.

Judgment affirmed.

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

ERROR TO THE CIRCUIT COURT OF COOK COUNTY. OPINION FILED NOVEMBER 23, 1877.

ALEXANDER McCOY AND LORIN G. PRATT *v.* THE APPLEBY MANUFACTURING COMPANY.

CORPORATION—*Liability thereof for legal service in a suit for dissolution of same.* Where a solicitor, at the instance and employment of a majority of the directors and stockholders of a corporation, is retained in a suit to dissolve the corporation and close up its affairs, and upon the hearing the court properly adjusted the equities between the stockholders and decreed a dissolution of the corporation, such services were rendered for and on behalf of the corporation, and are properly chargeable to a fund of the corporation in the possession of the court.

McCOY & PRATT, *Attorneys for Plaintiffs in Error.*
JOHN I. BENNETT, *Attorney for Defendants in Error.*

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Justice Murphy delivered the opinion of the court:

This is a petition filed by the plaintiffs in error against the defendant in error, on the 24th day of June, 1877, to recover pay for their services theretofore rendered to and performed for said defendant, as attorneys-at-law and solicitors in chancery in and about the affairs of said company, from and after the 15th day of June, 1875, up to the time of filing said petition.

It appears from the record in this case that a certain portion of the alleged bill accrued to, and the services were performed by, the law firm of Harding, McCoy & Pratt, to wit, the sum of $1,036; but that by the terms of the dissolution of said firm in December, 1875, these petitioners succeeded to the business and rights of the former firm, and became entitled, as a consequence, to any benefits which arise from this claim of $1,036, so claimed for the services of Harding, McCoy & Pratt. In addition to said sum, petitioners claim the further sum of $2,457.50 for additional services rendered by them for said defendant by the present firm of McCoy & Pratt, as per bills rendered and attached to said petition, designated as exhibits A and B, respectively. These claims are objected to by Richard B. Appleby, one of the stockholders of said defendant and interested in its affairs, upon the grounds that the services rendered by said petitioners were not for a corporate purpose, and therefore are not properly chargeable to said corporation.

From the record it appears that the Appleby Manufacturing Company was a corporation, existing under the laws of this state, located and doing business in the city of Chicago; that Richard B. Appleby was director and acting president of said company, when, on the 15th day of June, 1875, a difficulty arose between the president and the corporation. He assuming title to a large part of the corporate property in his individual right, which, in the opinion of the other directors and stockholders, was inconsistent with the interest of the company and his duty to it as its president. At this time difficulty had become so violent as to have caused the entire suspension of the business of the company; that on that day, Walter S. Babcock, treasurer, and all the directors, except said Appleby, called upon and employed the then firm of Harding, McCoy & Pratt, not only to counsel and assist the company in respect to the difficulty with its then president, but to do and perform any and all the business of the company which might require the assistance of legal advisors.

Under this employment, the firm of Harding, McCoy & Pratt embarked in the business, and continued to transact it until the following December, when Mr. Harding went out of the firm; since which time the petitioners have continued to transact the business of the company until the bill, made up of apparently reasonable charges, has reached the large sum now claimed by the petitioners. It is not seriously contended, as we understand counsel, that the charges are themselves unreasonable as to the *amount*. The question made against them is, that the services for which they are

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charged were not corporate but individual in their character. Upon the determination of that question must depend the decision of this case. From this record it appears that they transacted a large amount of business of said company. One very important service they rendered, the corporate character of which we think ought not to be questioned, which was to file a bill in chancery in the name of Walter S. Babcock, but at the instance and employment of all the directors and stockholders, except said Appleby, to dissolve the corporation and close up its affairs, and upon the hearing of that bill, with the cross-bill filed by Appleby, the court properly adjusted the equities between the stockholders and decreed a dissolution of the corporation.

It is now conceded by counsel that, under these proceedings to close up said corporation, there is now a fund in the hands of the court below, belonging to said corporation, abundantly large to pay the bill of the petitioners after paying and discharging all the other debts and liabilities of said company, if it be proper to charge the same against said corporation. Upon the proof submitted before the master, it seems to us clear that the services were rendered for and on behalf of the company, and are properly chargeable to the fund now in the court below, and that the master's report should have been approved. The court below entertained different views and sustained exceptions to said report, except as to $150. This we think was error, and for which the decree of the court below is reversed and the cause remanded for further proceedings.

Reversed and Remanded.

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT. OCTOBER TERM, 1877.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY. ORAL OPINION RENDERED NOVEMBER 24, 1877.

THE PENNSYLVANIA COMPANY *v.* GEORGE W. SLOAN.

PRACTICE—*In the Appellate Court—motion to strike out bill of exceptions.*—Where no written points are filed, as cause for new trial, with the motion, the motion for a new trial should be overruled.

The Appellate Court will not consider the motion for a new trial, as to errors assigned for overruling the same, unless written points were filed in the court below as cause for the new trial.

NEGLIGENCE.—After three verdicts upon questions of negligence and contributory negligence, although the Appellate Court possibly might have found differently, yet they will not be disposed to disturb the verdict.

AMENDMENT.—Although the Practice Act, by a liberal construction, permits amendments as to parties, yet the substitution of one defendant for another, and treating the cause as having been originally commenced against the person last put into the record, is not allowed.

FOREIGN CORPORATION—*Statute of limitations.*—A corporation chartered in an-

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other state cannot plead the statute of limitations to an action in trespass or case in this state. It has no being outside the state which created it.

PLEADING—*Immaterial issue.*—Where issue is joined upon the plea of the statute of limitations, pleaded by a foreign corporation, it will be immaterial.

GEORGE WILLARD, *Attorney for Appellant.*
JOHN LYLE KING, *Attorney for Appellee.*

Chief Justice HEATON delivered the opinion of the court:

Action on the case for personal injuries suffered by appellee while attempting to cross appellant's railroad track at Eighteenth street, a public highway in Cook county. Pleas, general issue and the statute of limitation of two years. Replications to plea of statute of limitations, first, that action did accrue within two years, and, fourth, that defendant was a corporation of the State of Pennsylvania, and was at the time of the commencement of the suit, ever since has been, and now is, out of the State of Illinois. Replications two and three are not now in the case, having been disposed of by demurrer.

The appellant joined issue upon the first replication, and filed two rejoinders to the fourth, the first of which avers that appellant, on the 1st of July, 1869, came into Cook county, and commenced operating the Pittsburgh, Fort Wayne & Chicago railway, and had continually operated the same to the present time, during all which time it had and maintained in said county goods and effects, and for the conduct of said business the appellee had and kept in said county certain persons who were its officers, agents, etc., upon whom service of process could have been had at any time, etc., so as to submit it in its corporate capacity to the jurisdiction of the court. Second rejoinder was the same, except that it averred that the appellant had goods and chattels, etc., subject to attachment, levy and sale, and also averred that it resided in said county. To these rejoinders the plaintiff below filed a demurrer, which the court overruled, and he thereupon elected to stand by his demurrer.

The issues of fact were submitted to a jury, who found for the plaintiff a verdict for $3,000. The court overruled a motion for a new trial, and rendered judgment on the verdict and for costs. Defendant below appealed to this court, and assigns various errors, some of which we will notice. We will first, however, dispose of a motion to strike out the bill of exceptions, because no written points were filed as cause for new trial before the motion for a new trial was overruled in the court below. We do not think the motion should be allowed, and it is overruled.

By the above statement it will be seen that the issues submitted to the jury were, first, as to appellant's negligence under general issue, and, second, was the appellant a resident of the State of Illinois for the last two years prior to the bringing the suit? The jury found both issues for the appellee. As to the first issue of fact, there had been substantially three verdicts, and, so far as we know, upon proper instructions. The testimony presents questions of

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negligence and of contributory negligence, and after three verdicts we do not feel inclined to further investigate the evidence. We have examined, and think the questions presented by it were proper to be passed upon by the jury, and although we possibly might have found differently, are not disposed to disturb the verdict, but assume that the verdict was correct upon that issue.

The correctness of the verdict upon the issue on the statute of limitations depends upon the correctness of the second instruction given by the court on its own motion. The section of the Practice Act allows amendments, introducing new parties necessary to be joined as plaintiff or defendant, discontinuous to a joint plaintiff or defendant, changing the form of the action, and in form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain his action for the claim for which it was intended to be brought, or the defendant to make a legal defense. The change made in this case was the dismissal, in substance, of one defendant and the putting another defendant in the record; for there seems to be no doubt from the evidence that the Pittsburgh, Fort Wayne & Chicago Railroad Company is one chartered railroad corporation, owning the franchise of a railroad, and that the appellant is another corporation and lessee of the former, directly or indirectly, and acting under another and different charter. It also appears that appellee supposed the first named of these corporations was the immediate cause of his injury by its negligence, and that he discovered on the third trial of his case that the last named company were the lessees of the road, and that it was their cars and engine which caused his injury if either were guilty. He therefore substituted, by leave of the court, the last named for the first, and took out a new summons against the new party, the appellant, had it duly served, and filed an amended or new declaration against the new defendant, which appeared, pleaded and formed the present issue. Now that clause of the statute which refers to parties by name only relates to joint plaintiffs or defendants, and the general clause, we think, only relates to the subject-matter of the controversy, and not to the parties, and that there is no statute allowing the substitution of one defendant for another. All the cases cited to sustain this act of the court, so as to make the commencement of the action relate back to the first summons against the Pittsburgh, Fort Wayne & Chicago Railroad Company, are cases of mere misnomer, where the party intended to be sued was actually served with process, but the plaintiff failed to get the full or true name of the party he intended to and did in fact sue. But there is no case cited where the wrong person was served and declared against, whether natural or artificial, and on the discovery that there was a mistake as to the person who was in fact guilty, the court allowed the innocent party to be stricken from the record, and the name of the guilty one inserted, and then treated the cause as having been originally commenced against the person last put into the record and served; nor do we believe such a case can be found. The fact that R. C. Meldrum may have been, or in

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fact was, the agent of both corporations, we think, makes no difference. We therefore think the instruction wrong, and that there was no evidence to sustain the verdict upon the issue made on the second plea.

We now come to the question of the statute of limitations. We have examined this question with some care, and the conclusion reached by us is that foreign corporations, created and chartered in another state, cannot be or reside in this state. That such a corporation is precisely like a natural person who should or does reside in the State of Pennsylvania, and does not and cannot come into this state, but who, by his servants, agents and attorneys, carries on a business in this state. We think a person so situate a non-resident within the meaning of the statute of limitations, and could not plead it in bar of an action in a case like this. See 20 Wallace, 137, and cases there cited; 50 N. Y. 656; 5 Nev. 44, and many other cases referred to in the above. We find no case where a corporation is held to have the power of passing beyond the territorial limits of the state creating it. In this case we think no averments in appellant's plea could overcome the legal and physical impossibility of its power to migrate. That the issue formed in this case upon the plea of the statute of limitations was an immaterial issue of fact; that the court below erred in overruling the demurrer to appellant's rejoinder; that no material issue was, in fact, tried but the one upon the plea of not guilty. We think, under all the circumstances of the case, the judgment on the verdict correct; that the error of the court as to its ruling and instructions did not prejudice the appellant, as they could only affect the plea of the statute of limitations, and which, as above stated, we think could not be legally pleaded.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY; THE HON. JOSEPH E. GARY, JUDGE, PRESIDING.

THE WILLIAMSBURG CITY FIRE INSURANCE CO. *v.* ELIZABETH S. CARY.

INSURANCE—*Consent to removal of goods.*—It is not indispensable to a recovery for a loss of goods insured, after their removal to a different place, that consent should be first obtained for the removal; a subsequent ratification of the act, with a full knowledge of all the facts, is equivalent to a precedent consent. When the local agent of an insurance company is informed that goods insured have been removed, long before any loss occurs, and the company does not elect to cancel the policy and give the assured an opportunity of again insuring, it will be liable for the loss. It would be inequitable to permit an insurance company to maintain that its policy was not binding upon it, and still retain the balance of the unearned premium when it had positive knowledge of that which it insists effected the forfeiture.

SAME—*Estoppel to insist upon that which has been waived.*—A policy of insurance does not become absolutely void on a breach of the implied warranty as to the location of the property embraced in it, as the company may waive any restriction made for its benefit; and when such waiver distinctly appears, the insurer will be estopped from insisting upon that which is inconsistent with what he has said and done, and which affects the rights of others.

SAME—*Defects in preliminary proof waived by denial of liability.*—When an insurance company refuses to pay a loss, placing its refusal upon its non-liability in any event, it cannot insist, in defense of an action, that the preliminary proof was insufficient.

SAME—*Waiver of limitation clause.*—Although a policy of insurance may contain a clause prohibiting a suit for a certain time after loss, yet, if the company positively refuses to pay under any circumstances, claiming that it is not liable at any time or in any event, the assured may bring suit at once, as the refusal will render the limitation clause nugatory.

ERROR—*Excluding testimony that could not change the result.*—Where a case is fairly submitted and justice done, the judgment will not be reversed for error in excluding evidence that would not have tended to change the result.

CAULFIELD, HARDIN & PATTON, and J. M. BINCKLEY, *Attorneys for Appellant.*
JOHNSTON, ROGERS & APPLETON, *Attorneys for Appellee.*

Justice SCOTT delivered the opinion of the court:

This was an action of *assumpsit*, by the appellee against the appellant, to recover on a policy of insurance for a loss of a lot of millinery goods, valued at $1,600. A trial was had, resulting in a verdict and judgment for the plaintiff.

When the risk was assumed by the insurance company the goods covered by the policy were situated on the ground floor in building

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No. 88 State street, but, before the destruction by fire, the assured had removed them to No. 368 Wabash avenue. It is conceded no previous consent had been given the assured for the removal, but whether the company subsequently consented to carry the risk on the goods, in the new location, was one of the contested questions on the trial. On this point the testimony was conflicting, but if the jury gave credence to the witness Underwood, it was sufficient to warrant the finding in favor of plaintiff.

Upon this question in the case, defendant asked the court to instruct, the description of the location of the goods insured amounted to a warranty they should remain in the same situation, unless appropriate words, elsewhere expressed in the policy, manifested an intention to cover the property wherever situated; but, if no such words were found, and the goods were removed without consent, first had and obtained, such removal entirely discharged the insurance. We are inclined to think the substance of all that is accurately stated in this instruction was contained in others that were given on behalf of defendant, but the court was justified in refusing it, for the reason, the latter clause is not a correct expression of the law. It was not indispensable that consent should be first had and obtained to the removal of the goods. A subsequent ratification of the act, with a full knowledge of all the facts, is equivalent to a precedent consent. After the goods had been removed to the place where they were destroyed, the company's local agent was notified of such removal, and was asked to consent to carry the risk in the new location. This fact is not controverted, but whether such agent did in fact give his consent is a matter of contention between the parties. As we have seen, the finding was for plaintiff, and that ought to be regarded as conclusive. At all events, the company, when notified of the change in the location of the goods, did not elect to cancel the policy. Authority was reserved to either party to rescind the insurance contract. On every principle of justice, the non-action of the company, on receiving information of what had been done, ought to be regarded as an election not to declare the policy forfeited on account of the removal of the goods. Equitably, if the company did not desire to carry the risk longer, because of the change in the location of the goods, it ought, in fair dealing, to have returned the unearned premium and rescinded the insurance contract. It might well treat the removal of the goods as a breach of the warranty implied from a description of the location of the goods, and declare the policy forfeited. But no action was taken, and after notice, the assured might infer the company was willing to carry the risk notwithstanding the change in the location of the property. Had the company canceled the policy, as was its privilege, the assured could, doubtless, have been able to procure other insurance, and in all probability would have done so. The non-action of the company was a strong indication it was willing to continue the policy in force, and may reasonably have inspired that belief in the mind of the assured. Surely it would be

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inequitable to permit the company to maintain, the policy was not binding upon it, and still retain the balance of the unearned premium, when it had positive knowledge of that which it is insisted effected a forfeiture. That knowledge, in this case, was given long before any loss occurred, and yet the company did not choose to avail of its privilege to cancel the policy.

Much subtle reasoning has been indulged on the proposition, if the location of the goods described in the policy was changed without first obtaining the consent of the company to such removal, it would render the policy void, and the liability of the company would only arise on the making of a new contract with it or with its agent. A more accurate expression of the law would be, the removal of the goods covered by the policy would give the company, on obtaining information of that fact, the right to cancel the policy, but if no notice was given before loss occurred, doubtless the policy would cease to be binding, and no action could be maintained upon it. That is the contract between the parties, and there is no reason why it is not valid. But it is not strictly correct to say the policy becomes absolutely void on a breach of the implied warranty as to the location of the property embraced in it. The restriction the law imposes upon the assured, in this regard, is for the benefit of the insurer, that the risk may not become more hazardous, but, nevertheless, it is a privilege it may waive at its election. Where such waiver distinctly appears, as we are authorized to believe it does in this case, the law is, the party will be estopped from insisting upon that which is inconsistent with what he has said and done, and which affects the rights of others. *New England Fire and Marine Insurance Co.* v. *Wetmore*, 32 Ill. 221; *Illinois Fire Insurance Co.* v. *Stanton*, 57 Ill. 354.

As to the objection, the proofs of loss furnished were insufficient under the conditions of the policy, we think the assured was relieved from any obligation to make further proofs, in consequence of the company placing its refusal to pay the loss suffered on the distinct ground of non-liability in any event. Timely notice of the loss was, in fact, given, and had the company been willing to pay the loss upon sufficient proofs, the defects now insisted upon could and would have been readily supplied. But that was not the reason of its refusal, and had the assured complied with every minutia in the condition of the policy in making the proofs of loss, we are warranted in believing, from the facts proven, the refusal of the company would have been none the less absolute and positive. It would have been folly to impose upon the assured the burden of doing an act that would not in the slightest degree have changed the determination of the company. The law has required no such useless thing to be done. *Peoria Marine and Fire Insurance Co.* v. *Whitehill*, 25 Ill. 470.

Nor was the action prematurely brought. Having placed its refusal to pay the loss on the ground there was no liability upon the company in any event, it cannot avail of the limitation clause of

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the policy as a defense. Waiving preliminary proofs, as also a waiver of this stipulation in the policy, renders it nugatory. According to the testimony, the president, on examination, decided the assured had no legal claim upon the company for the loss. This conclusion was not produced by any defects in the preliminary proofs of loss, but it was in consequence of the belief of the company, under no circumstances, could be held liable for the loss. What reason can be assigned for extending to the company the benefit of the limitation clause in the policy, or to the bringing of an action for a loss which its officers have decided, upon full examination, not to pay at any time nor under any circumstances? The time given, in which to make payment of the loss, was of no value to the company, for it did not intend to pay at all, and the assured was at liberty to bring her action at once. *Ætna Insurance Co.* v. *Maguire*, 51 Ill. 342.

We are inclined to think there was no error in the action of the court in excluding testimony offered by defendant, but if there was it was not of sufficient importance to justify a reversal of the judgment for that reason alone. The case seems to have been fairly submitted, and on the whole record we think justice has been done. Had the testimony excluded been admitted, we do not think it would have had any tendency to change the result.

The judgment will be affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

INSURANCE.—If the holder of notes, by agreement, accepts of the maker policies of insurance covering property destroyed by fire, upon which there is a *prima facie* cause of action, in discharge of the notes in the absence of fraud he will be bound by the contract, and the maker, when sued on the notes, need not show that a complete cause of action existed in his favor on the policies to make his defense availing. *Brunswick* v. *Birkenbeull*, 83 Ill. 413. An insurance company has no power to declare a forfeiture of a life policy after the death of the assured, who did no act in his lifetime authorizing the forfeiture, and who died before any forfeiture was properly declared. Their liability to pay the amount of the policy became fixed by his death, and no act, short of payment or tender could relieve from their liability. *Protection Life Ins. Co.* v. *Palmer*, 81 Ill. 88. Where a party insured meditates a secret purpose at some future time to set his building on fire, the act of setting the building on fire avoids the contract of insurance, but it is no reason for declaring it void after loss has occurred. *Imperial Fire Ins. Co.* v. *Gunning*, 81 Ill. 236. A knowledge of this intention to destroy the property would authorize an immediate cancellation of the policy. *Id.* After a loss a court of equity will not rescind the contract. *Id.* The remedy is at law. *Id.* *Assumpsit* will lie upon a *sealed* policy of insurance. *Protection Life Ins. Co.* v. *Palmer. Supra.* It may be shown that the applicant for the policy in fact did not make the representations as shown by the application, but that the application was filled out by the agent of the company, he inserting the statements, claimed to be false, of his own accord. *Hartford Life Ins. Co.* v. *Gray*, 80 Ill. 28. It has never been ruled that the court will, in the absence of all evidence, presume that the application was thus made out. *Id.* Where A in fact procures a policy of insurance himself for the benefit of B, it need not be averred in the declaration that B had any interest in the life of

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A. *Guardian M. L. Ins. Co.* v. *Hogan*, 80 Ill. 35. But where one procures insurance on the life of another the plaintiff must aver in his declaration that he had an insurable interest in the life insured, and must prove the same affirmatively. *Id.* A wife has the right, by the use of all the persuasive arts at her command, to induce her husband to procure a policy of insurance on his life for her use, and on his death to receive all its benefits and proceeds. *Pingree* v. *Jones*, 80 Ill. 177. But when issued to one who has no insurable interest in the life of the insured, it is a mere wage policy and is void. *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35. A moral claim does not constitute an insurable interest in behalf of a creditor. *Id.* The mere relation of father and son does not constitute an insurable interest in the son in his father's life. *Id.* Where the sum insured is largely in excess of the insurable interest, it tends to prove that the insurance was procured for mere purposes of speculation, and there can be no recovery. *Id.* Facts *only tending* to prove an insurable interest should not be declared by the court to constitute such interest. *Id.* In a suit on a substituted policy, the amount of premium paid on a former policy may be proven. *Id.* Where there is no evidence as to the cause of the death of a party whose life is insured, the presumption is that it was from natural causes. *Id.* A condition in a policy that if the premium is not paid on or before the time specified therein, it shall be void, may be enforced if waived by the company. *Chicago Life Ins. Co.* v. *Warner*, 80 Ill. 410. If the practice of a company induces a belief that the forfeiture-clause will not be insisted on, the company will be estopped from insisting on it. *Id.* Where a dividend is due and payable at the same time with the premium, which is not paid, the dividend may be applied toward the payment of the premium. *Id.* False representations made to an agent of a company, who knows that they are false, but adopts them as true, does not amount to a fraud on the company. *Guardian M. L. Ins. Co.* v. *Hogan*, 80 Ill. 35. Where the owner of property insures the same, and the tenant refuses to pay the premium, and after a loss by fire voluntarily rebuilds, he will not be entitled to any contribution by the owner, or have any claim, legal or equitable, to any part of the insurance money. *Ely* v. *Ely*, 80 Ill. 532. The interests of the landlord and tenant are each insurable. *Id.* Where the mortgagee insures property he may receive and enjoy the insurance money, and also collect his mortgage debt. *Id.* A provisional clause in an insurance policy should be understood in the ordinary meaning of the words used. *Fireman's F. I. Co. of Can.* v. *Rodeph Sholom*, 80 Ill. 558. And the company will be liable if the risk is permitted to stand after it becomes, from other causes, more hazardous. *Id.* Where *due notice and proof of loss* are required by a policy, a liberal construction should be given to the words used, and the notice and proof should be given within a reasonable time. *Knickerbocker Ins. Co.* v. *Gould*, 80 Ill. 388. And reasonable time should be determined by the circumstances. *Id.* Where the facts in regard to diligence are disputed, it is a question of fact for the jury. *Id.* Where a defective notice and proof of loss is given in time, and no defects are pointed out, and an opportunity to correct them given, any objection to the same will be considered as waived. *Id.* Proofs of loss are admissible in evidence to show that they were made and delivered as required by the terms of the policy, but *the extent of the loss must be shown by other evidence.* *Id.* Where a party, by false representations as to value, obtains a policy upon a valuation at twice the value of the goods, this, of itself, renders the policy absolutely void. *Lycoming Fire Ins. Co.* v. *Revlin*, 79 Ill. 402. A party insuring in a mutual life insurance company becomes a member and is bound by its rules. *Id.* And will be held strictly to his contract with regard to payment of dues. *Id.* But the rules of the company may be waived where rights are not substantially affected

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thereby. *Id.* In Illinois a policy of insurance on one's life may be made payable to his widow or heirs, to the exclusion of his creditors. *People* v. *Phelps*, 78 Ill. 147. But when payable to the "*legal representatives*" will be assets for the payment of debts. *Id.* Where a dwelling-house is left vacant *two* months before a loss by fire, contrary to a condition in the policy, no recovery can be had on the policy. *American Ins. Co.* v. *Podfield*, 78 Ill. 167. The recital of payment in policy estops the company from proving that the premium was not in fact paid. *Teutonic Life Ins. Co.* v. *Anderson*, 77 Ill. 22. Where the company looks to an association for the payment of premiums it is immaterial whether those falling due before the person's death were paid or not. *Id.* And the failure of the assured to pay the party insuring is no defense to a suit on the policy. *Id.* Where a company undertakes to rebuild a house injured by fire, they are not *liable for rent* until after a reasonable length of time has elapsed for that purpose. *St. Paul Fire and Marine Ins. Co.* v. *Johnson*, 77 Ill. 598. Where insurance is taken on condition that a watchman should be kept on the premises, the particular part he occupied is immaterial, if he was on the premises and substantially complied with the contract. *Andes Ins. Co.* v. *Shipman*, 77 Ill. 189. And when the company required that a record of the watchman's performance of duty should be kept, and knew that no such record could be kept, they must stand the loss. *Id.* Any twenty-five or more residents of this state, who own property worth $50,000 in value, may form an incorporated mutual fire insurance company. Laws of Ill. 1877. When a declaration of such intention is duly filed with the auditor, he shall deliver to such persons a copy of the charter, which, when filed with the county clerk, shall be their authority to organize and do business. *Id.* A certified copy of such charter is good evidence. *Id.* See Laws of Ill. 1877, pp. 123–127.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY; THE HON. J. W. COCHRAN, JUDGE, PRESIDING.

WILLIAM SCOTT ROBERTSON *v.* CHRIST. BROST.

EVIDENCE—*Hearsay.*—Testimony as to statements made by one not a party to the suit is inadmissible, except for impeachment, and is not admissible for that purpose unless the proper foundation is laid by calling such person's attention to the fact and the time and place.

WITNESS—*Competency of wife, for her husband.*—Where a wife is sent to demand money due her husband, this will not, under the statute, make her a competent witness, for her husband, to prove admissions of the defendant going to prove a prior contract. If she makes a contract as her husband's agent, she is competent to prove the same.

EVIDENCE—*Rebutting as to impeaching evidence.*—Where impeaching evidence is given as to witness' statements contradictory to his testimony in a deposition, he should be permitted to be recalled and examined as to such statements, although his attention may have been called to them in his deposition, and he therein testified that, to the best of his recollection, he had made no such statements.

JOHNSON & HEWETT, *Attorneys for Appellant.*

MCCULLOCH & STEVENS and CRATTY BROS., *Attorneys for Appellee.*

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Chief Justice SHELDON delivered the opinion of the court:

This was an action brought by appellee, Brost, to recover of appellant, Robertson, the sum of $197.77, the price of seven car loads of coal which Brost claimed to have sold and delivered to Robertson. The plaintiff recovered, and the defendant took this appeal, and asks a reversal of the judgment for several reasons.

The verdict in this case is by no means satisfactory. The evidence goes strongly to show that the sale of the coal was to one Joseph Foster, of Chicago.

The parties themselves are in direct variance in their testimony, but the facts and several items of written evidence are in corroboration of the defendant. The seven car loads of coal were shipped to Chicago, and were all billed or invoiced, in Brost's handwriting, as bought by Joseph Foster, of Chicago, of Brost.

Foster, to whom the coal was sent, testified that, before the receipt of the first car load, Brost called on him, in Chicago, and made the arrangements about the price and future consignments of the coal, and it was agreed that Robertson should do the corresponding for Brost, and that Robertson acted as the agent, only, of Brost, in the matter. After the coal had all been delivered to Foster, Brost drew a draft on him for the amount. Not being paid, it was forwarded to Chicago, and placed in the hands of attorneys for collection against Foster. Brost sent his wife in to Chicago with a letter to Foster, requesting him to settle for the coal which he got of Brost, with his wife, accompanied also with an account for the coal, made out as bought by Foster of Brost. These attempts to collect from Foster failing, this resort was had to Robertson. But without pronouncing as to the sufficiency of the evidence to sustain the verdict, we will proceed to consider other assignments of error.

It is insisted that the court below erred in admitting and rejecting testimony.

The wife of Brost was admitted, against objection, to testify in his favor in regard to statements and admissions made by Foster and Robertson in interviews had with them.

Her testimony as to Foster's statements and admissions were clearly inadmissible, aside from the objection of the witness being the wife of Brost, as being mere hearsay evidence. The only ground for the reception of such testimony would have been in impeachment of the credit of Foster as a witness in the case, in showing contradictory statements by him. But no foundation was laid for that by inquiry of Foster as to such statements or admissions to or in the presence of Mrs. Brost. But, as wife, we think the witness was incompetent to testify to the conversation had with either Foster or Robertson. The justification for receiving the evidence is rested upon sec. 5, p. 489, Rev. Stat. 1874, permitting the wife to testify for the husband "in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband."

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The agency of the wife here claimed to exist, was that of sending her to Foster and Robertson to get the money for the coal. By virtue of such agency it is claimed that the wife was a competent witness to establish a contract of the sale of the coal by Brost to Robertson, in November, 1873, by testifying to admissions made by Foster and Robertson at these times of going to them for the money in January, 1874, tending to show the sale of the coal was made to Robertson. Had the wife, as agent of her husband, made the sale of the coal, then, under the statute, she would have been competent to testify as to the transaction. But she was not. Brost himself made the sale of the coal, with which she had no connection.

The asserted agency of the wife was only in going after the money, some time afterward. She demanded payment, and it was refused. That was all the transaction there was of the business of such agency. Had it been material to the issue, which it was not, to prove the facts of demand of payment, and refusal of payment, then the wife might have been an admissible witness to prove these facts, as matters of a business transaction, where the transaction was had and conducted by a married woman as the agent of her husband. But the claim that such an agency as there was here, to go for the money for the coal, converted the wife into a competent witness to prove a prior contract of the sale of the coal, by testifying to admissions made at the time of her demand of payment, is, as we view it, a perversion of this provision of the statute. Its allowance would be to enable the wife to be made a competent witness for her husband in every suit. He would need but to send her to the adverse party for some purpose pertaining to the subject of litigation, and thus qualify her, under the guise of an agency, to testify to admissions made which would go to establish the cause of action. We are of opinion the wife should not have been received here as a witness at all.

The rejected testimony complained of, is that of the witness Foster. In his deposition taken in the case, he had testified that he bought the coal of Brost; that Robertson acted in the capacity of agent. The plaintiff introduced the depositions of certain witnesses, tending to show that Foster had made contrary statements. Foster, being present at the trial, was offered as a witness by the defendant to contradict these statements, and explain what he did say on the occasion testified of by these witnesses. The court excluded the testimony. Foster, in his deposition in the case, had his attention called to the time, place and persons involved in these contrary statements, and testified that, to the best of his knowledge, he did not make them. We think, nevertheless, that Foster should have been allowed to be re-examined, as was proposed, in regard to such statements. That such is the proper practice, see 1 Greenl. Ev., sec. 462.

For the errors indicated, the judgment is reversed and the cause remanded. *Judgment reversed.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY; THE HON. HENRY BOOTH, JUDGE, PRESIDING.

JOHN S. HENRY *v.* THE MERIAM & MORGAN PARAFFINE COMPANY.

PRACTICE—*Judgment for balance on affidavit of merits by defendant as to part.*—If a defendant, in a case where he is required to accompany his pleas with an affidavit of merits, files with his pleas an affidavit that he has a good defense as to a portion of the plaintiff's demand, the latter may concede the defense as to such sum, and will then be entitled to judgment for the residue, without any trial, regardless of pleas to the whole cause of action.

M. J. DUNNE, *Attorney for Appellant.*
FRANK A. JOHNSON, *Attorney for Appellee.*

Justice CRAIG delivered the opinion of the court:

This was an action brought by appellee against appellant as guarantor of a certain promissory note, executed by one Rigdon and payable to Armstrong & Co., for the sum $380, and which was assigned by indorsement by the payees to appellee.

The appellee filed with its declaration an affidavit that there was due the plaintiff $380, with ten per cent interest from the 16th day of October, 1875, and also the further sum of $40, costs paid and incurred in efforts to collect the note of the makers thereof.

To the declaration the appellant pleaded the general issue, with an affidavit of merits as to the $40, also a plea of *nul tiel corporation.*

After the filing of the pleas by appellant, appellee moved for judgment for the amount sued for, less $40 claimed by appellant in his affidavit of merits. This motion the court allowed, and the appellant insists it was error to render judgment while the plea of *nul tiel corporation* was not disposed of.

The position assumed by appellant is fully met by section 37, Revised Statutes of 1874, p. 779, which, in substance, provides that, if the plaintiff, in a suit upon a contract for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due from the defendant, after allowing all just credits and set-offs, he shall be entitled to a judgment as in case of default, unless the defendant shall file with his plea an affidavit that he verily believes he has a good defense to said suit, upon the merits, to the whole or a portion of plaintiff's demand, and if to a portion, specifying the amount.

The affidavit filed by appellant with his pleas disclosed a defense to the plaintiff's cause of action to the extent of $40, when appellee conceded the correctness of the defense so far as it went, and was willing to take judgment for the balance of the demand sued for, after deducting the $40. This obviated all necessity for

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any further delay in the proceedings, and clearly entitled appellee to a judgment for the amount conceded by both parties to be justly due, as was held in *Allen* v. *Watt*, 69 Ill. 655.

If it be true that appellee had no legal existence as a corporation as appellant had pleaded, it would have been an easy task for him to have interposed, in the affidavit filed, a defense to the whole of the plaintiff's demand, but, as he failed to do this, the statute is plain the plea of *nul tiel corporation* availed him nothing. In the language of the statute, the plaintiff "shall be entitled to judgment as in case of default."

The object of the statute is apparent. If a defendant has a good defense upon the merits to the whole of the plaintiff's demand, and that fact is disclosed by affidavit filed with the pleas, then the cause will stand for trial in its regular order; but, on the other hand, if the affidavit of merits only goes to a portion of the demand sued for, and the plaintiff is willing to concede the justness of the amount relied upon as an off-set, the necessity for the delay and costs of litigation is removed.

This record fails to disclose that appellant had any defense upon the merits, except as to the sum of $40. When the appellee admitted this amount, it was within the power of the court to strike the plea of *nul tiel corporation* from the files, or disregard it entirely and render judgment as in case of default.

The authorities cited by appellant have no application to the practice in a case like this, which is governed entirely by the statute.

As we perceive no error in the record, the judgment will be affirmed. *Judgment affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY; THE HON. WILLIAM BROWN, JUDGE, PRESIDING.

JAMES C. MAYBERRY *v.* CHARLES VAN HORN.

PRACTICE—*Judgment for residue after allowing set-off sworn to.*—Where the plaintiff proceeds under section 37 of the Practice Act of 1874, by filing his affidavit with his declaration, and the defendant files the general issue, with notice of set-off, with an affidavit of a defense to a given amount, if the plaintiff admits a deduction of such sum, it is proper to render judgment in his favor for the residue, without a trial.

HORACE W. TAYLOR, *Attorney for Appellant.*
WILLIAM LATHROP, *Attorney for Appellee.*

Chief Justice SHELDON delivered the opinion of the court:

This was an action of *assumpsit* upon two promissory notes, there having been filed with the declaration, under the 37th section of the

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Practice Act, Rev. Stat. 1874, p. 779, an affidavit showing the nature of the demand and the amount due the plaintiff from the defendant after allowing to the latter all his just credits, deductions and set-offs. The defendant filed a plea of the general issue, with notice of set-off to the amount of $125, accompanied with his affidavit that he had a good defense to the suit upon the merits to the amount of $65. The plaintiff thereupon filed a written admission that said sum of $65 might be deducted from his claim, and moved the court for judgment for the amount due on the notes after deducting said sum of $65, and judgment was rendered accordingly.

It is complained that the court erred in rendering such judgment.

The section referred to provides that, where such an affidavit is filed with the declaration, the plaintiff shall be entitled to judgment, as in case of default, unless the defendant, his agent, or attorney, shall file with his plea an affidavit stating that he verily believes he has a good defense to the suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount, according to the best of his judgment and belief.

In *Allen* v. *Watt*, 69 Ill. 655, in reference to this same section contained in a former act, the court say, "that it was intended by the legislature that the affidavit filed with the plea should disclose, with reasonable certainty, the entire ground of defense relied upon. . . . The affidavit here interposed a set-off to the amount of $42. This was allowed. If the affidavit was true this was all the defense there was to the suit, for although it is not expressly said that this is all the defense the defendants have, such is the necessary implication."

Haggard v. *Smith*, 71 Ill. 226, is an authority for rendering judgment for the residue of the plaintiff's demand after deducting the amount of the claim of defense set forth in defendant's affidavit.

The rendering of the judgment by the court below was in consonance with the above authorities, and the judgment is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

WRIT OF ERROR TO THE CIRCUIT COURT OF COOK COUNTY; THE HON. JOHN G. ROGERS, JUDGE, PRESIDING.

LEVI F. MASON *v.* JAMES H. ABBOTT.

DEFAULT—*Plea on file.*—It is error to render judgment against a defendant by default, when his plea to the merits is on file.

APPEARANCE—*Effect of withdrawing.*—Where an attorney, after filing a plea to the merits, withdraws his appearance, this does not withdraw the plea, and a trial must be had.

GARDNER & SCHUYLER, *Attorneys for Plaintiff in Error.*

Justice CRAIG delivered the opinion of the court:

This was an action of *assumpsit*, brought by James H. Abbott,

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against Charles H. Beckwith, Franklin H. Beckwith, Charles L. Beckwith and Levi F. Mason. The original summons was served on Charles H. Beckwith only, but a plea was filed on behalf of all the defendants by their attorneys. Subsequently, as appears from the record, the attorney appeared in court and withdrew *his* appearance. The action was dismissed as to all the defendants except Mason, and a judgment by default was rendered against him, to reverse which he brings up the record by writ of error.

It was error to render judgment against Mason by default, when his plea to the merits of the action was on file. This question has repeatedly been decided by this court. *Lyon* v. *Barney*, 1 Scam. 387; *Manlove* v. *Bruner*, ib. 390; *Covell* v. *Marks*, ib. 391; *McKinney* v. *May*, ib. 534; *Steelman* v. *Watson*, 5 Gilm. 249; *Sammis* v. *Clark*, 17 Ill. 398.

It is true, the attorney who filed the plea withdrew his appearance, but that action on his part did not withdraw the appearance of Mason or the plea which had been filed on his behalf. So long as the plea of Mason was on file, he could not be regarded as being in default, nor could a judgment be rendered against him except upon a trial.

For the error indicated, the judgment must be reversed and the cause remanded. *Judgment reversed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY; THE HON. JOSEPH E. GARY, JUDGE, PRESIDING.

PATRICK L. GARRITY *v.* JOSEPH O. WILCOX *et al.*

(To appear in 83 Ill. 159.)

1. PRACTICE—*Affidavit of merits as to portion of plaintiff's claim—its sufficiency.* In a suit by partners, in *assumpsit*, the defendant pleaded *non assumpsit*, accompanied with the following affidavit of merits: "A B, being duly sworn, deposes and says that he is the defendant in the above entitled cause, and that he verily believes he has a good defense to a portion of said plaintiff's demand, and to the full sum of $450, upon the merits, in this, that said sum of $450 was, at sundry and divers times, by the defendant, sent to said plaintiffs, as partners, etc., and by the said plaintiffs received, but which said sum, or any part thereof, the said plaintiffs to said defendant have not accounted, or given this defendant credit therefor;" *Held*, that the affidavit was good in form and substance, and that it was error to strike the same from the files.

Amendment of pleadings—striking affidavit from files, for interlineations.—The fact that words in a defendant's affidavit of merits are interlined before it is sworn to, in order to make it conform more strictly with the statute, affords no ground for striking the affidavit from the files.

FORMER DECISION.—It was said in *Stanberry* v. *Moore*, 56 Ill. 472, that the practice of making amendments by erasures and interlineations is a bad one, and ought not to be tolerated; that a paper thus disfigured ought to be stricken

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from the files. This, however, was not necessary to be said, as that matter was not a point in the case. The remark was only intended to indicate a better practice.

SAWIN, JONES & HUNTING, *Attorneys for Appellant.*
NEWTON BURKE, *Attorney for Appellees.*

Justice BREESE delivered the opinion of the court:

This was *assumpsit*, in the Superior Court of Cook county, upon a promissory note, to which the defendant pleaded *non assumpsit*, accompanying the same with the following as an affidavit of merits: After entitling the cause and court and term, it proceeds: Patrick L. Garrity, being duly sworn, deposes and says that he is the defendant in the above entitled cause, and that he verily believes he has a good defense to a portion of said plaintiffs' demand, and to the full sum of $450, upon the merits, in this, that said sum of $450 was, at sundry and divers times, by the defendant, sent to said plaintiffs, as partners, etc., and by the said plaintiffs received, but which said sum, or any part thereof, the said plaintiffs to said defendant have not accounted, or given this defendant credit therefor.

A motion was sustained striking the plea from the files, for the alleged reason of the insufficiency of this affidavit, and a default and judgment taken against the defendant for $901 and costs. To reverse this judgment this appeal is taken, and the only question is the sufficiency of this affidavit.

We are of opinion the affidavit is in substantial compliance with section 37 of the Practice Act of 1874. The fact that words were interlined in the affidavit before it was sworn to, in order that it should more strictly and literally conform to the statute, afforded no ground whatever for this adverse action of the court.

It is, perhaps, too frequently the case that amendments are made to pleadings by erasures and interlineations, but in the hurry of business it is sometimes necessary. What was said in *Stanberry* v. *Moore*, 56 Ill. 472, was not necessary to be said, as that matter was not a point in the case, and was only intended to indicate a better practice.

The affidavit in question is good in form and substance, and being so, it was error to strike the plea from the files, as it had a solid statutory foundation. It follows the judgment entered by default was irregular and erroneous, and must be reversed.

The judgment is reversed and the cause remanded.

Judgment reversed.

EDITOR'S NOTES.

AMENDMENTS AT COMMON LAW.—The Practice Act, according to recent decisions, is liberally construed in regard to amendments. *Wilday* v. *Wight*, 71 Ill. 374. Thus in that case a plaintiff was of his own motion permitted to amend the summons so as to conform to the declaration, and after a plea in abatement had been filed to reach the defect. *Wilday* v. *Wight*, 71 Ill. 374; see, also, *C. & T. Coal and R. R. Co.* v. *Lickiss*, 72 Ill. 521. If terms are imposed, they must not be unreasonable. *Misch* v. *McAlpine*, 78 Ill. 507. As where a party was compelled to

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go to trial, when he could not, for the want of material testimony. *Id.* A sheriff's return may be amended even after error brought, but if such amendment is sought after the cause is disposed of—after judgment or decree—special notice is necessary. *Terry* v. *Eureka College*, 70 Ill. 236; *Mass. Mut. Life Ins. Co.* v. *Kellogg*, 82 Ill. 614; *National Ins. Co.* v. *Chamber of Commerce*, 69 Ill. 22. An affidavit in attachment may be amended. *Roberts* v. *Dunn*, 71 Ill. 46. Also in replevin. *Kirkpatrick* v. *Cooper*, 77 Ill. 565. The names of the parties plaintiff may be changed. *Challenor* v. *Niles*, 78 Ill. 78. An improper plaintiff may be dismissed from the cause without refiling the declaration or further plea. *Dickson* v. *C. B. & Q. R. R. Co.*, 81 Ill. 215. Amendments are not ground for continuance unless calculated to surprise. *Litchfield Coal Co.* v. *Taylor*, 81 Ill. 590; *Snowell* v. *Moss*, 70 Ill. 313. In proceedings for judgment against delinquent lands, for taxes, all amendments which could be allowed in any personal action may be allowed. *Walsh* v. *The People*, 79 Ill. 521. It is hardly ever too late to amend, either before or after verdict, upon terms. *Thompson* v. *Sornberger*, 78 Ill. 353; *Chicago & P. R. R. Co.* v. *Stein*, 75 Ill. 41. The verdict may be amended in the presence of the jury so as to put it in proper form. *City of Pekin* v. *Winkel*, 77 Ill. 56. After verdict in suit against two defendants, the plaintiff was allowed to dismiss the suit as to one by an amendment of the declaration. *Cogshall* v. *Beeseley*, 76 Ill. 445. The record, at a subsequent term, by consent of parties, may be amended almost without limit, so that it does not affect third parties or vested rights. *Church* v. *English*, 81 Ill. 442. But without consent the power is limited to clerical errors, and then only on notice and to cure mistakes of form therein. *Cairo & St. L. R. R. Co.* v. *Holbrook*, 72 Ill. 419; see *Lill* v. *Stoakey*, 72 Ill. 495. If the opposite party is in court at the time of granting leave, this will dispense with notice. *National Ins. Co.* v. *Chamber of Commerce*, 69 Ill. 22. Even after appeal an amendment may be made and a supplemental record filed above, so as to obviate error. *Grassly* v. *Adams*, 71 Ill. 550. The requirement that amendments, to be allowed, should be made without erasure or interlineation, supposed to have been settled in *Stanberry* v. *Moore*, 56 Ill. 472, is relaxed. It is a bad practice, nevertheless, to erase, interline and disfigure pleadings, and should be confined only to cases of absolute necessity. The parties should be required to have a well engrossed copy of the amended pleading made, compared and filed in place of the original.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY; THE HON. JOSEPH E. GARY, JUDGE, PRESIDING.

JOAQUIN HOHMANN v. FREDERICK EITERMAN.

APPEARANCE—*In appeal case.*—Where the appellee, in an appeal taken from the judgment of a justice of the peace, files a trial notice with the clerk, under the rules of the court, this, independent of statutory provision, is a full appearance and submission to the jurisdiction of the court, and will obviate the necessity of service on the appellee.

SAME—*Statute construed.*—The 68th section of the chapter of the Rev. Stat. of 1874, entitled "Justices of the Peace and Constables," does not exclude the common

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law modes of entering an appearance in a case, but only provides a mode of entering it in vacation.

PRACTICE—*Filing papers.*—Where a notice required by rule of court is actually filed and placed among the other papers in a case, the fact the clerk has omitted to mark it as filed, will not invalidate the notice. If the opposite party knows of its being in the papers, this is sufficient.

M. MARX & SON, *Attorneys for Appellant.*
ALLEN, BARMM & ALLEN, *Attorneys for Appellee.*

Justice WALKER delivered the opinion of the court:

It appears that appellee sued appellant, before a justice of the peace of Cook county, and recovered a judgment against him. He thereupon prayed and perfected an appeal by filing a proper bond, in due time, before the justice, who lodged the papers in the Superior Court, as required by the statute. Afterward, and on the 24th day of December, 1875, plaintiff filed what is by the rules of the court denominated a trial notice. It was entitled of the cause, with the docket number, and requested the clerk to place the cause on the trial docket for the January term, 1876, and was signed by plaintiff's attorneys.

On the 28th day of April, 1876, being about four months after the cause was placed on the trial docket, both parties were in court, expecting the case to be reached in the call then progressing. In the afternoon of that day, counsel for defendant was called into another court, and, about 4 o'clock in the afternoon, the case was called for trial and submitted to a jury, in the absence of defendant, his attorney and witnesses. The jury found a verdict for $147 for plaintiff, on which judgment was rendered.

A motion to set aside the judgment and reinstate the cause on the docket was entered, but it was subsequently overruled, to which defendant excepted, and brings the case to this court by appeal, and asks a reversal.

There was no service on appellee in the court below, and it is claimed that, without such service, or the entry of an appearance in writing at least ten days before the term at which the trial was had, the court had no jurisdiction of the person of defendant, and should therefore have set aside the judgment and reinstated the cause.

The 68th section of the chapter entitled "Justices of the Peace and Constables," provides that, where service is not had on appellee, he may enter his appearance ten days before the term, and have a trial. The appearance is required to be in writing, and filed with the clerk, and placed among the papers in the case, and the question is, whether the filing of the notice to place the case on the trial docket was an appearance.

Independent of statutory provisions, we have no doubt this was a full appearance and submission to the jurisdiction of the court by the plaintiff; and, having entered a full appearance, no possible reason is perceived why he should be served with process. Its only office is to bring parties before the court who are not subject to its

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jurisdiction. A voluntary appearance, then, dispenses with the necessity of process or service.

When appellee filed the trial notice, it was for the purpose of having a trial at the earliest period that the business of the court would permit, and he could not move to place the cause on the trial docket until he was in court; nor did he limit his appearance when he filed his motion. And defendant must have understood appellee was in court, as the record fails to show that he sued out a summons after the appearance was entered, or any effort was made to procure service. But it seems to us to be too obvious, that there was an appearance, to render anything more than a mere statement of the facts necessary to demonstrate the proposition.

It is said the trial notice was not marked filed, although it was in fact filed with the clerk on the day of its date. The bill of exceptions, however, does not state that it was not placed among the other papers in the cause. If there, then it was the duty of appellant to see and know the fact, and if he did, then the paper answered every purpose it would have done had the clerk performed his duty, and marked it filed. Seeing the case on the trial docket, it is reasonable to suppose appellant looked to see by what authority the clerk had placed it there, and we presume he did examine the notice, as he and his attorney were present, watching the case, on the forenoon of the day of the trial. If he knew the paper was on file, as we must presume he did, then he waived the objection that it was not marked filed, as he made no motion to have the case transferred to the general calendar. He probably made no such motion, as he knew that the other party would have applied for and obtained leave to the clerk to mark it filed *nunc pro tunc*, and he would have accomplished nothing by such a motion.

The 68th section does not exclude the common law modes of entering an appearance in a case, but only provides a mode of entering an appearance in vacation. But even if it did, this was an appearance by appellee, in writing, filed with the clerk and placed among the papers of the case, and fully conforms to the substantial requirements of the section.

We perceive no error in the record, and the judgment of the court below is affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

APPEARANCE may be special or limited, or it may be general or full. An instance of a special or limited appearance is where a garnishee files a plea to the jurisdiction of the court, to which a demurrer is sustained and the garnishee stands by his plea. It is error to render final judgment against the garnishee; the judgment should be conditional, and a *sci. fa.* sued out and served on the garnishee, returnable at the next term. *T. W. & W. Ry. Co.* v. *Reynolds*, 72 Ill. 487. A defendant who goes without making any objection into court, before a justice of the peace, and voluntarily confesses judgment, thereby confers jurisdiction over his person. *Bliss* v. *Harris*, 70 Ill. 343. An appeal from a justice of the peace must be taken (except in special cases) within twenty days from the rendition of the

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judgment. The filing of the appeal bond is in the nature of process; hence, if a bond be filed after the twenty days, any appearance of the appellee, not limited to objections as to the time and manner of perfecting the appeal, will be deemed a waiver of all such objections. *Pearce* v. *Swan*, 1 Scam. 266; *Mitchell* v. *Jacobs*, 17 Ill. 235; *Kemper* v. *Town of Waverly*, 81 Ill. 278. A general appearance waives notice and process in civil actions. *Baldwin* v. *Murphy*, 82 Ill. 485; *Protection Life Ins. Co.* v. *Palmer*, 81 Ill. 88; *Filkins* v. *Bryne*, 72 Ill. 101; as well as in special proceedings. *The People ex rel.* v. *Sherman*, 83 Ill. 165; *Gilkerson* v. *Scott*, 76 Ill. 509. The filing of a demurrer is a general appearance. *Protection Life Ins. Co.* v. *Palmer*, 81 Ill. 88. So too is pleading in bar. *Filkins* v. *Bryne*, 72 Ill. 101.

APPEAL FROM A JUSTICE OF THE PEACE.—The filing of the bond, even if defective, effectuates the appeal. *Miller* v. *Superior Sewing Mach. Co.*, 79 Ill. 450. It must be filed within twenty days; if filed twenty-one days after the judgment the appeal will, on motion made in apt time, be dismissed. *Kemper* v. *Town of Waverly*, 81 Ill. 278. If the bond is filed with the justice, the appellee is bound to follow up the appeal without further notice. *Fix* v. *Quinn*, 75 Ill. 232; *Fink* v. *Disbrow*, 69 Ill. 76. Where a defective transcript is sent up, the proper practice is to obtain a rule on the justice or party appealing to remedy the defects. *Fink* v. *Disbrow*, 69 Ill. 76. When the bond is filed in the Circuit Court no action can be taken until the appellee is in court, by service of summons, or by return of two *nihils*, or by entry of appearance. *Camp* v. *Hogan*, 73 Ill. 228. No action can be taken by the Circuit Court, at any term, unless the appeal was taken at least ten days prior to the term. *Baines* v. *Kelly*, 73 Ill. 181. The Circuit Court may require a sufficient appeal bond, and in case of non-compliance with the rule for that purpose, dismiss the appeal. *Bennett* v. *Pierson*, 82 Ill. 424. The filing of the appeal bond on the part of the appellant waives all defects in the process and proceedings of the justice; the case, if the justice had jurisdiction of the subject-matter, must be tried *de novo* at the circuit. *Cairo & St. Louis R. R. Co.* v. *Murray*, 82 Ill. 76; *Village of Coulterville* v. *Gillen*, 72 Ill. 599. If the papers on appeal are sent to the wrong court, that court should strike the case from its docket. *Wadhams* v. *Hotchkiss*, 80 Ill. 437.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

WRIT OF ERROR TO THE CIRCUIT COURT OF ROCK ISLAND COUNTY; THE HON. GEORGE W. PLEASANTS, JUDGE, PRESIDING.

LAMPING BROS. v. WILLIAM PAYNE.

REPLEVIN—*Matter of inducement in plea is not traversable.*—Where a plea, in an action of replevin, sets up an execution against a third party, and a levy by the defendant, as an officer, of such execution upon the goods in dispute as the property of such third party, and avers that the goods in dispute were the property of such third party, and were not the property of the plaintiff, the averments as to the execution and levy are mere matters of inducement, which may be treated as surplusage, and still the plea would present a good defense to the action.

By a general demurrer to such a plea, the plaintiff confesses that the goods in

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question are not his, as claimed in his declaration, but are the goods of another; and that being so, the action cannot be maintained, and it is unimportant whether the defendant, as to the one confessed to be the owner, has a lawful right to meddle with the goods or not.

STATUTE—*Construction of, as to alternative judgment in replevin.*—Sec. 22, chap. 119, Rev. Stat. of 1874, p. 853, applies only to cases where the general property is in the plaintiff, and the defendant shows a special property, consisting of a right to hold the property as against the plaintiff only for a certain sum of money, as, where the defendant shows special property by the levy of a *fi. fa.* against the plaintiff, or where he holds the property by virtue of some lien, as a carrier, warehouseman or otherwise.

JOHN B. HAWLEY, *Attorney for Plaintiffs in Error.*
ROBERT T. MCNEAL and WM. H. GEST, *Attorneys for Defendant in Error.*

This was replevin, brought in the circuit court, by plaintiffs in error, against defendant in error, for certain goods found in the possession of defendant.

Among other pleas, defendant pleaded a plea, called fourth plea, which was as follows:

"And the defendant, for a further plea in this behalf, says *actio non*, because he says that, at the time when, etc., he, the defendant, was sheriff of said county of Rock Island, and on the twelfth (12th) day of September, A.D. 1874, at the county aforesaid, two executions came into his hands as such sheriff, issued by the clerk of the circuit court of said Rock Island county, under the seal of said court, bearing date the 12th day of September, A.D. 1874, one of said executions being issued on a judgment in said court recovered on the eleventh (11th) day of September, A.D. 1874, in a suit wherein the Hargraves Manufacturing Company was plaintiff and one Michael J. Murphy was defendant, for the sum of $342.32, damages, and the costs of suit, which said execution, by the misprision of the clerk of said court in issuing the same, recites said judgment as recovered on the 11th day of September, A.D. 1804, and the other of said executions being issued on a judgment recovered in said court on the said 11th day of September, A.D. 1874, in a suit wherein Jay C. Wimple and Daniel C. Connell, partners, etc., as J. C. Wimple & Co., were plaintiffs, and Michael J. Murphy was defendant, for the sum of $424.97, damages, and costs of said suit; which last mentioned execution, by the misprision of the clerk of said court in issuing the same, recites said last named judgment as recovered on the 11th day of September, A.D. 1804, which said judgments were then and there in full force and effect, and the money due thereon unpaid, which said executions, issued as aforesaid, were directed to the defendant, as such sheriff, to execute, and that, by virtue of said executions, the defendant, as such sheriff as aforesaid, did, on, etc., and in the lifetime of said executions, at the county aforesaid, take the said goods and chattels in said declaration mentioned, and levy upon the same, by virtue of the executions as aforesaid, as the property of said Michael J. Murphy; and the defendant avers that the

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said goods and chattels in said declaration mentioned, at the time said executions came into the hands of defendant, were the property of the said Michael J. Murphy, and were subject to execution, and that *said goods* and *chattels were not*, nor *were any part of them*, at the said time, etc., *in the plaintiff*, as by said declaration is alleged and claimed, and this the defendant is ready to verify, wherefore he prays judgment, etc."

To this plea a general demurrer was interposed, which the Circuit Court overruled, and gave judgment in bar of the action and for a return of the property.

Justice DICKEY delivered the opinion of the court:

It is insisted that the demurrer to this plea ought to have been sustained, and that the plea is faulty in not alleging that defendant "was duly elected and qualified as sheriff," and in not showing that the executions mentioned did, upon their face, run "in the name of the People of the State of Illinois," and in not showing that defendant indorsed upon the executions the time when they came into his hands, and in not showing that the goods in question were the property of Murphy at the time of the levy, and because the plea showed that the executions were void upon their face, etc.

Without considering the question as to the importance of the matters herein presented, if they were found in a material and traversable part of the plea, the judgment of the Circuit Court must be sustained, upon the ground that all the allegations called in question relate merely to matter of inducement, which may all be rejected as surplusage, and still the plea shows a complete defense to the action; that the goods were the property of Murphy, and "that the said goods and chattels were not, nor were any part of them, in the plaintiffs, as alleged," etc.

By the demurrer to this plea, the plaintiffs confess, upon the record, that the goods in question were not the goods of the plaintiffs, but are the goods of one Murphy. That being so, the action cannot be maintained, and it is wholly unimportant whether the defendant had or had not, as between him and Murphy, a lawful right to meddle with the goods.

It is contended that the judgment should have been in the alternative, under sec. 22, chap. 119, Rev. Stat. of 1874, p. 853. The provision applies only to cases where the general property is in the plaintiff, and the defendant shows a special property, consisting of a right to hold the property, as against the plaintiff, only for a certain sum of money, as, where the defendant showed special property by a levy of a *fi. fa. against the plaintiff*, or where defendant holds the property as the property of the plaintiff, but by virtue of some lien, as carrier, warehouseman or otherwise.

Upon this record, the plaintiff, by his own confession, has no interest in the property, and is not entitled to the possession under any circumstances.

The judgment of the court below is affirmed. *Judgment affirmed.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

WRIT OF ERROR TO THE SUPERIOR COURT OF COOK COUNTY; THE HON. JOSEPH E. GARY, JUDGE, PRESIDING.

LEVERETT B. SIDWAY *v.* JAMES D. MARSHALL.

AMENDMENTS AND JEOFAILS — *Mistake in plaintiff's christian name.*—Under the sixth section of the Statute of Amendments, the fact that the plaintiff's christian name in the summons is wrong, when it is stated correctly in the declaration, will not authorize the reversal of a judgment by default. It is sufficient if the name is once rightly alleged in any of the proceedings.

The court, under the Practice Act, is authorized to allow an amendment in the pleadings, or any of the proceedings, by inserting the plaintiff's true christian name wherever omitted or stated incorrectly, without notice to the defendant.

SAME — *Right to impose terms or require notice.*—Where an amendment is allowed that is calculated to take either party by surprise, or that will affect the right or justice of the matter of the suit, or alter in any material respect the issues, the court may impose terms requiring notice to the party to be affected by it.

HOWE & RUSSELL, *Attorneys for Plaintiff in Error.*
WALTER & BURNHAM, *Attorneys for Defendant in Error.*

Justice SCOTT delivered the opinion of the court:

Leave was given by the court to amend the pleadings by making the name of plaintiff James D. Marshall, but if that privilege was availed of, there is nothing in the record that indicates it. The summons was in the name of John, and the declaration, filed the same day the summons was issued, was in the name of James Marshall, plaintiff's true name. Service was in time, but there being no appearance, judgment was rendered against defendant by default.

It is provided, in the sixth section of the chapter of the Revised Statutes entitled "Amendments and Jeofails," no judgment shall be reversed, impaired or in any manner affected by reason of any of the omissions, defects or things in the process, pleadings, proceedings or records in that section named, and among others, as in the tenth division, on account of any mistake in the name of a party or person where the name shall have been "once rightly alleged in any of the pleadings or proceedings," nor, as in the fourth division, for any variance between the original writ and the declaration or other pleading. These saving clauses of the statute cover the alleged defect in the pleadings in this case. Although plaintiff's name was stated erroneously in the summons, it was rightly alleged in the declaration, and that is sufficient to sustain the judgment. But if the amendment was actually made, and plaintiff's true christian name inserted wherever omitted in the pleadings or proceedings, it was authorized by the Practice Act, as was decided by this court in the *Teutonia Insurance Co.* v. *Mueller*, 77 Ill. 22.

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Defendant maintains the amendment was material, and that he was entitled to notice before default should be entered against him. Two answers may be given to the position assumed: First, the amendment in this case was not material, for the reason plaintiff's name was "rightly alleged" in the declaration, and that was sufficient, according to the positive provisions of the statute, to sustain the judgment. And second, the statute has not provided any notice shall be given to the opposite party of such motions and amendments. All amendments of this character, not being against the right and justice of the matter of the suit, and not altering the issues between the parties, shall be made by the court in which judgment was given, and it is nowhere intimated any notice to the opposite party is necessary to enable the court to exercise this equitable power. Should notice to the adverse party be required in every instance where the court allows such formal amendments, it would amount to a deprivation of all benefit intended to be secured by the statute. By absenting himself from the court, defendant could render it impracticable for the court, under such a rule, to make any amendments whatever, notwithstanding such amendments might not affect, in the slightest degree, the right and justice of the matter in suit, or alter the issues between the parties. Nor is there any hardship in this rule, for such amendments are to be allowed "for the furtherance of justice on such terms as shall be just." When any amendment is allowed that is at all calculated to take either party by surprise, or that would affect the right or justice of the matter of the suit, or alter, in any material respect, the issues between the parties, the court may impose terms that it shall be permitted only upon notice to the party to be affected by it. Any other rule would render the practice so difficult that it would amount to a practical abrogation of the liberal provisions of the statute in regard to amendments, and work a total deprivation, in many instances, of its benefits.

In either view suggested there is no error in the record, and the judgment must be affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

AMENDMENT.—The Appellate Court, first district (1 Chi. Law J. 77), *held*, in *The Pennsylvania Company* v. *Sloan*, that the substitution of one defendant for another, and treating the cause as having been originally commenced against the person last put into the record, could not be allowed. With the above case *Sidway* v. *Marshall*, 83 Ill. 438, and *Teutonia Ins. Co.* v. *Mueller*, 77 Ill. 22. *The Pennsylvania Company* v. *Sloan*, is not, as we understand it, in conflict. The nine recent decisions under the Practice Act of 1872, on this subject, are of practical importance and required almost daily by every practitioner; we therefore give a resume of them.

AS TO PARTIES.—M, admx. instituted suit on a policy of insurance on the life of her intestate, against the company for the amount insured, the company demurred to the declaration for want of proper parties; the demurrer was sustained, but on motion M, admx., was dismissed out of the suit, and the widow and heirs of the assured made plaintiffs. On appeal, the Supreme Court *held*, that the amendment was proper; citing sec. 1, Rev. Stat. 1874, p. 137; sec. 24, Rev. Stat. 1874, p.

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778. Mr. Justice Scott, who gives the opinion, says: "Under the liberal provisions of this statute, (sec. 24, *supra*,) any amendment in civil actions, either in form or substance, is permissible that tends to the furtherance of justice." *Teutonia Life Ins. Co.* v. *Mueller*, 77 Ill. 22; see *Litchfield Coal Co.* v. *Taylor*, 81, 590; *Challenor* v. *Niles*, 78 Ill. 78; *Dickinson* v. *C. B. & Q. R. R. Co.*, 81 Ill. 215.

AS TO PROCESS.—A plaintiff may, on his own motion, be permitted to amend the summons so as to conform to the declaration in case of a variance, and a plea in abatement filed to reach the defect. *Wilday* v. *Wright*, 71 Ill. 374.

HOW MADE.—May be made by interlineations and erasures. *Garrity* v. *Wilcox*, 83 Ill. 159; limiting *Stanberry* v. *Moore*, 56 Ill. 472.

TERMS.—Reasonable terms may be imposed. *Misch* v. *McAlpine*, 78 Ill. 507, but where a merely formal amendment of the summons is made, it is quite proper not to impose terms. *Chester etc. Coal &. R. R. Co.* v. *Lickiss*, 72 Ill. 521. Inserting the words "in an action of *assumpsit* in a summons which fails to name the form of action is merely formal. *Id.*

OF THE SHERIFF'S RETURN.—If a sheriff's return of service is defective, it may be corrected even after error brought. *Terry* v. *Eureka College*, 70 Ill. 236. Special notice after the case is finally disposed of, however, is necessary. *Mass. Mut. Life Ins. Co.* v. *Kellogg*, 82 Ill. 614. *Affidavit in replevin* may be amended even on appeal from a justice of the peace. *Kirkpatrick* v. *Cooper*, 77 Ill. 565. *Affidavit in attachment* to avoid a motion to dismiss, may be amended. *Roberts* v. *Dunn*, 71 Ill. 46. *Complaint in forcible detainer* not calculated to surprise the defendant may be allowed. *Snowell* v. *Moss*, 70 Ill. 213. *Proceedings for judgment against delinquent lands* may be amended as liberally as if in personal action. *Walsh* v. *The People*, 79 Ill. 521.

OF PLEADINGS.—It is hardly ever too late to amend pleadings, whether before or after verdict, upon such terms as justice may seem to demand. *Thompson* v. *Somberger*, 78 Ill. 353. A court should allow amendments to sworn pleadings with great caution; the party asking leave to amend should submit in writing the amendment proposed, supported with an affidavit of its truth and some explanation of the reason why the matter proposed to be added was not originally inserted. *Jones* v. *Kennicott*, 83 Ill. 484. New counts may be added to the declaration. *Chi. & P. R. R. Co.* v. *Stein*, 75 Ill. 41.

December 15, 1877. GARY, J.: Any amendment, however immaterial, gives the defendant a right to plead over if he wants to. A defendant can avail himself of the right to plead if he desires. The amendment does not get rid of the plea. The pleas which are in form to the whole declaration remain as pleas to any amendments to the declaration, *but you have the right to plead over.*

JOINDER.—Gary, J.: You cannot amend by joining a count in *assumpsit* in an action on the case. The joinder depends on the form of the action. Actions in form *ex contractu* cannot be joined with actions *ex delicto*. Chitty's Pl., Joinder. Chitty's authority with me is the very highest authority, although 2 Cai. Ca. 216 is *contra*.

DEMURRER.—To plea in the case, action upon a promissory note against a guarantor. Plea that he was an *endorser* and *not a guarantor*. Gary, J.: You deny that you made any guaranty, and that is an appropriate defense under the general issue.

OF VERDICT.—In the presence of the jury, before they separate, a verdict should be put in proper form. *City of Pekin* v. *Winkel*, 77 Ill. 56. *After verdict* against two, the plaintiff may discontinue suit as to one. *Cogshall* v. *Beesley*, 76 Ill. 445.

IN CHANCERY.—Amendments at all stages of the cause are discretionary with

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the chancellor, and to allow is the rule, to disallow them, the exception. *Bann* v. *Bragg*, 70 Ill. 283; *Lewis Lanphere*, 79 Ill. 187; *Erickson* v. *Rafferty*, 79 Ill. 209; *Atkins* v. *Billings*, 72 Ill. 597; *Marsh* v. *Green*, 79 Ill. 385; *Jefferson* v. *Kennard*, 82 Ill. 28; *Forman* v. *Stickney*, 77 Ill. 575; *Hoyt* v. *Tuxbury*, 70 Ill. 331; *Dale* v. *Irwin*, 78 Ill. 170.

IN CRIMINAL CASES.—Amendments are excepted from the statute of Amendments and Jeofails; the question of the power of a court to allow amendments is to be determined, therefore, by the common law. *The People ex rel.* v. *Whitson*, 74 Ill. 20.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

WRIT OF ERROR TO THE CIRCUIT COURT OF WARREN COUNTY; THE HON. ARTHUR A. SMITH, JUDGE, PRESIDING.

S. MARION REYNOLDS *v.* THE PEOPLE OF THE STATE OF ILLINOIS.

CRIMINAL LAW — *Conviction of a less offense than charged.*—The rule, that a defendant in a criminal case may be convicted of a lesser offense than that for which he is charged and tried, applies only where the lesser offense is included in the higher one. If it is not a constituent element in the higher crime charged, no such conviction can be had.

SAME — *One charged with felony cannot be convicted as accessory after the fact.*—The offense of which an accessory after the fact may be guilty, is not included in, nor has it any connection with the principal crime. The one cannot be committed until the principal offense is an accomplished fact. Therefore, one indicted for larceny cannot be convicted of being an accessory after the fact.

FORMER DECISION —What was said in *Yoe* v. *The People*, 49 Ill. 410, on this subject, was not necessary to the decision, and the rule was not correctly stated.

FORMER ACQUITTAL — The acquittal of a party indicted as a principal is no bar to an indictment against him as an accessory after the fact, and *vice versa*.

ACCESSORY AFTER THE FACT — *Proof of.*—Proof of the principal felony does not prove or tend to prove a party is guilty as an accessory after the fact.

WILLIAMS, MCKENZIE & CALKINS, *Attorneys for Plaintiff in Error.*
J. J. TUNNICLIFFE, *State's Attorney, for The People.*

Justice SCOTT delivered the opinion of the court:

At the June term, 1876, of the Knox County Circuit Court, S. Marion Reynolds, J. W. Mageors *alias* Bob Mageors and John Kibby, were jointly indicted for the larceny of a steer, the property of James Thomas. Kibby was permitted to give evidence on behalf of the State against his co-defendants, and was not himself arraigned. On the trial Mageors was found guilty of larceny, and his punishment fixed at three years in the penitentiary, and Reynolds was found guilty as "an accessory after the fact," with a recommendation he suffer the full penalty of the law. Motions for a new trial and in arrest of judgment were severally overruled and judgment pronounced on the verdict. Mageors was sentenced to

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the penitentiary for a period of three years, and Reynolds to pay a fine of $500, and to be confined in the county jail for a period of two years. Reynolds brings the case to this court on error.

It is very clear the conviction of Reynolds cannot be sustained under the present indictment. Of the crime of larceny, for which he was indicted jointly with others, he was acquitted, but the principal being found guilty, he was found guilty as an "accessory after the fact." This conviction is without warrant of law.

An accessory is defined in the statute to be one "who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of crime." One thus guilty is considered a principal and punished accordingly. An "accessory after the fact" is not punished, under our statute, as a principal. A less measure of punishment is provided. The definition given in the statute as well as at common law, makes a clear distinction in the offenses. Under our law, "every one not standing in the relation of husband or wife, parent or child, brother or sister to the offender, who knows the fact that a crime has been committed, and conceals it from the magistrate, or who harbors, conceals, maintains or assists any principal felon or accessory before the fact, knowing him to be such, shall be deemed an accessory after the fact."

One offense defined is a felony, and the other is but a misdemeanor. Text writers record it from the old books, that "every treason includes a misprision of treason, and every felony a misprision of felony," and such misprision is but a misdemeanor. It has been definitely declared in the decisions of this court, as in *Carpenter* v. *The People*, 4 Scam. 197, when a defendant is put upon his trial for a crime which includes an offense of an inferior degree, he may be acquitted of the higher offense and convicted of the lesser, although there may be no count in the indictment specifically charging that particular offense. Illustrations are given in other cases. Where the crime charged is murder, the accused may be convicted of manslaughter; or where the crime charged is rape, the conviction may be for attempt to commit a rape. The principle is, the graver offense necessarily includes the lesser, and proof of the higher crime cannot be made without proof of all that which it includes. But this rule always implies the lesser offense is included in the higher crime with which the accused is specifically charged, and if it is not a constituent element in the higher crime charged, no conviction can be had. *Carpenter* v. *The People*, *supra*; *Beckwith* v. *The People*, 26 Ill. 500.

The offense of which an "accessory after the fact" may be guilty, is not included, nor has it any connection, with the principal crime. This is apparent from the definitions given, both in our statute and in the common law. The one cannot be committed until the principal offense is an accomplished fact. Persons occupying a certain relation to the offender are excluded from the operation of the statute. The guilty knowledge, which is the essence of the offense, comes after the principal crime is committed, and of course they can

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have no connection with each other. But no better test need be sought than the fact a party indicted as a principal and acquitted may yet be indicted as an "accessory after the fact," or if indicted as an "accessory after the fact" and acquitted, he may be indicted as a principal, and the reason assigned in the common law authorities is, they are "offenses of several natures." Hence a conviction for one is no bar to a prosecution for the other. Hale's Pleas of the Crown, 1 vol. 626.

What was said in *Yoe* v. *The People*, 49 Ill. 410, on this subject, was not necessary to the decision, and on more mature reflection we are satisfied it was not correctly stated.

According to the finding of the jury, the accused did not participate in the principal crime for which he was indicted, but was found guilty of a misdemeanor subsequently committed, with which he had not been charged. This is not according to the analogies of the law. Proof of the principal felony does not prove nor tend to prove a party is guilty as an "accessory after the fact." It would be a most illogical conclusion. As at common law, so under our statute, they are "offenses of several natures."

The judgment will be reversed, and the cause remanded.

Judgment reversed.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF DE KALB COUNTY; THE HON. THEODORE D. MURPHY, JUDGE, PRESIDING.

THOMAS JONES v. JOHN T. KENNICOTT.

NE EXEAT—*Petition for should show that property sold by defendant was not exempt from execution.*—A petition for a *ne exeat*, upon the ground that the defendant has sold all his property and is about to depart the State, is defective, if it fails to show that the property alleged to have been sold was not exempt from execution.

AMENDMENT—*To sworn pleadings should be allowed with great caution.*—A court should allow amendments to sworn pleadings only with great caution, and before allowing such amendments, the party asking leave to amend should present, in writing, the amendment proposed to be made, supported with an affidavit of its truth and some explanation as to why the matter proposed to be added was not originally inserted.

KELLUM & CARNES, *Attorneys for Appellant.*
J. J. FLANNERY, *Attorney for Appellee.*

Justice DICKEY delivered the opinion of the court:

This was a petition for *ne exeat*, filed by appellant, against appellee. The writ was issued, appellee arrested and let to bail, and, at the return term, the defendant moved to quash the writ for insufficiency of the petition. This motion was sustained by the court,

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Appellant asked leave to amend the petition, which was refused, and, by order of court, the suit was dismissed.

It is now insisted that it was error to quash the writ. The petition was defective, in not showing that the property alleged to have been sold by the defendant was not exempt from execution. *Malcolm* v. *Andrews*, 68 Ill. 100.

It is contended that it was error to refuse to grant leave to amend. It is not shown by the record what amendment the petitioner proposed to make. A court should allow amendments to sworn pleadings only with great caution, and, before allowing such amendment, the party asking leave to amend should present and submit, in writing, the amendment proposed to be made, supported with an affidavit of its truth and some explanation of the reason why the matter proposed to be added was not originally inserted.

Again, the application came too late. The writ was quashed. The defendant was no longer in court. Had the petition been made good by amendment, a new writ would have been required. So the amendment could have done appellant no good.

The judgment must be affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

NE EXEAT—*Requisites of affidavit and bill.*—As to form of affidavit. *Gorton* v. *Frizzell*, 20 Ill. 292. The affidavit must be to the truth of the allegations in the bill or petition. Rev. Stat. 1874, chap. 97, sec. 5, p. 716. And must show the guilt of fraud, or a strong presumption of fraud. *Parker* v. *Follansbee*, 45 Ill. 473-8; *Malcolm* v. *Andrews*, 68 Ill. 105; *In the matter of Jesse Smith*, 16 Ill. 347; *Gorton Frizzell*, 20 Ill. 291. This must be shown by *facts stated* and circumstances detailed, 16 Ill. 347, *supra*; 20 Ill. *supra*. And must not state conclusions. *Id.* The writ may issue on a positive affidavit of a threat or purpose of going abroad, 1 Ves. 170; *Fisher* v. *Stone*, 3 Scam. 68. The affidavit is sufficient if positive as to defendant's intention to go abroad although upon *knowledge and belief only*. 23 Ga. 142. The allegation of non-residence alone is sufficient. 1 B. Mon. (Ky.) 129. It will be sufficient if the *general bearing* of the facts alleged lead to a conclusion that his departure will defeat complainant's claim, and that such is his object. 10 N. J. Eq. 138. There must be a positive affidavit that the party against whom the writ is sought threatens or purposes to go abroad, and that the debt of the petitioner would be lost, or at least endangered, by the departure of the debtor. 3 Johns. Ch. 75.

BILL.—The bill must show a refusal to deliver up estate or strong presumption of fraud. Ill. Const., Art. 2, sec. 12, Rev. Stat. 1874, p. 60. And that the debtor is fraudulently or wrongfully endeavoring to evade the payment of his debt. *Bernap* v. *Marsh*, 13 Ill. 535. A bill alleging that defendant threatened to leave the state, and verified by affidavit, is sufficient to obtain the writ. 8 Ga. 295. Complainant must swear positively that something is due him, but he may swear as to his belief of the amount due. 7 Johns. Ch. 189. A bill may be dismissed on motion for want of equity. Bre. 41, *Fisher* v. *Stone*, 3 Scam. 68. But where there is apparent equity the party is required to demur, plead or answer. *Fisher* v. *Stone*, 3 Scam. 68. As to the nature of the writ, see 25 Ark. 377. An officer cannot justify under a void writ. 20 Ill. 296, *supra; Bratten* v. *Cannon*, 1 Scam. 200. As to affidavit failing to rebut presumption of fraud. 25 N. J. Eq. 28.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE CIRCUIT COURT OF WHITESIDE COUNTY; THE HON. WILLIAM W. HEATON, JUDGE, PRESIDING.

MARY L. DOTY v. ANDREW J. BURDICK.

FORCIBLE ENTRY AND DETAINER—*Title not involved, but right of possession.*—In an action of forcible entry and detainer, or forcible detainer only, the title to the premises is not involved, nor can it be inquired into on the trial. Possession, and the right to possession, independent of title, are the only questions involved.

SAME—*Landlord cannot regain possession forcibly.*—The landlord has no right to employ force and violence to regain possession, although such possession may be wrongful, but must evict by forcible entry and detainer, or by action of ejectment.

SAME—*Actual force not necessary.*—To maintain forcible entry and detainer, or forcible detainer, actual, or constructive force only, is necessary. A mere wrongful entry, or a wrongful holding over, only, is required.

TITLE—*How shown.*—A deed from one person to another does not even tend to prove title, unless connected with the paramount source of title, or with a bar of the statute.

POSSESSION—*As evidence of title.*—A person in the actual peaceable possession of real estate is presumed to be the owner of the fee until the presumption is rebutted, and he is not required to show in what manner or by what title he holds, until the plaintiff shows paramount title. He may show a better outstanding title than the plaintiff, and thus defeat a recovery in ejectment, although he may have no title whatever, even though his possession was wrongful in its inception.

SAME—*When delivery of key gives right to.*—The delivery of a key of a house by a tenant to a person other than the landlord, or his heir, will not transfer a right of possession to such person, unless he has acquired the interest of the landlord or his heirs.

LANDLORD AND TENANT—*Tenant estopped to deny landlord's title.*—A tenant is estopped from disputing his landlord's title. Having entered under him, the tenant acknowledges that he is the owner.

SAME—*When tenant may dispute the title of landlord.*—In a suit on a lease to recover rent, or for a breach of any of its covenants, the tenant may show that the landlord has assigned the lease by a sale of the demised premises, or that he has been evicted by a paramount title, which form exceptions to the general rule.

Where a person enters into possession of land under another, and thereby admits his title, he must restore the possession to the person from whom he received it before he can set up title in himself or in another.

SAME—*Denial of landlord's title forfeits tenant's right.*—If a tenant denies his landlord's title, and claims the premises adversely, either for himself or for another, he thereby renders his possession tortious, and forfeits his lease, and the landlord may sue for and recover possession.

SAME—*Rights of person entering under tenant.*—An under-tenant, or other person

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let into possession by the tenant, must yield the possession to the landlord. He succeeds to the original tenant's rights, and nothing more.

KILGOUR & MANAHAN, *Attorneys for Appellant.*
C. L. SHELDON, *Attorney for Appellee.*

Justice WALKER delivered the opinion of the court:

Appellant brought an action of forcible entry and detainer in the Circuit Court of Whiteside county, to the August term, 1874, against appellee, to recover a house and lot in the village of Rock Falls. It appears that one Barnett Doty, in his lifetime, rented the house to one Ford, who, at the expiration of his lease, left the house, and it thereby became vacant. Ford, when he left, gave the key to Sheldon, and appellant entered the house through a window, and thus acquired possession. This was in April, 1874, and appellant, on the 30th of that month, still being in possession, leased the premises to one Simpson for one year, he to pay $72 rent therefor, in installments of $6 for each month, and in advance.

After Simpson went into possession of the house and lot under the written lease from appellant, and whilst it was in full force, he attorned to A. Doty, who claimed to have purchased the property, and took a lease from him. At the end of the second month, Simpson being in arrear one month's rent to appellant, she notified and required him to leave the property, and he began to prepare to do so; and on the 2d day of June, whilst Simpson's wife was packing their goods preparatory to leaving, appellant went into the house, and took with her and placed therein a sewing machine; and afterward, and on the same day, appellee, claiming to have purchased the premises from A. Doty, came there with a load of household goods to go into the house and take possession. Appellant forbade his entrance, and he found A. Doty and Simpson, who came, finding appellant in the door, she having forbade their entrance, and, as they say, she struck A. Doty with a club, on his attempting to force himself into the house, and she shut and locked the door. They thereupon forced it open, and entered and removed appellant by force, both taking hold of her and putting her out of the house, and removed her sewing machine into the street, and Simpson left, and appellee went into the house and lot, and continued to occupy them.

Thereupon appellant commenced this proceeding to recover possession. The jury found a verdict for defendant, and the court, after overruling a motion for a new trial, rendered judgment on the verdict, and the plaintiff appeals to this court.

It is urged that the Circuit Court erred in not granting a new trial, in giving defendant's and in refusing and modifying plaintiff's instructions, together with others embraced in these objections.

This court has ever uniformly held that, in an action of forcible entry and detainer, or in a forcible detainer only, the title to the premises is not involved, nor can it be inquired into on the trial; that possession, and the right to possession, independent of title, are

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the only questions involved. Hence, appellee had no right to introduce evidence of title on the trial, and even if he had, he could not, as we presume the entire profession are aware, prove it by an unconnected deed. The offer to introduce the deed from A. Doty to appellee would not even tend to prove title, unless connected with paramount source of title, or with a bar of the statute; but a person in the actual, peaceable possession of real estate is presumed to be the owner of the fee until the presumption is rebutted. A person in the full possession, when sued in ejectment, has the right to insist that the plaintiff shall show that he has paramount title before he is required to show in what manner or by what title he holds. He may show a better outstanding title than the plaintiff, and thus defeat a recovery, although he may have no title whatever beyond his mere naked possession, which may have its inception in wrong, or even force, if it is not against the plaintiff. It is one of the most elementary rules of practice that a plaintiff in ejectment must show a valid title, traced to the paramount, or to a source with that of the defendant's title, before he can recover. He, if at all, recovers on the strength and perfection of his own title, and not on the weakness of his adversary's title. The mere production of a deed from one person to another does not tend to prove title. It must appear that the grantor had title, before there is proof. Hence, in a case requiring proof of title, appellee would have failed.

When appellant acquired possession, the house was vacant and unoccupied. There is no evidence that any one had any property of any kind in it; and even if the holding of the key by Sheldon, as the agent of A. Doty, could be held to give the latter possession, there is nothing to show that such possession was rightful. Ford had leased from Barnett Doty, and was bound to deliver the possession to him, if living, and if not, then to his heirs. If he delivered the possession to a person not entitled to it, the person thus receiving it did not thereby become legally invested with it. It is manifest that the heirs of Barnett Doty could sue for and recover possession from any person whom Ford might have let into possession, unless it was an heir or assignee of Barnett Doty. It does not appear that A. Doty had any prior possession, or was an heir or assignee of Barnett Doty. If he was, then he had the power and authority to evict appellant by forcible entry and detainer, or by an action of ejectment, but he had no right to forcibly eject her without legal process. Under our law, whatever it may be in other jurisdictions, the landlord has no right to take the law into his own hands, and employ force and use violence to regain possession, although such possession may be wrongful. It would lead to violence, if not to bloodshed, and hence would be contrary to a sound public policy, and is forbidden. See *Reeder* v. *Purdy*, 41 Ill. 284; *Page* v. *De-Puy*, 40 ib. 506; *Farwell* v. *Warren*, 51 ib. 470. These cases must be held to establish the doctrine in this court too firmly to be overruled on the authority of some adverse ruling of a court in some other state.

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It has long been the established doctrine of this court, if not all the English and American courts, with perhaps one or two exceptions, that the tenant cannot dispute his landlord's title. Having entered under him, he thereby acknowledges that the landlord is the owner, and the tenant is estopped from denying it. *Fusselman* v. *Worthington*, 14 Ill. 135. In a suit on the lease, to recover rent, or for a breach of any of its covenants, the tenant may show that the landlord has assigned the lease by a sale of the demised premises, or that he has been evicted by paramount title, etc., which form an exception to the rule; but the exception does not, nor can it, apply to a case of this character, where the title is not in question and cannot be investigated. But few owners of real estate would be inclined to lease land if the tenant had the authority to determine whether his landlord's title was good, and legally yield possession to another, or to contest it when sued for possession, or if he were to be permitted to show an outstanding title and defeat a recovery.

The law has, therefore, adopted as a rule, that, where a person enters under another, and thereby admits his title, he must restore the possession to the person from whom he received it, before he can set up title in himself or in another. *Fusselman* v. *Worthington*, *supra*; *Cox* v. *Cunningham*, 77 Ill. 545. This is the English doctrine, which has prevailed in their courts from an early day, and is the prevailing doctrine in this country. It is long established, is reasonable and well calculated to subserve the convenience of society, and to promote justice and good order.

It is also a well established rule that an under-tenant, or other person let into possession by the tenant, must yield the possession to the landlord; that a person claiming to have acquired possession from the tenant only acquires the tenant's rights and nothing more. *McCartney* v. *Hunt*, 16 Ill. 76; *Brown* v. *Keller*, 32 ib. 151. And other cases might be cited to sustain the proposition were it deemed necessary.

To maintain the action, actual, or constructive force only, is necessary. A mere wrongful entry or a wrongful holding over, only, is required. Again, where the tenant denies the landlord's title, and resists his right, he thereby forfeits his lease, and the landlord may sue for and recover the possession. *Fusselman* v. *Worthington*, *supra*. He, by claiming the premises adversely for himself or another, thereby renders his possession tortious.

In this case, Simpson, the tenant, denied the title of appellant, and held it for A. Doty, and his possession thereby became wrongful as against appellant, and she thereby became entitled to the possession, and could have sued for and recovered the premises; and the possession surrendered to appellee was in like manner wrongful. The tenant could not transfer any better title or right of possession than he holds, nor could appellee show that he was the owner of the fee, in this action. He, by collusion with Simpson, acquired no advantage, but simply took and occupied the place of Simpson; and as appellant was entitled to recover against Simpson, she was equally entitled to recover against appellee.

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The finding of the jury was manifested against the evidence, and the instructions, so far as they are opposed to the views here expressed, were wrong, and calculated to mislead the jury.

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

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE COUNTY COURT OF COOK COUNTY; THE HON. MARTIN R. M. WALLACE, JUDGE, PRESIDING.

THE CHICAGO & NORTHWESTERN RAILWAY CO. *v.* THE PEOPLE *ex rel.* H. B. MILLER, COLLECTOR.

COOK COUNTY—*Under township organization.*—The county of Cook is under the township organization law, and the acts of the officers of the township and county in acting under such law in assessing property, levying taxes and collecting the same are not void.

SPECIAL ASSESSMENTS—*Collector's oath.*—The collector's oath, in an application for judgment against lands for special assessments, attached to his report, that it is a true and correct record of delinquent lands and lots in the village of E, within the county of C, upon which he has been unable to collect the special assessments, printer's fees and other costs charged therein, as required by law, for the year therein set forth—that said special assessments now remain due and unpaid, as he verily believes—was held sufficient. There being no taxes, it was not necessary to state that the application was for the sale of the lands for *taxes* and assessments.

SAME—*Omission of tract does not defeat the application for judgment.*—While the Revenue Law may demand correctness in a proceeding for judgment against delinquent lands, still it was never designed that the whole taxes and assessments should be defeated by the mere omission of a tract of land or a lot from the list.

SAME—*Confirmation conclusive.*—The confirmation of a special assessment by the County Court upon the report of the commissioners, is conclusive until reversed. It is *res adjudicata*, and cannot be questioned on application for judgment.

EDWARD ROBY, *Attorney for Chicago & Northwestern Railway Company.*
TULEY, STILES & LEWIS, *Attorneys for Sarah M. Baker and W. M. Derby.*
BENNETT, KRETZINGER & VEEDER, *Attorneys for Appellant, William Lamb.*
GEORGE O. IDE, *Attorney for Appellee.*

Justice WALKER delivered the opinion of the court:

There have been filed a number of records, presenting, some of them, all, and others a portion of the same questions, and, as a matter of convenience, we shall consider them all in one opinion. In doing so, we deem it unnecessary, in discussing any question, to refer to the record to which it is only applicable.

Appellants urge that Cook county is not acting under township

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organization, and hence there are no means provided by law for collecting the revenue and special assessments; that the various officers of the towns and the county, in acting under the township organization law of the state, in assessing property, levying the tax, collecting it, and in making sale for delinquent taxes, are, and have been, proceeding without warrant of law, and all of their acts are unlawful and void. This, though not in terms so stated, we understand to be the position, although not made very clear by the argument.

The same question was presented by the same counsel in the case of *The People* v. *Brislin*, 80 Ill. 423, and it was discussed at length, and the objection was there held to be groundless.

It is urged that the oath of the collector is insufficient and fails to comply with the law. It is this:

> I, Henry B. Miller, collector of the county of Cook, State of Illinois, do solemnly swear that the foregoing is a true and correct record of the delinquent lands and lots in the village of Evanston, within the county of Cook, upon which I have been unable to collect the special assessments, printer's fees and other costs charged thereon, as required by law, for the year therein set forth; that said special assessments now remain due and unpaid, as I verily believe.

We give the body of the affidavit, which was under a proper venue, was signed and properly sworn to by the collector.

The objection, as we understand it, is, that it fails to state that the application is for the sale of the lands for taxes and assessments. It is only necessary to say, if we properly understand the objection urged, that there were no taxes claimed to be due, hence the oath would have been false, if it had so stated.

It is insisted that the affidavit "states that the list shows the total amount of special assessments for the year, and yet it is made in several cases as to the same land in one year. We fail to find, in the list of lands returned, that they have been several times assessed, and that such assessments appear in several places in the list. We have turned to the transcript of the record in each of these cases, and fail to find a bill of exceptions in either; nor do they disclose the objection urged, nor do the facts appear that are assumed. Hence we infer that the argument is intended for some other case. Nor does the affidavit state anything in reference to the total amount of the assessment, nor can we infer from its language that the assessment was made in several cases as to the same land. It simply states, as the statute requires, that he had returned the lands and lots, and had been unable to collect the special assessments, etc., thereon, as required by law, for the year set forth in the list, and that the assessments remain due and unpaid, as he believes. So the objection, if it exists, is not in the record.

Counsel says: "An incomplete record of the delinquent lands is not a correct one, and is not a compliance with section 188." When we have examined the transcript of the records in these cases, we fail to see upon what counsel bases the objection. If reference is made to the transcripts of the records in these cases, we fail to see that the recorded list was either incomplete or incorrect. If such

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was the fact, then it should have been made to appear. On turning to that section of the Revenue Law, and comparing the collector's return with it, we fail to find any non-compliance by the collector with its requirements. That section does not say anything, in terms, in reference to a complete or a correct list, but simply requires the collector to file a list of delinquent lands and lots with the county clerk, which shall be made out in numerical order, etc. Whilst the law, no doubt, demands correctness in such proceedings, it could never have designed that the whole taxes and assessments should be defeated by the mere omission of a tract of land or a lot from this list. But the affidavit does state that it is a true and correct record of the delinquent lands, as section 190 of the Revenue Law requires.

In *Brislin's case* it was held that the confirmation by the County Court of the report of the commissioners who made the assessment was conclusive, until reversed. The finding and judgment of the court thereby became *res adjudicata*, and cannot be again inquired into or questioned collaterally by parties or privies. In these cases there was a confirmation, and that decision is conclusive of that question. If irregular, appellants should have made the objection in the County Court before the assessment was confirmed.

We, upon an examination of all the questions presented on these records, fail to perceive any error, and the judgments must be affirmed. *Judgments affirmed.*

EDITOR'S NOTE.—The following cases are also considered in this opinion: *Sarah M. Baker* v. *The People ex rel. Miller; W. M. Derby* v. *The Same;* and *William Lamb* v. *The Same.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

APPEAL FROM THE COUNTY COURT OF COOK COUNTY; THE HON. MARTIN R. M. WALLACE, JUDGE, PRESIDING.

SAMUEL BEERS ET AL. *v.* THE PEOPLE *ex rel.* HENRY B. MILLER, ETC.

TAXES.—*Who must apply for judgment.*—In counties under township organization, the county collector, and not the sheriff, is the proper person to make application for judgment against delinquent lands for taxes.

SAME—*Of the report, as showing taxes due.*—A collector's report on application for judgment, which states that it contains the list of lands, etc., upon which remain due and unpaid the amounts levied and assessed for the year 1873, and also which remain due and unpaid, for which the property was forfeited to the state for the unpaid taxes for the years 1871 and 1872, with interest at ten per cent and costs, and upon which remain due and unpaid the taxes and special assessments for the year 1870, together with the names of the owners, as far as known, and the total amount due and unpaid on each tract, and which also states that the figures in the column headed "Total tax," represent the total

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taxes due thereon, respectively, is a sufficient compliance with the statute, as stating the total amount of taxes claimed to be due.

SAME—*Of the notice of application for judgment as to term.*—The collector may apply for judgment against lands for taxes at the May term, and if, from any cause, it is not made, or the judgment recovered, at that term, he may apply at any subsequent term, and he may fill the first blank in his notice, given in sec. 182 of the Revenue Law, with the term to which he makes the application, and the second blank with the Monday on which the sale is to be made.

SAME—*Complaints may be heard by county board through a committee.*—A county board may hear and determine individual complaints against an assessment for taxation through a committee of its members, to whom such matters may be referred. And if such committee give notice of the time and place of their meeting to receive complaints, and report their action, which is approved by the board, this will be a sufficient compliance with the law.

SAME—*Irregularities and omissions not fatal to tax.*—The failure to give the notice or hold a meeting by the assessor, supervisor and town clerk, to hear complaints against assessments for taxes, or any other error or informality in the proceedings of any of the officers connected with the assessment, levy or collection, not affecting the substantial justice of the tax itself, will not, under the statute, in any manner vitiate the tax or assessment.

SAME—*Presumption as to validity of tax.*—In the absence of proof to the contrary, it will be presumed that an assessment of property for taxation has been properly made, and the tax levied is just and proper, and this especially where no complaint by the party assessed has been made to the township board of review or to the county board.

EDWARD ROBY, HOLDEN & MOORE, *Attorneys for Appellants.*
JOHN M. ROUNTREE, *Attorney for Appellee.*

This was an application by Henry B. Miller, collector of the county of Cook, for judgment against certain lands and town lots, for taxes due thereon, for the year 1873 and prior years. The appellants appeared and filed various objections to the rendition of judgment, those of importance being noticed in the opinion of the court. The County Court overruled the same, and rendered judgment against the property, to reverse which this appeal was taken.

Justice WALKER delivered the opinion of the court:

The first question presented is, that the sheriff, and not the collector, is the proper person to apply for an order to sell delinquent lands for taxes. This question was considered and decided in the case of *The People* v. *Brislin*, 80 Ill. 424, and the case of *The Chicago & Northwestern Railroad Co. et al.* v. *The People*, *ante*, 467. Hence we deem it unnecessary to further discuss the question.

It is next urged, that the proceeding "is not, nor does it profess to be, for the 'total' amount due or claimed to be due on the land for the year named." Sections 182 and 192 of the Revenue Law are referred to in support of the position.

On turning to the collector's report, he says the list of lands and lots upon which remain due and unpaid the amounts levied and assessed for the year 1873, and also which remain due and unpaid

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for which the property was forfeited to the state for the unpaid taxes for the years 1871 and 1872, with interest at ten per cent, and costs, and upon which remain due and unpaid the taxes and special assessments for 1870, together with the names of the owners, as far as known, and the total amount due and unpaid on each tract and lot. He also says, the figures in the column, headed "Total Tax," represent the total amount of taxes due thereon, respectively. We are unable to see why this is not in every respect a rigid compliance with the requirements of the Revenue Law, so far as this objection is concerned. If the objection exists it is not perceived, and counsel have failed to specify how or in what it consists. They have left us to conjecture as to what it applies.

It is next claimed, that the notice is insufficient, as it would authorize a sale at a different time from that fixed by law.

The application was made to the August term, 1874, of the Cook County Court, and the notice so specified the term, and fixed the day of sale for the 28th day of the following September. The 182d section requires the notice of the application after the first day of April. It requires that he shall give notice that he will apply to the County Court at the ——— term thereof for judgment, and shall give notice that on the ——— Monday next, succeeding the day fixed by law for the commencement of the term to which the application is to be made, he will sell the lands and lots, etc.

It is objected that the collector has no power to fill these blanks, and hence the notice is insufficient. Had counsel turned to the 185th section, they would have found that the application should be made to the May term of the County Court, and the collector is required to specify the Monday on which the sale shall be made. This section, however, provides, that if, from any cause, judgment is not rendered at that term, it shall be held legal to have judgment at any subsequent term of the court. It will thus be seen, that the collector may apply at the May term, and if, from any cause, such application should not be made or the judgment recovered, he may apply to any subsequent term; that it was intended that he should fill the first blank in his notice in the 182d section with the term to which he would make the application, and to fill the second blank with the Monday on which the sale would be made, is apparent.

The criticism that the blank means nothing, is not well made. The 182d section is substantially the same as the 26th section of the Revenue Act of 1853 (Sess. Laws, p. 74), which has the same blank left to insert the term of court as that found in the 182d section, and the profession and collectors since that time have uniformly held, that it indicated that the officer should insert the term to which he intended to apply, in the notice, instead of leaving it blank, as found in that section. Such long and uniform construction is reasonable, and must be held to be not only warranted, but altogether proper.

It is next urged, that the county board did not hear complaints of individual assessments for taxation, at the July meeting, in 1873.

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It appears that the commissioners met on the second Monday of that month, and a standing committee of three of their number was appointed, to whom all assessment rolls and tax matters were referred, and they published a notice that they would meet on the 12th day of August, 1873, at 10 o'clock A.M., at the county commissioners' room, and continue in session three days, to consider the assessments for the year 1873. They described themselves as the committee on equalization of taxes. The minutes of the meeting of July 14 recite that the body referred tax and assessment matters to a committee. The committee reported to the board on the 22d day of August what they recommended in reference to assessments and equalization for taxes; and it appears the report was unanimously concurred in by the board.

It is urged that the board could not act through or by means of a committee on complaints made against assessments, but that the law requires the whole board to act as a body. The 97th section does not specify the manner in which the board shall proceed, beyond the requirement that on the application of any person considering himself aggrieved, or who shall complain that another's property is assessed too low, they shall review the same, and correct it as shall appear to be just, and provides for notice to the person whose property is claimed to be assessed too low. It is believed that all bodies composed of a large number of persons, act through committees to procure facts in reference to the matter to be acted upon, and receive recommendations as to the action that should be adopted. And it is believed that boards of supervisors have, ever since counties have become organized under the township organization law, acted through committees in dispatching the county business. This is believed to be general and uniform, and we are unable to see in what this course is improper. They can, no doubt, more satisfactorily, and with a great saving of time, obtain evidence and facts upon which to act in their final determination.

Notice was given, and appellants were afforded the opportunity to appear and have their grievances removed, if they had any of which to complain. There is no pretense that any injustice has been done to any one in the assessment, nor does it appear that any person sought to appeal from the assessment of his property, and was deprived of a hearing. We are not impressed with the fact that there has been the slightest wrong done to the tax-payers. That precise equality of burthen in proportion to value of property was not attained, is more than probable, as exactness and precision in valuing property for such purposes is not nor can it ever be attained. It would be Utopian to expect it from human agency.

Section 86 of the Revenue Law provides, that in counties under township organization the assessor, clerk and supervisor of the town shall meet, on the fourth Monday in June, for the purpose of reviewing the assessment; and, on the application of any person who shall consider himself aggrieved, or who shall complain that the property of another person is assessed too low, they shall review the

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assessment, and correct the same as shall appear to them just. The 87th section provides, that the assessor shall give notice of at least ten days of the time and place of such meeting. And the 88th section provides, that the failure to give the notice, or to hold the meeting, shall not vitiate such assessment, except as to the excess of valuation or tax thereon shown to be unjustly made or levied. Thus, it is seen that appellants had two opportunities afforded them of showing that they were over or wrongfully assessed, and if so, they had the further opportunity of proving the fact on the trial, and of reducing their tax to the extent of the over-valuation. But, so far as the record shows, they availed themselves of neither, and we must conclude that they had no grievance of which to complain, and if they conceive others have, they should leave them to make the defense, and not arrogate the right to themselves.

But the 88th section expressly declares, that the failure to give the notice or to hold that meeting shall not vitiate the assessment; and having so provided in that section, we have no warrant for saying that the failure to meet and act, as required by the 97th section, was to have any other or different effect. If it could be held that such a meeting was essential to the validity of the assessment or levy, the 191st section has clearly removed the objection, as it has provided that no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any omission or defective act of any officer or officers connected with the assessment, may, in the discretion of the court, be amended. These statutes unmistakably show that it was the legislative will that mere technical objections, not affecting the justice of the tax itself, should not be regarded.

These enactments were, no doubt, designed to dispense with the strictness of the common law in the summary proceeding for the levy and collection of taxes — to remove and wipe out all mere technical objections in the raising of the revenue — thus placing the tax-payer who honestly owes his tax to the government, which affords him protection, on precisely the same footing as any other person who owes an honest debt. Nor should the courts interpose obstructions to thwart the legislative will.

In this case there is nothing shown from which it can be inferred that a single cent of the tax which appellants are resisting is unjust, and the presumption is that they have not been assessed in disproportion to that imposed upon other persons in the municipality in which this tax was levied. The tax, then, being just, even had the town officers or the board of commissioners failed to meet, under these enactments we could not hold that it vitiated the tax imposed on appellants' property, and much less that it would avoid the entire levy of the township or county in which the officers resided. The general assembly has commanded, and all must yield obedience to its requirements. We perceive no error in this record, and the judgment must be affirmed. *Judgment affirmed.*

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SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

GEN. NO. 68463. PENDING DEC. TERM, 1877.

CATHERINE OEHM *v.* WILLIAM D. CURTIS ET AL.

PRACTICE.—Motion to strike plea from file for want of an affidavit of merits.

J. WINSHIP, *Attorney for Plaintiff.*
L. M. SHREVE, *Attorney for Defendant, Curtis.*

Action, *assumpsit*, with common counts and affidavit of amount due. Plea verified.

COUNSEL: Your honor, this is a motion to strike the plea from the file for want of an affidavit of merits.

GARY, J: The statute says that where the plaintiff files an affidavit with his declaration, that the defendant, if a resident of the county, shall file an affidavit with his plea. In the case of *Honore* v. *Home National Bank*, 80 Ill. 489, the action was on a promissory note, but contained also the common counts. There was a plea denying the execution of the instrument verified, and I struck it out because there was no affidavit of merits, and the Supreme Court upon the first hearing reversed the decision, and then upon a rehearing affirmed my decision. But they affirmed it upon the ground that the plea denying the execution of the instrument did not answer the whole declaration, there being the common counts, and that the plaintiff might be entitled to recover upon either cause of action. It is a plea in bar, and if a bar, it is a bar to every count in the action. If this plea is true, the plaintiff cannot recover at all in this case. And it is sworn to, to be true. Now the court stated that under the statute, I did not err in striking the affidavit from the files. The ground upon which they affirmed the case upon a rehearing was, that that plea might be true, and under the common counts the plaintiffs have a right to recover. Now in this case there can be no recovery if this plea is true. Leave to amend is allowed. You put in a new declaration, and then you can have a rule on him to amend by giving notice.

EDITOR'S NOTE.—As to affidavit of merits, see *Bank* v. *C. D. & V. R. R. Co.*, 1 Chi. L. J. 26-31, and cases there cited.

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HOME MANUFACTURING CO. *v.* GEORGE GOUGH ET AL.

VENDOR AND VENDEE—*Executory Contract.*—Where a contract for the sale of land is executory, the fee remaining in the vendor, as a security for the payment of the purchase money, and after demand of payment and refusal by vendee, the vendor may treat the contract as rescinded, and recover the possession by an action of ejectment, or he may resort to a court of equity for a specific performance of the contract.

SAME—*Trust relation of vendor and vendee.*—In equity, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor.

SAME—*Remedy mutual.*—In cases of specific performance, the remedy is mutual.

SPECIFIC PERFORMANCE.—A (corporation) executed and delivered to B a bond for a deed to a town lot, conditioned that if B would pay A his due bill, dated the 11th day of December, 1867, for $500, payable to A, and also pay C a certain note for $1,000, given to him by B, November 7, 1867, payable one year from date, on which A was security for B, then A would convey to B said lot. B took possession when the bond was executed, and has ever since kept possession. The note to C was given for money borrowed of him by B and used in building on said lot. Some payments on this note have been made and nothing has been paid on the due bill. A files his bill for a specific performance of the contract, and to ascertain the amount due on both said note and due bill, and to subject the premises to sale for the payment of the same. B's answer admits the bond, note, and taking possession, but insists that the notes were paid by services rendered by him to A under a special contract. C was made a party defendant and defaulted, and the court, by its decree, found the facts above stated, and that there was due to A, on the due bill, $983.32, and to C, on his note, $442.21, and ordered that the amount due A be paid, with costs, but that as to the sum due to C, A is entitled to no relief, and after paying costs and the sum due A, the balance should go to B.

Held, that in all such cases, when the contract is free from fraud, oppression or other defect, courts of equity usually enforce the specific performance of the contract, and that the court erred in refusing to do so in this case.

ERROR TO MORGAN COUNTY.

DUMMER, BROWN & RUSSELL, *Attorneys for Plaintiffs in Error.*
KETCHUM & TAYLOR, *Attorneys for Defendants in Error.*

Chief Justice HIGBEE delivered the opinion of the court:

The substantial facts, as disclosed by the record in this case, are, that on the 11th day of December, 1867, the plaintiff in error, a corporation, executed and delivered to defendant Gough a bond for a deed to a town lot, conditioned that if Gough would pay to plaintiff in error his due bill of that date for $500, payable to said plaintiff in error, and also pay to defendant Malinda a certain note for $1,000, given to him by said Gough, November 7, 1867, payable one year after date, on which note plaintiff in error was security for said Gough, then plaintiff would convey to Gough said lot. Defendant Gough, at the time said bond was executed, went into possession of said lot, and has continued there ever since. The

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note to Malinda was given for money borrowed of him by Gough and used in building a house on the lot sold him by plaintiff in error. Some payments had been made on this note before the bill was filed, but a part of the money still remaining unpaid on this note, and nothing having been paid on the due bill, plaintiff in error files this bill for a specific performance of the contract, asking the court to find the amount due on both said note and due bill, and subject the premises to sale for the payment of the same. The answer of defendant Gough admits the making the bond as stated, the giving the notes and taking possession of the premises, but insists that the notes were paid by services rendered by him to complainant under a special contract. Malinda was made a party defendant and defaulted, and on the final hearing of the cause, the court, by its decree, found the facts above stated, and that there was due to complainant, on the due bill, $983.32, and to Malinda, on his note, $442.21, and ordered the amount due complainant to be paid, with costs, within forty-five days, or, in default of payment, that the master in chancery sell the premises. That as to the sum of $442.21, due to Malinda, complainant is entitled to no relief. Orders that from the proceeds of the sale the master pay, first, the costs; second, the sum due complainant, with interest; third, the balance (if any) to defendant Gough.

Complainant excepted to the decree, and now assigns for error the ruling of the court in refusing the relief asked in reference to the sum due on the Malinda note.

The evidence fails to show that defendant Gough had paid these notes, or either of them, by his services, as claimed in his answer, and we think the court correctly found and stated the amount due on each. It only remains, then, to determine the relief to which complainant is entitled.

The contract is executory, the fee remaining in the vendor, as a security for the payment of the purchase money, and after demand of payment and refusal by vendee, the vendor may treat the contract as rescinded, and recover the possession by an action of ejectment, or he may resort to a court of equity for a specific performance of the contract. In equity, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor. Story's Equity Jurisprudence, sec. 789.

The vendee, after the payment or tender of the purchase money, may come into a court of equity to compel the vendor to convey the premises, according to the terms of his contract. On the other hand, the vendor may come into a court of equity for a specific performance of the contract on the other side, and to have the money paid; for in cases of specific performance the remedy is mutual.

At the instance of the vendor, the court may decree that the vendee pay the purchase money, or that he surrender up the possession, or that the land be sold for the payment of the sum found due. Guided by these principles, it does not seem that there should be much difficulty in fixing the rights of the parties under this contract. Courts

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are not to make contracts for the parties, but simply to cause them to be executed according to the intention of the parties.

The complainant had agreed that upon Gough paying it $500 and the note which Malinda held against Gough, and upon which complainant was security, that it would convey to him the land, and Gough agreed, on his part, that he would make these payments in consideration of the conveyance.

Complainant holds the legal title as its security, and cannot be compelled to part with it until the terms of the purchase are complied with. But it is urged by defendant Gough that the note to Malinda was given for borrowed money, and not as a part of the purchase money, and that, in any event, the taking personal security by Malinda waived his right to a lien upon the premises.

Where the vendor has parted with his title and seeks to charge the property conveyed with a vendor's lien this defense would be deemed sufficient, but that is not this case. Here the contract is executory. Gough agreed to pay both these notes as the consideration for a conveyance, complainant to retain the legal title as a security for the performance of his agreement. Complainant was security on the Malinda note and interested in its payment, and equity will not permit Gough to retain the property and refuse to comply with the terms upon which he received it.

In all such cases, when the contract is free from fraud, oppression, or other defect, courts of equity have enforced the specific performance of the contract, and we think the court erred in refusing to do so in this case. The decree is therefore reversed and the cause remanded, with directions to the court to enter a decree requiring complainant to execute to Gough a deed according to the terms of the contract, and place it in the hands of the master in chancery. That Gough pay all costs and the amount found due both to complainant and Malinda, and that upon the payment to Malinda he surrender up to Gough his note, to be canceled, and that upon the payment of the sums found due, both to complainant and Malinda, and all costs, the master deliver to Gough the deed. If these sums and costs are not paid within a time to be fixed by the court, then the premises to be sold and the proceeds applied, first, to the payment of all costs; second, the amount due to both complainant and Malinda, and, third, the residue (if any) to defendant Gough. *Decree reversed and cause remanded.*

EDITOR'S NOTES.

SPECIFIC PERFORMANCE.—Courts of equity will regard the substance, and not the mere form of agreements and other instruments, and will give them the precise effect the parties intended in furtherance of that intention. Story's Eq. Jur., sec. 791. The vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid, for the remedy, in cases of specific performance, is mutual. Story's Eq. Jur., sec. 790.

VENDOR'S LIEN.—There is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third

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person, whenever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice. For it is a general principle that as against himself and any claiming under him such an agreement raises a trust. Story's Eq. Jur., sec. 1231. But although a lien will be created in favor of a vendor for the purchase money, on the sale of an estate, yet, if the consideration of the conveyance is a covenant to pay an annuity to the vendor, and another covenant to pay a part of the money to third persons, it seems that the latter, not being parties to the conveyance, will not generally have any lien thereon for the payment of such money, for they stand in no privity to establish a lien, at least unless the original agreement import an intention to create such a lien. Story's Eq. Jur., sec. 1233.

ESTOPPEL.—See *Trusevant* v. *Bettis*, 5 Cent. L. J. 221 (No. 10, September 7); Bigelow on Estoppel, 259, 503; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Brown* v. *Rickets*, 3 Johns. Ch. 553.

SURETY.—It is a general rule that in equity a surety is entitled to the benefit of all the securities which are held by the creditor. Story's Eq. Jur., sec. 499 and note.

PETER CARROLL *v.* CITY OF JACKSONVILLE.

PRACTICE—*Appeal from judgment of a justice of the peace.*—Where the transcript of the justice from his docket shows that the "appeal was allowed," the entry will be held sufficient, though it does not show the time of filing of the bond, and there are no file marks and entry of approval on the bond.

EVIDENCE.—It is the presumption of law, that every public officer will do his duty, so where a justice of the peace allows an appeal, this court will presume, in the absence of proof to the contrary, that, had not the requisite bond been filed and approved by him within the time required by law, the justice would not have allowed the appeal.

AMENDMENT—*Motions.*—A motion to strike a cause on appeal from a justice of the peace from the docket, and for a *procedendo*, for defects in the appeal bond, if met by a counter-motion to file a good and sufficient bond, should be overruled and the latter motion allowed, with reasonable time to file the bond.

APPEAL FROM MORGAN COUNTY.

GEORGE W. SMITH, *Attorney for Appellant.*
ROBERT D. RUSSEL, *Attorney for Appellee.*

Justice LACY delivered the opinion of the court:

On the 28th day of March, A.D. 1877, judgment was rendered before A. H. Groff, a justice of the peace in Morgan county, against the appellant for violating the city ordinance of appellees, in the sum of $25 and cost of suit.

An appeal by appellant was attempted to be taken in the case, but the justice before whom the judgment was rendered having soon after been removed from office by the county commissioners of the county, and one W. H. McCullough having been appointed justice in his place, the cause for some reason was not certified to the Circuit Court. On the 13th day of October, 1877, one of the days of the October special term of the Morgan County Circuit Court, ap-

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pellant by his attorney moved the court for rule on W. H. McCullough, successor in office to A. H. Groff, as justice of the peace, to certify the records and papers in this cause to the Circuit Court. This motion was based on the affidavit of Peter Carroll, appellant, showing among other things that on the 1st day of April, A.D. 1877, he took an appeal to the Circuit Court of said county, and filed his appeal bond with said justice (A. H. Groff), which said bond was accepted and approved, etc.

On the 25th of October, 1877, the court below entered a rule on the justice to certify and transmit the papers and record according to the motion. In obedience to such rule, on the 27th day of October, A.D. 1877, the justice sent up a transcript of the cause, together with an appeal bond, signed by appellant and Wm. Carroll, as security. The bond was very defective in form, and not such as was required by the statute. At the foot of the transcript of the justice record, and a part of the transcript was added these words by Justice Groff, "appeal allowed."

On the same day the transcript was filed in the Circuit Court, the attorney for appellees entered his motion to strike the cause from the docket and for *procedendo* to the justice of the peace.

At the November term of the Circuit Court, to which time the cause had been continued, the attorney for appellant moved the court by cross-motion for leave to file a good and sufficient appeal bond.

Thereupon the court below overruled the cross-motion to which appellant accepted and sustained the motion of the appellees, dismissed the appeal, and ordered a *procedendo* to the justice of the peace, to which ruling the appellant excepted.

Appellant assigns for error the overruling of appellant's cross-motion, and sustaining the motion of appellees and dismissing the appeal.

The statute of this state provides that "no appeal from a justice of the peace shall be dismissed for any informality in the appeal bond; but it shall be the duty of the court, before whom the appeal may be pending, to allow the party to amend the same within a reasonable time, so that a trial may be had on the merits of the case." Stat. 1874, p. 648, sec. 69.

But it is contended in this case by counsel for appellees that the appeal bond was not filed and approved in this cause within the twenty days from the rendition of the judgment before the justice of the peace; that there were no file marks or marks of approval by the justice on the appeal bond.

But the only evidence in this case as to whether the appeal bond was filed and approved within the time required by law, was the appellant's affidavit, showing that the bond was filed and approved within the proper time, and the entry of the justice on his docket that "appeal was allowed."

In the absence of any proof to the contrary, we must hold this

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proof to be sufficient. The affidavit of appellant is positive that the appeal bond was filed and approved within the proper time.

The entry of the justice allowing the appeal must also be held sufficient, even were it not dated, as in this case it is doubtful if the entry is dated; for the reason, that the presumption of law is, that every public officer will do his duty. Had not the bond been filed and approved by him within the time required by law, the justice would not have allowed the appeal.

For the above reasons the judgment of the court below will be reversed and the cause remanded, with instructions to the Circuit Court to overrule the motion of appellees to strike the cause from the docket and for *procedendo*, and to allow the motion of appellant to file a good and sufficient appeal bond within a reasonable time. *Judgment reversed and remanded.*

EDITOR'S NOTES.

The following decisions of the Supreme Court are interesting in connection with the above case from the Appellate Court:

1. When the appeal bond is accepted and approved by the justice, even if it is defective, the appeal is perfected from the judgment; it then becomes the duty of the opposite party to follow the case to the Circuit Court. *Miller* v. *Superior Sewing Machine Co.*, 79 Ill. 450. The appeal need not be prayed for at the time of rendering judgment. *Fix* v. *Quinn*, 75 Ill. 232.

2. Where an appeal was taken from the judgment of a justice of the peace, in a case for obstructing highways, the bond was executed in the name of the town by the commissioner of highways, instead of the supervisor, for which reason the Circuit Court dismissed the appeal and refused a motion to file an amended bond to cure the defect; but the Supreme Court reversed the decision. *Town of Partridge* v. *Snyder*, 78 Ill. 519.

3. An appeal from the judgment of a justice of the peace is a purely statutory right; the bond must be filed by the appellant within the time prescribed by the statute. If filed twenty-one days after judgment, his appeal will be dismissed on motion. But the objection must be taken at the earliest moment and before full appearance, or the appellee will waive it. *Kemper* v. *Town of Waverly*, 81 Ill. 278; *Pearce* v. *Swan*, 1 Scam. 266; *Mitchell* v. *Jacobs*, 17 Ill. 235.

4. No summons is requisite when the appeal is perfected by filing the bond with the justice. *Fix* v. *Quinn*, 75 Ill. 232; *Fink* v. *Disbrow*, 69 Ill. 76.

5. Otherwise, when the bond is filed with the clerk of the Circuit Court. *Hayward* v. *Ramsey*, 74 Ill. 372; *Hohmann* v. *Eiterman*, 83 Ill. 92.

6. But the appellee may waive process and appear; the filing of a trial notice is a full appearance. *Hohmann* v. *Eiterman*, 83 Ill. 92.

7. Additional appeal bond may be required, in the discretion of the Circuit Court; it is not error to dismiss the appeal in case of non-compliance with a rule on appellant to file an additional appeal bond. *Bennett* v. *Pierson*, 82 Ill. 424.

8. It is also discretionary with the court to allow or deny a motion to reinstate the appeal; unless this discretion is flagrantly abused, the decision will not be disturbed. *Nispel* v. *Wolf*, 74 Ill. 303.

9. But the Circuit Court acquires no jurisdiction of the appeal before the term to which the appeal is taken, e. g., where the term began on the 18th, and an appeal was taken on the 19th of the month, *held*, that the Circuit Court had no

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power to dismiss the appeal at that term, or to require an additional bond. *Baines* v. *Kelly*, 73 Ill. 181; see also *Camp* v. *Hogan*, 73 Ill. 228; *Hayward* v. *Ramsey*, 74 Ill. 372.

10. Technical defects in an appeal bond, or the justice's transcript, are of no avail. The remedy for the defect is to obtain a rule on the justice to supply or remedy it. *Fink* v. *Disbrow*, 69 Ill. 76.

11. The appellant, by filing the appeal bond in the Circuit Court, waives all informalities and enters his full appearance in the action; unless, upon hearing the evidence, the court finds that the justice had no jurisdiction of the subject-matter, it must entertain the case. *Village of Coulterville* v. *Gillen*, 72 Ill. 599; *Cairo & St. L. R. R. Co.* v. *Murray*, 82 Ill. 76.

12. And hear and determine it according to the justice thereof. (Sec. 72, Rev. Stat. 1874, p. 648.) *Id.*

13. In an appeal in a suit for a violation of a city ordinance, the same rule obtains; no objection to the proceedings before the justice of the peace can be taken on the appeal; the trial is *de novo*. *Harbaugh* v. *City of Monmouth*, 74 Ill. 367.

14. An appeal lies from the judgment of a justice of the peace, in a proceeding to recover a penalty under section 58 of the Road Law. *Town of Pardridge* v. *Snyder*, 78 Ill. 519.

FREDERICK T. PUTT *v.* T. G. DUNCAN.

PRACTICE—*Demurrer.*—An objection raised, that the demurrer to a replication was not disposed of, comes too late in this court.

SAME—*Variance.*—An error assigned, that the note varied from the one set out in the declaration, is not well taken. Such objection cannot prevail if made for the first time in this court.

SAME—*Instruction.*—An instruction which informed the jury that all damages accruing after the sale of a horse was well calculated to mislead the jury. In a legal sense, all damages should be considered to accrue at the time the warranty was made and the sale consummated, but the evidence and development of the injury may appear afterward. The words, "damages accruing after the said sale," mean damages developed after the sale.

WARRANTY—*Practice—instruction.*—A breach of warranty is a question for the jury to determine, and an instruction to the jury that, "although they may believe there was a warranty of the horse, yet, unless the jury further believe from the evidence that there was a substantial breach of warranty, the jury will find for plaintiff for the amount of the note and interest to this date," was clearly error under the evidence. The appellant was entitled to have this issue found in his favor, and if any damages resulted from the breach, however small, it should have been set-off against appellee's demand.

APPEAL FROM FORD COUNTY.

GRAY & SWAN, *Attorneys for Appellant*, cited: *The Alton etc. Railroad Co.* v. *Northcott*, 15 Ill. 49; *Taylor* v. *Beck*, 13 Ill. 376; *Moore* v. *Little et al.*, 11 Ill. 549; *Richeson* v. *Ryan et al.*, 15 Ill. 13; *Sammis* v. *Clark*, 17 Ill. 398; *Chapman* v. *Wright*, 20 Ill. 120; 1 Par. Con. 4 ed. 473, note C; *Aurora Fire Ins. Co.* v. *Eddy*, 55 Ill. 223; *Reynolds* v. *Lambert et al.*, 69 Ill. 498; *C. B. & Q. R. R.* v. *Gregory*, 58 Ill. 277; *I. C. R. R. Co.* v. *Chambers*, 71 Ill. 521.

TIPTON & POLLOCK, *Attorneys for Appellee*, cited: The verdict ought not to be set aside when the evidence is conflicting. *City of Chicago* v. *Torgerson*, 60 Ill.

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200; *City of Galesburg* v. *Higley*, 61 Ill. 287; *Fitch* v. *Zimmer*, 62 Ill. 126; *Stenger* v. *Swartwout*, 62 Ill. 257; *Peru Beer Co.* v. *First National Bank*, 62 Ill. 265; *Cass* v. *Campbell*, 63 Ill. 259; *Chapman* v. *Stewart*, 63 Ill. 332; *C. A. & St. L. R. R. Co.* v. *Stover*, 63 Ill. 358; *Vogt* v. *Buschman*, 63 Ill. 521; *Tucker* v. *Watte*, 64 Ill. 416; *McNellis* v. *Pulsifer*, 64 Ill. 494; *Chicago City Railway Co.* v. *Young*, 62 Ill. 238. Where a note is introduced in evidence, without objection, in the court below, it is too late to raise the objection for the first time in the Supreme Court, that there is a variance between the note and declaration. *Robert Doyle* v. *Frank Douglas Machinery Co.*, 73 Ill. 273; *William Thompson* v. *George Hoagland et al.*, 65 Ill. 310. As to giving the sixth and eighth instructions: *Hovey* v. *Pitcher*, 13 Mo. 191; *Chambers* v. *Jaynes*, 4 Pa. Stat. 39–39; *Rees* v. *Smith*, 1 Ohio, 124. As to demurrer to replication: *Hopkins* v. *Woodward*, 75 Ill. 62; *Belleville Nail Mill Co.* v. *Chiles*, 78 Ill. 14; *Strohm* v. *Hayes*, 70 Ill. 41; *Davis* v. *Ransom*, 26 Ill. 100; *Parker* v. *Palmer*, 22 Ill. 489.

Justice LACY delivered the opinion of the court:

This was a suit by appellee against appellant, brought on a promissory note, dated March 25, 1876, for $500.

The defense set up to the note was, that it was the balance of $1,500 agreed to be paid by appellant to appellee for the purchase of a stallion horse called "Wonder." That the horse was warranted to be sound except a small pimple on the leg, and that would not hurt him, and that the horse was entirely worthless; also plea of set-off for the $1,000 paid.

The evidence shows that Charles Putt purchased one-half interest in the horse two days after the purchase from appellee, Charles Putt agreeing to pay $500 for one-half interest. The evidence in this case tended strongly to show that the horse was warranted as claimed by appellant; that he was unsound at the time of the sale, being affected with laminitis, and bog-spavin, and was thick winded; that he was worth greatly less than he would have been if as good as warranted. That the unsoundness of the horse grew worse in consequence of disease contracted before sale to appellant, and that the greatest depreciation in his value became apparent after Charles Putt purchased the half interest. The issues in the cause were tried by a jury.

On the trial of the cause, the court, against the objection of appellant, gave for appellee to the jury the following instructions:

6. "The court instructs the jury for the plaintiff that, if they believe from the evidence that the defendant sold an undivided interest in the horse within a few days, that then the defendant cannot in any event set-off any damages accruing after said sale."

8. "The court further instructs the jury that, although they may believe there was a warranty of the horse, yet, unless the jury further believe from the evidence that there was a substantial breach of warranty, the jury will find for plaintiff for the amount of the note and interest to this date."

The giving of the above instructions, among other matters, is assigned for error.

We are of the opinion that the giving of the eighth instruction was

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clearly error, when given in this case under the state of the evidence. If there was a breach of the warranty at all, which was a question for the jury to determine, the appellant was entitled to have this issue found in his favor, and if any damages resulted from the breach, however small, it should have been set-off against appellee's demand. *W. J. Estop et al.* v. *W. H. Fenton et al.*, 66 Ill. 467; *Taylor* v. *Beek*, 13 Ill. 49.

The sixth instruction, which informed the jury that all damages accruing after the sale of the horse to Charles Putt, was well calculated to mislead the jury. In a legal sense, all damages should be considered to accrue at the time the warranty was made and the sale consummated, but the evidence and development of the injury may appear afterward.

Yet we think that the instruction was well calculated to convey the idea to the jury that the words "damages accruing after the said sale," meant damages developed after the sale, and that they should not allow any damages which became first apparent after the sale of the half interest to Charles Putt.

The instruction cannot, by any reasonable construction mean, as is contended by counsel for appellee, that damages should not have been allowed for injuries arising from causes originating after the sale to Charles Putt.

The error assigned that the note varied from the one set out in the declaration is not well taken, such objection cannot prevail if made for the first time in this court. *Doyle* v. *Frank Douglas Machine Co.*, 73 Ill. 273; *Wm. Thompson* v. *George Hoagland*, 65 Ill. 310.

Also the objection raised that the demurrer to the eighth replication was not disposed of comes too late in this court. There should have been issue joined on the demurrer in the court below. By going to trial without this, the appellant waived the benefit of his demurrer. *Hopkins* v. *Woodward*, 75 Ill. 62.

The court below should have granted a new trial, and for not having done so, this cause is reversed and remanded.

Judgment reversed and remanded.

JESSE LOCKHART v. CYRUS HULLINGER.

WAGERS—*Bets on an election.*—The law is well settled in this state that wagers depending on the result of a presidential election are against public policy and void. No recovery can be had on a void instrument.

APPEAL FROM MACON COUNTY.

J. S. POST, *Attorney for Appellant*, cited: *Gregory* v. *King*, 58 Ill. 169.

Justice DAVIS delivered the opinion of the court:

This was an action originally commenced before a justice of the peace by Hullinger against Lockhart, and taken by appeal to the Circuit Court of Macon county, in which court a judgment was rendered against Lockhart for $77.20 and costs.

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The action was brought on a written instrument, of which the following is a copy:

NIANTIC, ILLINOIS, Sept. 23, 1876.

On the election of R. B. Hayes to the office of President of the United States in 1876, I promise to pay Cyrus Hullinger seventy-five dollars, and if not elected, this note is null and void. JESSE LOCKHART.

On the trial the only evidence offered was the above written instrument, and the only question presented by the record is, whether on such an instrument the plaintiff below was entitled to recover the judgment rendered in his favor.

The law is well settled in this state, that wagers depending on the result of a presidential election are against public policy and void.

Instruments similar to the one sued on have been held, to all intents and purposes, bets on an election, and therefore void on their face. *Gordon* v. *Casey*, 23 Ill. 70; *Guyman* v. *Burlingame*, 36 Ill. 201; *Gregory* v. *King*, 58 Ill. 169.

The instrument sued on in this case being void, no recovery could be had upon it.

The judgment must be reversed. *Judgment reversed.*

CATHARINE WHEELAN v. ELLEN FISH.

FORCIBLE DETAINER—*Separate action to recover possession of a tract of land.*—A separate action against a married woman who is living with her husband upon certain premises which the husband is in the legal possession of, and which they are both occupying and enjoying together as their joint home, cannot be maintained. While the husband is thus living there in his own home, the wife surely has the right to live with him, and that right cannot be disturbed while the marital relations exist between them. The possession is that of the husband, and the wife cannot unlawfully withhold the possession of the premises on demand made, for she has no possession to surrender. A separate action against her cannot be maintained.

SAME—*Under the 6th clause of sec. 2, chap. 57, Rev. Stat. 1874.*—In June, 1873, A and B his wife executed their deed of trust to C for certain lands to secure the payment of a promissory note made by A for $500, due one year after date. After the maturity of the note D obtained a decree in chancery against A and B for the foreclosure of the deed of trust. Under that decree the land was sold, and a deed executed to D, who was the purchaser at the sale. Afterward, and before the commencement of this suit, D demanded of B the immediate possession of the land so purchased by and conveyed to her. The possession was not surrendered, and a suit was instituted to recover the possession. This proceeding was based on the sixth clause of section 2 of chapter 57 of the Revised Statutes of 1874, entitled "Forcible Entry and Detainer," which provides, "that the person entitled to the possession of lands or tenements may be restored thereto when land has been sold under the judgment or decree of any court in this state, or by virtue of any sale made under any power of sale in any mortgage or deed of trust contained, and the party to such judgment or decree, or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent." *Held,*

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that D brought herself within the provisions of this act in all respects, *except that in making a demand and commencing her proceeding to recover possession she did not make that demand and commence the proceedings against the husband and wife*, who were both parties to the chancery cause in which the decree of foreclosure was obtained, and were both in possession of the premises claimed by D. Also, *Held*, that under this statute, to enable D to recover, she must show, not only that she was entitled to the possession, but that B unlawfully withheld that possession on demand made.

EVIDENCE—*Admissibility of.*—Upon the trial below, B attempted to show that after the execution of the deed of trust, and the master's deed to D for the land in controversy, the same was conveyed to B by E, who had received a conveyance of the same from the sheriff under a sale on execution issued on a judgment obtained against A. *Held*, that the court properly refused to permit B to make such defense, or in any manner to try the validity of the title in this proceeding.

APPEAL FROM MACOUPIN COUNTY.

BALFOUR COWEN and HORACE GWIN, *Attorneys for Appellant*, cited *Strawn* v. *Strawn*, 50 Ill. 37. *Botsford* v. *Wilson*, 75 Ill. 132. Herman's Law of Estoppel, 433. 20 Am. R. 282, and cases there cited. *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164, and cases cited.

J. G. KOESTER, *Attorney for Appellee.*

Justice DAVIS delivered the opinion of the court:

This was an action of forcible detainer, commenced by Ellen Fish against Catharine Wheelan, a married woman, to recover the possession of a tract of land described in the complaint filed in this case.

The record discloses that in June, 1873, James Wheelan and Catharine his wife (the appellant) executed their deed of trust to Henry Fish for the land in controversy to secure the payment of a promissory note made by the husband for $500, due one year after date.

After the maturity of the note, the appellee obtained a decree in chancery at the December term, 1875, of the Macoupin Circuit Court against the said James Wheelan and Catharine, his wife, for the foreclosure of the deed of trust. Under that decree the land was sold by the Master in Chancery, and after the expiration of the time to redeem, a deed was executed by him to the appellee, who was the purchaser at the sale, conveying to her the land in dispute. Afterward, and before the commencement of this suit, the appellee demanded of the appellant the immediate possession of the land so purchased by and conveyed to her.

Upon the trial below, the appellant attempted to show that after the execution of the deed of trust, and after the Master in Chancery had executed his deed to the appellee for the land in controversy, the same was conveyed to the appellant by Seymour B. Wilcox, who had, on the 30th day of May, 1876, received a conveyance of the same from the sheriff of Macoupin county, under a sale on execution issued on a judgment obtained against the said James Wheelan at the August term, 1870, of the Circuit Court of Macoupin county. But the court very properly refused to permit the appellant to make

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such defense, or in any manner to try the validity of the title in this proceeding.

On the case made by the appellee, the court below found in her favor, and gave judgment that she recover the possession of the premises, and that she have a writ of possession therefor. In so finding and giving judgment for the appellee we think the court erred.

This proceeding was based on the sixth clause of section 2 of chapter 57 of the Revised Statutes of 1874, entitled "Forcible Entry and Detainer," which provides, "that the person entitled to the possession of lands or tenements may be restored thereto when land has been sold under the judgment or decree of any court in this state, or by virtue of any sale made under any power of sale in any mortgage or deed of trust contained, and the party to such judgment or decree, or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof, after demand in writing by the person entitled thereto, or his agent."

The appellee brought herself within the provisions of this act in all respects, except that in making a demand and commencing her proceeding to recover possession she did not make that demand and commence the proceedings against the husband and wife, who were both parties to the chancery cause in which the decree of foreclosure was obtained, and were both in possession of the premises claimed by appellee.

Under this statute, to enable the appellee to recover she must show, not only that she was entitled to the possession, but that the appellant unlawfully withheld that possession on demand made. When the trust deed was executed, James Wheelan, the husband, was seized in fee of the land, and it was given to secure the payment of a debt due by him alone, and the wife joined in the conveyance only to pass her right of dower and homestead in the land.

At that time the husband was legally in possession of the premises; and while it is not shown directly that he was occupying them as his home, it does appear from the whole case that the husband and wife were then living together upon the premises, and having since occupied and enjoyed them as their joint home.

While the husband was thus living there in his own home, the wife surely had the right to live with him, and that right could not be disturbed while the marital relations existed between them.

When the demand of the appellee was made on the appellant for the possession of the premises, the appellant had no possession to surrender. The possession was that of the husband, and the wife had no right, and could not be required, to give up that which did not belong to her. The husband being legally in the possession of the premises in controversy, and the wife being there with him, as she had the right to be, she did not unlawfully withhold the possession of the premises on demand made, and the separate action against her cannot be maintained. The judgment against her must be reversed. *Judgment reversed and remanded.*

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CHARLES M. BODLEY *v.* LEWIS ANDERSON.

REPLEVIN—*Demurrer to replication in.*—The declaration in this case was filed in the *detinet*, and a plea of *non detinet*. A filed a special plea that he took the goods as agent of B, by virtue of a chattel mortgage executed by C and D to E, to secure a note of $1,100, due Feb. 16, 1877, and that the note was indorsed by E to B. There was a special replication to this second plea that the note was given to indemnify E for signing a note as security for the makers of the mortgage to F; and that E had never paid the note. A demurrer was overruled to this replication. *Held*, that as the second replication to the second special plea set up no legal bar to that plea, the demurrer should have been sustained to it.

PRACTICE—*New trial.*—A motion was made by A for a new trial, which was overruled, and the court rendered judgment finding the property in C, and ordering a return. *Held*, that the court should have granted a new trial.

SAME—*Instructions.*—An instruction, "That if the note described in the mortgage (given to E) did not mature till the 19th day of February, A.D. 1877, and that appellant took possession on the 17th day of February, A.D. 1877, then the jury would find for the plaintiff," and another instruction, "That promissory notes in this state have three days of grace; that in law a note was not due until three days after the day expired on the face of the note," *compelled the jury to find for C under the evidence.*

MORTGAGE OF INDEMNITY—*Right to take possession under and foreclose.*—By the terms of this mortgage, when the $1,100 note mentioned in it became due, then the condition was broken, and the mortgagee had a right to and must take possession of the mortgaged property, or lose his security. This was the contract C had made. This mortgage note was assignable, and when turned over to the holder of the other note, and was collected, it paid the debt of C, and relieved E from the very burthen he had agreed should never be imposed upon him.

CONTRACT—*Of security.*—The agreement between E and C was that the former, in signing the latter's note as security, was to be kept harmless; that he was only to pay if C did not.

APPEAL FROM FORD COUNTY.

C. H. WOOD and GRAY & SWAN, *Attorneys for Appellant*, cited: "Juries exclusively find upon fact of making of contracts, and when so found written they find the true intent and obligations under the instruction of the court. Any material mistake in an instruction in the true intent and obligations imported by the language used is error." *Ill. Cent. R. R. Co.* v. *Cassell*, 17 Ill. 394. The court must construe the contract without the aid of witnesses to explain it. *McAvoy* v. *Long*, 13 Ill. 147. "It is a question for a jury, and a matter of fact, what contract has been made; but this ascertained, it becomes a question of law for the court to interpret it, and ascertain the meaning of the parties to it, and to declare their respective rights and the extent of their obligations." *Sigsworth* v. *McIntyre*, 18 Ill. 128. *Mitchell* v. *Town of Fond du Lac*, 61 Ill. 176; also *Worner* v. *Matthews*, 18 Ill. 87; *Simmons* v. *Jenkins*, 76 Ill. 479; *Martin* v. *Bagley*, 1 Allen, 381; Hilliard on Remedies for Torts, p. 82, sec. 88; *Hinckley* v. *West*, 4 Gilm. 168; *Austin* v. *People*, 11 Ill. 452; *Simmons* v. *Jenkins*, admr., 76 Ill. 479; *Barbour* v. *White*, 37 Ill. 164.

A. SAMPLE, *Attorney for Appellee*, cited: Herman on Chattel Mortgages, 429; *Old* v. *Cummings*, 31 Ill. 188; *Barbour* v. *White*, 37 Ill. 164; *Pettilon* v. *Noble*,

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Leg. News, 259, May 1, 1875; *Darst.* v. *Bates*, 51 Ill. 447; *Bonham* v. *Galloway*, 13 Ill. 68; *Sheppard* v. *Ogden*, 2 Scam. 257; *Comwell* v. *McCowan*, 53 Ill. 365: "In reference to the rights of the surety himself holding such a mortgage of indemnity; he cannot foreclose till he has paid the debt, and the bill must allege such payment." 1 Hilliard on Mortgages, 4 ed. sec. 42, p. 344; *Sheppard* v. *Sheppard*, 6 Conn. 37; *Lewis* v. *Richey*, 5 Ind. 152; *Mann* v. *Brady*, 67 Ill. 95; *Peoria Ins. Co.* v. *Frost*, 37 Ill. 333. "Error in instructions will not reverse if it is apparent that on a retrial the verdict must be the same." *Murry McConnell* v. *Jarris Kibbe*, 33 Ill. 181, and cases there cited.

Justice LACY delivered the opinion of the court:

This was an action of replevin, commenced by the appellee against appellant in the Ford county Circuit Court, March 1, 1877. The declaration was filed in the *detinet*, and plea of *non detinet*. Also there was a special plea filed by the appellant, that he took the goods described in the declaration as the agent of Joseph Loose, by virtue of a chattel mortgage executed by Lewis Anderson and Peter Peterson to Emanuel Collins to secure a note of $1,100 due Feb. 16, 1877, and that the note was indorsed by Collins to Jos. S. Loose.

Special replication to said plea, being second replication, *i. e.*, That the note was given to indemnify Collins for signing a note as security for the makers of the mortgage to George Wright; and that said Collins had never paid the note. A demurrer was overruled to this replication.

It appears from the record that the cause was tried by a jury, who found verdict for appellee — "We, the jury, find for plaintiff." A motion was made by appellant for a new trial, which was overruled, and the court rendered judgment finding the property in the appellee, and ordering a return.

The court gave second and third instructions for appellee in substance. 2d. That if the note described in the mortgage (given to Collins) did not mature till the 19th day of February, A.D. 1877, and that appellant took possession on the 17th day of February, A. D. 1877, then the jury would find for plaintiff.

3d. That promissory notes in this state have three days of grace, that in law a note was not due until three days after the day expired on the face of the note.

On the trial of the cause a note, as the evidence showed, signed by appellee and Peter Peterson, payable to Emanuel Collins, for the sum of $1,100 due Feb. 16, 1877, dated August 16, 1876, also chattel mortgage in the usual form, signed by the makers of the note, duly executed and recorded for the property in question, given to Collins to secure the note, were in evidence.

The evidence showed that the only consideration of the note and mortgage was for indemnification to Collins, for signing with them, as security, a note dated August 2, 1876, to said Wright, due in six months after date, for $816, drawing 3 per cent interest per month, and for $80 attorney's fee.

The principal note, payable to Wright, had been indorsed to said Loose, and Loose had recovered a judgment, and had execution

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issued thereon, and afterward, about the time the note made payable to Collins became due, he indorsed that note, to Loose also, with the agreement with Loose that he would sell the property and make it bring as much as he could, and apply the proceeds in discharge of the judgment rendered on the Wright note.

The Collins note and mortgage was then by Loose put into the hands of appellant for the purpose of taking the property into possession — which appellant did on the 16th or 17th Feb. 1877.

The giving of the second and third instructions for appellee the appellant assigns for error.

According to these instructions the jury was compelled to find for appellee.

As the evidence was clear that either the note and mortgage had not matured, or that the three days of grace had not run when appellee took possession of the property, neither of these facts were material to the issue, for at the time this suit was commenced the note and mortgage had long since matured, and the appellee had a perfect right to retain the goods under the mortgage. This was an action in the *detinet*, and even were it an action in the *cepit* there could be no return of the property. *Simmons* v. *Jenkins*, 76 Ill. 479.

But it is claimed by appellee's counsel that Loose nor his agent, the appellee, would have a right to take possession of the property or foreclose the mortgage until Collins had paid off the debt for which he was security; and various authorities are cited to support this position — especially the case of *Bonham* v. *Galloway et al.* 13 Ill. 68.

In that case, the mortgage sought to be foreclosed was given on real estate, and the condition contained in it was, that in case the security was kept harmless, the mortgage was to be void, otherwise the condition was broken. The condition according to its terms was not broken, and the complainant had no right to foreclose it until he had paid the debt.

In this case the condition of the mortgage is quite different. By its terms, when the $1,100 note mentioned in it became due, then the condition was broken, and the mortgagee had a right to, and must take possession of the mortgaged property, or lose his security. This was the contract appellee had made.

In addition to this, the Wright note and the Collins note and mortgage had united in one and the same person — any collection on the latter satisfied the former to that extent. Hence appellee would be saved from loss; for by the collection of the Collins note and mortgage the Wright note would be also satisfied.

The agreement between Collins and appellee was, that the former, in signing the latter's note as security, was to be kept harmless; he was only to pay if appellee did not.

It was a matter of indifference to appellee whether Collins first paid off the Wright note, and then by virtue of the chattel mortgage take possession of the property and foreclose it, or turned the note

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and mortgage over to Loose, the holder of the Wright note, in the first instance.

The mortgage note was assignable, and when turned over to the holder of the Wright note and was collected, it paid the debt of appellee, and relieved Collins from the very burthen he had agreed should never be imposed upon him.

As the second replication to the second special plea set up no legal bar to that plea, the demurrer should have been sustained to it. The court below should have granted a new trial.

For the above reasons the cause is reversed and remanded.

Judgment reversed and remanded.

CHARLES RAYMOND ET AL. v. PETER KERKER.

DISTRESS FOR RENT—*Sufficiency of deed to pass the rights to accruing rent to grantee without attornment to purchaser.*—A rented a farm of 160 acres to B, on the 1st day of March, 1873, for one year, at a rent of $640, to be paid in the fall or winter after the renting. B entered and occupied under the contract, but did not pay the rent. A filed a distress warrant. B filed three pleas denying his liability for rent. A fully proved the allegations of the distress warrant. B then read in evidence a deed executed by A to C, conveying the fee in the premises without reserving the accruing rent, and a release from C, the grantee in the deed, to A for all rent due him from B for the use of the premises. This release was made more than a year after this suit was commenced. It was understood, when A conveyed to C, that C was not to have possession of the premises until after the time when B's lease would expire. The evidence also tended to show that B had never paid the rent to either A or C, nor had he ever attorned to C, and that the release was executed by C to B in consideration of $5, and was intended to defeat this suit then pending. Upon this evidence the principal question is, whether the deed of A to C passed the rights to the accruing rent to the grantee, so as to deprive A of the right to maintain this suit *without attornment* by the tenant to the purchaser. *Held*, that accruing rent not reserved passes by the deed to the grantee, as between the parties to the deed; but that the *legal right to the rent does not pass by the grant*, as against the tenant, who has not consented thereto by attornment, and that in this case it is vested in A, who alone can maintain a suit at law for the recovery of the rent, and that A's right of action will not be defeated by interposing equities in favor of third parties.

EVIDENCE—*Admissibility of a release as evidence.*—After issues are found on the the pleas, it only remains to try them. And when a release, which is offered in evidence, was executed long after this suit was commenced, it was *held* inadmissible under either of the pleas in this case, and did not tend to prove any issue made by either of the pleas. The pleas had relation to the commencement of the suit, and the release certainly did not show that B was not then indebted to A for rent.

ATTORNMENT.—In this state it is necessary that there should be an attornment in order to give a complete remedy by the assignee against the tenant.

APPEAL FROM MCLEAN COUNTY.

WILLIAM E. HUGHES, *Attorney for Appellant*, cited: *Jackson* v. *Whedon*, 1 E.

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D. Smith, N. Y. 141; *McIntire* v. *Patton*, 9 Humph., Tenn. 447; *Hoen* v. *Simmonds*, 1 Cal. 119; *Gillen* v. *Chatfield*, 8 Minn. 455; 2 Bl. Com. 41.45; 3 Viner's Abr. 317; *Lloyd* v. *Lee*, 45 Ill. 277; *Brooks* v. *Record*, 47 Ill. 30; *Kane Co.* v. *Herrington*, 50 Ill. 232.

WILLIAMS, BURR & CAPEN, *Attorneys for Appellee*, cited: *Dixon* v. *Niccolls*, 39 Ill. 372; *Crosby* v. *Cook*, 13 Ib. 625; *Green* v. *Morris*, Ib. 363; *Kennedy* v. *Kennedy*, 66 Ib. 190; *Sherman* v. *Dutch*, 16 Ib. 282; Taylor on Landlord and Tenant, § 568; *Thomas* v. *Rutledge*, 67 Ill. 213; *Eastman* v. *Brown*, 32 Ill. 53; *Wood* v. *Price*, 46 Ill. 435; Taylor on Landlord and Tenant, § 567; *Breece* v. *Corne*, 5 Bing. 24; ——— v. *Cooper*, 2 Wils. 375; *Cornell* v. *Lamb*, 2 Cow. 652.

Chief Justice HIGBEE delivered the opinion of the court:

This is a proceeding by distress for rent. The appellants allege that they rented a farm of one hundred and sixty acres to appellee on the 1st day of March, 1873, for one year, at a rent of $640, to be paid in the fall or winter after the renting; that defendant entered and occupied under the contract, and has not paid the rent. The warrant was filed in the McLean Circuit Court, where defendant afterward appeared and filed three pleas:

1. That he is not and was not, at the time of issuing the distress warrant, indebted to plaintiffs for rent.

2. *Non assumpsit.*

3. At the time, etc., was not indebted for rent.

These pleas concluded to the country, and issue was joined on them.

Appellants fully proved the allegation of their distress warrant, which takes the place of a declaration and rested.

Appellee then read in evidence, against the objection of appellants, a deed dated the 27th day of September, 1873, executed by appellants to one George M. Toole, conveying the fee in the premises without reserving the accruing rents, and a release from Toole, the grantee in the deed, to defendant for all rent due him from appellee for the use of the premises. This release was made in July, 1875, more than a year after this suit was commenced.

It was understood when appellants conveyed to Toole (27th September, 1873), that Toole was not to have possession of the premises until the 1st of March, 1874, when appellees' lease would expire. The evidence also tended to show that appellee had never paid the rent to either appellants or Toole, nor had he ever attorned to Toole, and that the release was executed by Toole to appellee in consideration of $5, and was intended to defeat this suit then pending.

The court on this evidence found the issues for defendant, and rendered a judgment against appellants for costs, to reverse which appellants bring the case to this court, and assign error upon the judgment of the court below.

The principal question we shall consider is, whether the deed of appellants to Toole passed the rights to the accruing rent to the grantee, so as to deprive appellants of the right to maintain this suit, without attornment by the tenant to the purchaser; that accruing rent not reserved passes by the deed to the grantee, as between

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the parties to the deed is not an open question in this state, but whether the legal right to the rent passes by the grant as against the tenant, who has not consented thereto by attornment, is quite a different question. At common law a lease was not assignable so as to invest the assignee with the legal title to the rent. The tenant neither owed fealty or rent to the assignee until he had assented to the assignment by attorning to the purchaser. Where the lease is transferred, as to accruing rents by grant, there is privity of estate between the tenant and the grantee, but until attornment there is no privity of contract for the payment of the rent, and he, the grantee, cannot in such case maintain a suit at law against the tenant therefor.

The statute of 32 Hen. 8, which seemed to grant a right of recovery by the assignee against the tenant, was finally construed to give no such right until the tenant had attorned and thereby assented to become directly liable to the assignee. 1 *Ellis* v. *Ellis*, 1040. The 4th of Ann, which finally dispensed with the necessity of an attornment in order to give a complete remedy by the assignee against the tenant is not in force in this state. See Viner's Abridgment 317, *Fisher* v. *Deering*, 60 Ill. 114.

From this view of the law it would seem that at the commencement of this suit the legal right to the contract was vested in the appellants, and they alone could maintain a suit at law for the recovery of the rent. There was an entire want of privity of contract between the appellee and Toole, and for this reason the legal title to rent under the contract was not invested in him. Appellants, then, having the legal right to maintain a suit on the contract for rent, were the proper parties plaintiff in the proceeding for that purpose, and such right will not be defeated by interposing equities in favor of third parties not before the court or parties to the suit. *Chadsey* v. *Lewis*, 1 Gil. 153.

It is not necessary for this court to decide whether appellants could distrain for rent after they had granted the fee. No objections were made to the manner of getting defendant into court below, and after the issues were found on the pleas, it only remained to try them.

The release offered in evidence was executed long after this suit was commenced, and if it was competent evidence for any purpose it was not admissible under either of the pleas in this case, and did not tend to prove any issue made by either of said pleas. The pleas had relation to the commencement of the suit, and the release certainly did not show that appellee was not then indebted to appellants for rent.

We purposely forbear from expressing any opinion as to the effect of the eighth section of the act of 1873, Session Laws 1873, p. 119, as that act was not in force when this contract was made, and cannot have a retrospective effect. *Houser* v. *Myer*, 81 Ill. 321.

For these reasons we think appellants were entitled to recover on the case made by the pleadings and evidence, and the judgment is therefore reversed and the cause remanded.

Judgment reversed and cause remanded.

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JOSHUA WAGGONSELLER ET AL. *v.* NANCY REXFORD.

EVIDENCE—*Amissibility of—testimony of husband as agent of wife by virtue of chap. 51, Rev. Stat. 1874, p. 489.*—After providing that husband and wife shall not testify, for or against each other, and, after making other exceptions, it reads, "except in matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in same manner as other persons may under the provisions of this act."

SAME—*In regard to the agency of the husband for the wife.*—The only evidence of the agency, in any transaction by the husband, in matters of business for appellee, which was shown by the evidence of L. S. Rexford, was as follows: "I am her agent in the transaction of her business." He further stated that he went with his wife when she made a bargain with G. H. Rupert, in his lifetime, to board and house C. J. D. Rupert and his wife and family: "I went, as the agent of my wife, to see Rupert about the matter of my pay for the board of C. J. D. Rupert and family." Then witness states: "That Rupert told him at that time that he had agreed with witness' wife for boarding them at the rate of $20 per month while C. J. D. Rupert was absent, and $40 per month when he was present." This was about the first day of December, 1874. Mrs. Rupert and her three children came to our house to board about the 10th of June previous, and C. J. D. Rupert about the first of November, 1874. They all remained till the 10th of December, 1875. "At this same conversation, G. H. Rupert gave him an order on John D. McIntire for money to support C. J. D. and family on, on which order, at various times, McIntire paid in the aggregate about $700. Before that time, G. H. Rupert had given him $60 for his wife on the account." *Held*, that this evidence comes far short of proving an agency on the part of the husband "in matters of business transactions, where the transaction was conducted" by the husband as agent for the wife.

SAME—*Hearsay.*—When the witness went with his wife, at the time she made the above alleged bargain with G. H. Rupert, he was not her agent to do anything; he simply went along; but he testified about nothing that was said or done at that time. At the time he went to see G. H. Rupert, as he alleges, as the agent of his wife, "to see about the matter of his pay," etc., he testifies that Rupert stated to him what the contract was. *Held*, that this evidence was inadmissible.

SAME—*Of general agency of husband.*—He had no agency in making the contract; his agency at that time was confined "to seeing about his pay." To hold that this would be proof of agency sufficient to let in his testimony in regard to G. H. Rupert's admissions, would be to hold that the wife might constitute her husband her general agent to receive admissions in regard to "matters of business transactions" long since passed, and that he might become her witness to detail such admissions. *Held*, that the law, as laid down in the statute, never contemplated this.

SAME—*Admissibility of incompetent and improper evidence.*—The testimony of appellee's husband, which shows the time when C. J. D. Rupert and family commenced boarding with his wife, and when they quit; evidence indispensable to her right of recovery in this case, it alone establishing the amount of her claim, was equally incompetent and improper. There were "no matters of business transactions" connected with this testimony. The husband learned

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these facts in the same manner that any other individual might have learned them. In contemplation of the statute, she could not constitute him agent simply to learn these facts. *Held*, that, to make such evidence admissible, the knowledge must have come to him as a necessary part and parcel of the "business transaction" in which he was engaged as her agent.

APPEAL FROM TAZEWELL COUNTY.

J. W. DOUGHERTY, *Attorney for Appellant*, cited: *Robinson* v. *Brost*, 9 Chi. Leg. News, 240, Rev. Stat. 1874, 489; *Trepp* v. *Baker*, 78 Ill. 146; *Hays* v. *Parmalee*, 79 Ill. 563.

B. S. PRETTYMAN, *Attorney for Appellee.*

Justice LACY delivered the opinion of the court:

This cause was tried in the Tazewell county Circuit Court at the September term, 1877, before the court without a jury, on appeal from the County Court, appellee being plaintiff and appellants defendants below.

The cause of action was a claim in favor of appellee against the estate of G. H. Rupert, deceased; appellants being his executors, originating in an agreement, as was claimed, between G. H. Rupert, in his lifetime, and appellee, for the boarding by appellee on account of G. H. Rupert, one C. J. D. Rupert, his wife and three children, who were in indigent circumstances, at a stipulated price of $20 per month when C. J. D. Rupert was absent, and $40 per month when he was present.

The trial resulted in a judgment in favor of appellee for the sum of $220.

This appeal is taken from that judgment, and among other matters, it is assigned for error, that the court below erred in admitting the evidence of L. S. Rexford, who was the husband of appellee. On his testimony the establishment of appellee's claim wholly depended.

It is not contended that the evidence of L. S. Rexford was admissible to establish the claim save by virtue of chapter 51, Statute 1874, page 489. It is claimed that, by the exception contained in that section, the evidence was admissible.

After providing that husband and wife shall not testify, for or against each other, and, after making other exceptions, it reads, "except in matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in same manner as other persons may under the provisions of this act."

The only evidence of the agency, in any transaction by the husband, in matters of business for appellee, which was shown by the evidence of L. S. Rexford, was as follows: "I am her agent in the transaction of her business." He further stated that he went with his wife when she made a bargain with G. H. Rupert, in his lifetime, to board and house C. J. D. Rupert and his wife and family: "I went, as the agent of my wife, to see Rupert about the matter of

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my pay for the board of C. J. D. Rupert and family." Then witness states: "That Rupert told him at that time, that he had agreed with witness' wife for boarding them at the rate of $20 per month while C. J. D. Rupert was absent, and $40 per month when he was present." This was about the first day of December, 1874. Mrs. Rupert and her three children came to our house to board about the 10th of June previous, and C. J. D. Rupert about the first of November, 1874. They all remained till the 10th of December, 1875. "At this same conversation, G. H. Rupert gave him an order on John D. McIntire for money to support C. J. D. and family on, on which order, at various times, McIntire paid in the aggregate about $700. Before that time, G. H. Rupert had given him $60 for his wife on the account."

The above evidence was all the evidence to support the claim of the appellee, and all the evidence in regard to the agency of the husband for the wife.

This evidence comes far short of proving an agency on the part of the husband "in matters of business transactions, where the transaction was conducted" by the husband as agent for the wife.

When the witness went with his wife, at the time she made the above alleged bargain with G. H. Rupert, he was not her agent to do anything; he simply went along; but he testified about nothing that was said or done at that time. At the time he went to see G. H. Rupert, as he alleges, as the agent of his wife, "to see about the matter of his pay," etc., he testifies that Rupert stated to him what the contract was. This evidence was inadmissible.

He had no agency in making the contract; his agency at that time was confined "to seeing about his pay." To hold, that this would be proof of agency sufficient to let in his testimony in regard to G. H. Rupert's admissions, would be to hold that the wife might constitute her husband her general agent, to receive admissions in regard to "matters of business transactions," long since passed, and that he might become her witness to detail such admissions.

The law, as laid down in the statute, never contemplated this. The testimony of appellees' husband, which shows the time when C. J. D. Rupert and family commenced boarding with his wife, and when they quit; evidence indispensable to her right of recovery in this case, it alone establishing the amount of her claim, was equally incompetent and improper.

There were "no matters of business transactions" connected with this testimony. The husband learned these facts in the same manner that any other individual might have learned them.

In contemplation of the statute, she could not constitute him agent simply to learn these facts.

To make such evidence admissible, the knowledge must have come to him as a necessary part and parcel of the "business transaction" in which he was engaged as her agent. *William Scott Robinson* v. *Christ Brost*, Leg. News of April 7, 1877, p. 240; *Supp* v. *Baker*, 78 Ill. 146; *Hayes* v. *Parmalee*, 79 Ill. 563.

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It was therefore error to admit such evidence against the objection and exceptions of appellant.

The cause is therefore reversed and remanded.

Judgment reversed and remanded.

MARY V. EWING *v.* SCHOOL DIRECTORS, ETC.

CONTRACT—*Incompetency of teacher under—measure of damages.*—A was employed by B to teach a school for eight months for $313.75. The written contract provided that in case A was dismissed from the school by B for any violation of the contract, then the certificate of A should be annulled, and A should not be entitled to receive any compensation from and after such annulment or dismissal. A taught the school under this contract three and one half months, and was then dismissed by B for alleged incompetency, and paid for the time taught. A brings suit against B to recover for the balance of the time mentioned in the contract, and recovers a judgment for one dollar. The principal question in the case was whether A was incompetent within the meaning of the contract and the school law, and therefore improperly dismissed. No evidence was offered tending to show that A engaged in any other business after A's discharge and before the expiration of the time A had agreed to teach, nor that A could by any effort have obtained similar employment in that neighborhood. On the contrary, the testimony showed that A was ready at all times before the contract expired, to teach, but that A had made no effort to get another school, because it was in the middle of the term when the dismissal occurred, and there were no other schools then wanting teachers. *Held*, that under this evidence, if the jury found for A at all, it was their duty, by law, to have assessed A's damages at the amount fixed by the contract for the full term of eight months.

PRACTICE—*Instruction — incompetency.*—An instruction to the jury, "that if they believe from the evidence that A was dismissed from the school in question by B for incompetency, then A is not entitled to recover any compensation from and after such dismissal," was calculated to mislead the jury, and should not have been given. Neither the school law nor the contract authorized B to dismiss A unless A was *in fact* incompetent. A was not barred of a right of recovery simply because B *thought* A incompetent, if *in fact* A was *competent* at the time. *Incompetency*, under such circumstance, is a fact to be found by the jury from all the evidence before them.

APPEAL FROM MCLEAN COUNTY.

STEVENSON & EWING, *Attorneys for Appellant*, cited: Rev. Stat. 1874, 963; *Baldwin* v. *Kilburn*, 63 Ill. 550; *Neville* v. *School Directors*, 36 Ill. 71.

TIPTON & POLLOCK, *Attorneys for Appellee*, cited: *Clift* v. *White*, 12 N. Y. 538; *Moss* v. *Riddle*, 5 Cranch, 351; *Miller* v. *The People*, 5 Barb. (N. Y.) 203; *Griffin* v. *Cranston*, 1 Bosw. (N. Y.) 281; *Seymore* v. *Wilson*, 14 N. Y. 567; *Forbes* v. *Waller*, 25 N. Y. 439; *Bedell* v. *Chase*, 34 N. Y. 386; *Collins* v. *Fisher*, 50 Ill. 361; *Anderson* v. *Friend*, 71 Ill. 475. "A judgment will not be reversed, although some of the instructions may be technically wrong, where they were not calculated to mislead the jury and justice has been done." *Hardy* v. *Keeler*, 56 Ill. 152; *Toledo, P. & W. R. R. Co.* v. *Ingraham*, 58 Ill. 120; *Graves* v. *Shoefelt*, 60 Ill. 462; *C. B. & Q. R. R. Co.* v. *Dickson*, 63 Ill. 151; *Daily* v. *Daily*, 64 Ill. 329.

Chief Justice HIGBEE delivered the opinion of the court:

The appellant was employed by the appellees to teach school in

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said district for eight months, to commence on the 18th day of September, 1876, for which she was to be paid three hundred and thirteen dollars and seventy-five cents. The contract was in writing, and contained this provision: "*Provided*, That in case the said Mary V. Ewing shall be dismissed from the said school by the directors for gross immorality, incompetency, or any violation of this contract, or shall have her certificate annulled or revoked by the county or state superintendent, she shall not be entitled to receive any compensation from and after such annulment or dismissal."

Appellant taught the school under this contract three and one half months, when she was dismissed by the directors for alleged incompetency, and paid for the time she had taught.

This suit was brought to recover for the balance of the time mentioned in the contract. The case was tried by a jury in the court below, and appellant recovered a judgment for one dollar.

From the record it seems that the principal question tried in the court below was whether the teacher was incompetent within the meaning of the contract and the school law, and therefore properly dismissed.

The jury having found that appellant was competent, and that she was wrongfully dismissed, assessed her damages at one dollar. Appellant entered a motion for new trial, which was overruled.

The case is brought here by appeal, and errors assigned.

No evidence is offered in this case tending to show that appellant engaged in any other business after she was discharged and before the expiration of the time she had agreed to teach, nor that she could by any effort have obtained similar employment in that neighborhood.

On the contrary, she testifies that she held herself ready at all times before the contract expired, to teach, but that she made no effort to get another school, because it was in the middle of the school term when she was dismissed, and there were no other schools then wanting teachers.

Under this evidence, if the jury found for her at all, it was their duty, by law, to have assessed her damages at the amount fixed by the contract for the full term of eight months. *Williams* v. *Chicago Coal Company*, 60 Ill. 149. *Fuller* v. *Little*, 61 Ill. 1.

At the instance of appellee the court on the trial gave the following instruction:

"The court instructs the jury that if they believe from the evidence that the plaintiff was dismissed from the school in question by the directors for incompetency, then she is not entitled to recover any compensation from and after such dismissal."

Neither the school law nor this contract authorized the directors to dismiss her unless she was in fact incompetent.

She is not barred of her right of recovery simply because the directors thought her incompetent, and dismissed her for that reason, if in fact she was competent at the time. Incompetency under such circumstances is a fact to be found by the jury from all the evi-

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dence before them. This instruction was well calculated to mislead the jury, and should not have been given.

For these reasons the judgment is reversed and the cause remanded. *Reversed and remanded.*

THOMPSON D. FISHER ET AL. *v.* CASSIUS M. NICCOLLS.

NEGLIGENCE—*Physicians and surgeons—degree of skill required.*—The law does not require the highest degree of skill of physicians and surgeons, but they do undertake to bring to their aid the ordinary skill of those engaged in their profession, and to treat their patients with ordinary care and skill, and to exercise their best judgment in such treatment.

EVIDENCE—*admissibility of, as to best judgment and skill.*—On the trial of the cause in the court below, appellants were severally asked by their attorney, if in the treatment of appellee's hand they exercised the best judgment and skill of which they were capable. This question was objected to by appellee, and the objection sustained by the court. As there was no question made as to the general knowledge and skill of appellants, but the real controversy related to the manner in which they had treated appellee's hand, it was *held*, that this evidence was proper, and should have been admitted as tending to rebut the charge of negligence.

PRACTICE—*Instruction—ordinary skill and care—mistake in judgment.*—On the trial the appellants asked the court to instruct the jury "that, if they believed the defendants used ordinary skill and care in the treatment of plaintiff's hand, and made a mistake in judgment, then the defendants are not liable for the result of such mistake under the law." This instruction the court refused to give as asked, but gave it with the following modification: *Provided*, the defendants in making up their judgment did not disregard the well-settled rules and principles of medical science. *Held*, that this modification was improper, and should not have been made, that the instruction properly stated the law without the modification, and that there was no evidence in the case to which it was applicable.

NEW TRIAL—*Verdict against the evidence.*—Where the verdict, as in this case, is manifestly against the evidence a new trial will be granted.

APPEAL FROM MCLEAN COUNTY.

TIPTON & POLLOCK, *Attorneys for Appellants*, cited: A physician or surgeon is responsible only for ordinary care and skill and the exercise of his best judgment, in matters of doubt: Hilliard on Torts, 225; *Leighton* v. *Sargent*, 7 Foster, 460, and cases cited; *Tefft* v. *Wilcox*, 6 Kan. 61; *Branner* v. *Stormont*, 9 Kan. 51; *Simonds* v. *Henry*, 39 Maine, 155; McClelland's Civil Malpractice, 215, and cases cited; *McNevins* v. *Lowe*, 40 Ill. 209; *Ritchey* v. *West*, 23 Ill. 385. As to whether or not defendants used *their* skill in an ordinary, careful manner: *Anderson* v. *Friend*, 71 Ill. 475, and cases cited; *Clift* v. *White*, N. Y. 12, 538; *Moss* v. *Riddle & Co.*, 5 Cranch. 351; *Miller* v. *The People*, 5 Barb. 203: *Griffin* v. *Cranston*, 1 Bosw. 281; *Seymour* v. *Wilson*, 14 N. Y. 567; *Forbes* v. *Waller*, 25 N. Y. 439; *Bedell* v. *Chase*, 34 N. Y. 386; *McKown* v. *Hunter*, 30 N. Y. 628. As to the verdict being against the evidence: *Hibbard* v. *Molloy*, 63 Ill. 471; *Puterbaugh* v. *Crittenden*, 55 Ill. 485; *Waggeman* v. *Lombard*, 56 Ill. 42; *Goodwin* v. *Durham*, 56 Ill. 239; *Chicago & Alton R. R. Co.* v. *Purvines*,

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58 Ill. 38 ; *Smith* v. *Slocum*, 62 Ill. 354 ; *Knott* v. *Skinner*, 63 Ill. 239. Even where the evidence is conflicting, if it preponderates strongly in favor of a party, a verdict against him should be set aside, and if refused, the judgment will be reversed for that error. *Chicago R. I. & P. R. R. Co.* v. *Herring*, 57 Ill. 59 ; *Columbus C. & I. C. R. R. Co.* v. *Troesch*, 57 Ill. 155 ; *Davenport et al.* v. *Springer et al.*, 63 Ill. 276; *Schwartz* v. *Lammers*, 63 Ill. 500 ; *Chicago & Alton R. R. Co.* v. *Rice*, 71 Ill. 567 ; *Illinois Central R. R. Co.* v. *Chambers*, ib. 519 ; *Reynolds* v. *Lambert et al.*, 69 Ill. 495 ; *Toledo, Wabash & W. R. R. Co.* v. *Moore*, admr., 77 Ill. 217. "In weighing the testimony of *biassed* witnesses, however, a distinction is observed between *matters of opinion* and *matters of fact*. Such a witness, it is said, is to be distrusted when he speaks to matters of *opinion ;* but as to matters of *fact*, his testimony is to receive a degree of credit in proportion to the probability of the transaction, the absence or extent of contradictory proof, and the general tone of his evidence." 1 Greenl. Ev., Red. ed. 488 ; *Lockwood* v. *Lockwood*, 2 Curt. 209 ; *Dillon* v. *Dillon*, 3 Curt. 96-102 ; *Dickenson et al.* v. *Fitchberg*, 13 Gray, 546. Two witnesses, Dr. Luce and Dr. Hill, were asked in substance whether they had heard Dr. Little testify, and if so, *from his statement*, whether what he did was good surgery, or whether an ordinary, prudent and skillful surgeon might not be mistaken in his diagnosis. The court, on objection of plaintiff, refused to allow the witness to answer. This we think was error : *State* v. *Windsor*, 5 Harrington (Del.), 530 ; *Twombly and Wife* v. *Leach*, 11 Cush. 402 ; *Fenwick* v. *Bell*, 47 Eng. C. L. 311 ; *Hunt* v. *Lowell Gas Light Co.*, 8 Allen (Mass.), 170 ; *Commonwealth* v. *Rogers, Jr.*, 7 Met. (Mass.), 500 ; *Jameson et al.* v. *Drinkald et al.*, 22 Eng. C. L. 636 ; *Rex* v. *John Wright*, 1 British C. C. 456 ; *Malton* v. *Nesbit et al.*, 1 C. & P. 70 ; *State of Missouri* v. *Max Klinger*, 46 Mo. 224.

REEVES, STEVENSON & EWING, AND WELDON, *Attorneys for Appellee.*

Chief Justice HIGBEE delivered the opinion of the court:

This is a suit in case by appellee against appellants, who were practicing physicians, for alleged malpractice in the treatment of appellee's hand for a severe injury received the day before they were called. It is claimed that appellants so negligently and unskillfully conducted themselves that it became necessary to amputate the hand of appellee, and that the same was lost to him by reason of their negligence, unskillfulness and want of care.

It is not insisted or claimed, so far as we can discover by the record, that appellants are not properly educated and skilled in their profession, but it is claimed that the injury resulted from their negligent and unskillful treatment.

The evidence shows that these physicians were both graduates of medical colleges, and had been engaged in the practice of their profession for many years, and were not wanting in the ordinary skill of the profession.

The law does not require the highest degree of skill of physicians and surgeons, but they do undertake to bring to their aid the ordinary skill of those engaged in the profession, and to treat their patients with ordinary care and skill, and to exercise their best judgment in such treatment.

On the trial of the cause in the court below, appellants were severally asked by their attorney, if in the treatment of appellee's

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hand they exercised the best judgment and skill of which they were capable. This question was objected to by appellee, and the objection sustained by the court. As there was no question made as to the general knowledge and skill of appellants, but the real controversy related to the manner in which they had treated appellee's hand, we think this evidence was proper, and should have been admitted, as tending to rebut the charge of negligence.

On the trial the appellants asked the court to instruct the jury "that, if they believed the defendants used ordinary skill and care in the treatment of plaintiff's hand, and made a mistake in judgment, then the defendants are not liable for the result of such mistake under the law." This instruction the court refused to give as asked, but gave it with the following modification: *Provided*, the defendants in making up their judgment did not disregard the well settled rules and principles of medical science.

We think this modification was improper, and should not have been made. The instruction properly stated the law without the modification, and there was no evidence in the case to which it was applicable.

The main reason urged, however, for reversing the judgment in this case is, that the verdict is against the weight of the evidence, and we are referred to numerous decisions of our own Supreme Court, by both parties, declaring the general principles to govern the decision of this question.

We have examined these cases, and after a patient and careful examination of the evidence in this case we are prepared to say that under the ruling of the Supreme Court in any of the cases referred to, the verdict in this case is so manifestly against the evidence as to render it the duty of the court to grant a new trial.

We refrain from a discussion of the evidence in detail, as the case may again be submitted to a jury. But as the case now stands we think the verdict is not sustained by any reasonable view of the evidence, and that it does great injustice to appellants.

For these reasons the judgment is reversed, and the cause remanded. *Judgment reversed and remanded.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

THE PEOPLE EX REL. ETC. *v.* HERMAN LIEB.

MANDAMUS—Where a petition was filed for a writ of *mandamus* to a county clerk, requiring him to deliver to the petitioner the books and blanks prepared by him for the assessment of the real and personal property of the town, petitioner claiming to be assessor of said town, elected at an annual election, and where the board of appointment determined that there had been a failure by said town to elect an assessor, and thereupon duly appointed an assessor, to whom the county clerk delivered all the said books and blanks; it was *held*, that there was here no proper case for the award of a writ of *mandamus;* that the county clerk had once acted in delivering the books and blanks to one who was at least assessor *de facto*, and that he should be protected in so doing; that there is no obligation of law to bind him further, having already discharged the full measure of his statutory duty in this respect.

E. M. HAINES and WILLIAM BARGE, *Attorneys for Petitioners.*
EDWARD S. ISHAM and M. F. TULEY, *Attorneys for Defendant.*

SHELDON, J., delivered the opinion of the court:

This is a petition, filed June 6, 1876, for a writ of *mandamus* to Herman Lieb, county clerk of Cook county, requiring him to deliver to the petitioner the books and blanks prepared by such clerk for the assessment of the real and personal property of the town of South Chicago for the year 1876, petitioner claiming to be assessor of said town, elected as such at the annual election on the 4th day of April, 1876. The county clerk, in his answer, filed June 14, 1876, among other things sets up that, on the 15th day of April, 1876, the justices of the peace of the town of South Chicago, and the supervisors and town clerk of the town, at a meeting by them held, determined that there had been a failure by said town to elect an assessor of the town at the annual town meeting, on April 4, 1876, and that they thereupon, by warrant under their hands and seals, appointed one William B. H. Gray assessor of the town; that the same was duly certified to the respondent, as county clerk; that said Gray took the oath of office prescribed by law, and filed the same in the office of the town clerk of the town; that afterward, before the commencement of the suit, and before May 1, 1876 (the time limited for the delivery of the books), Gray, as such assessor, called upon the respondent and demanded such books and blanks. Whereupon he, believing that petitioner had not been elected assessor of the town, and that Gray was the lawful assessor, and had been lawfully appointed such, did deliver all said books and blanks to the said Gray, as the assessor of the town. That Gray ever since has held the same, and that since the 1st day of May, 1876, he has been actively engaged as such assessor in making the appraisement of property in the town, using the books and blanks in so doing; that he has a large part of the assessment now made,

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and, as respondent is informed, and believes, will have the entire assessment of the town completed on or before the first day of July, 1876—the day fixed by law for the return of the assessment. That respondent has no control or power over said books and blanks; that to prepare new books and blanks for the assessment of property in the town, would require at least six weeks, and that the same could not be done in time to deliver to the petitioner before the time required by law to make return of the assessment, and that it would be physically impossible to make out new assessment books and have a new assessment of property in said town, for the purposes of taxation, for the year 1876.

The answer is demurred to.

The provision of the statute under which the appointment of Gray was made, is as follows:

Board of appointment. Whenever any town shall fail to elect the proper number of town officers to which such town may be entitled by law, or when any person elected to any town office shall fail to qualify, or whenever any vacancy shall happen in any town, from death, resignation, removal from the town, or other cause, it shall be lawful for the justices of the peace of the town, together with the supervisors and town clerk, to fill the vacancy by appointment, by warrant under their hands and seals; and the persons so appointed shall hold their respective offices during the unexpired term of the persons in whose stead they have been appointed, and until others are elected and appointed in their places, and shall have the same power, and be subject to the same duties and penalties as if they had been duly elected or appointed by the electors. Rev. Stat. 1874, p. 1079, sec. 97.

We do not see but that the county clerk has performed his duty in the premises. He has already made delivery of the assessment books, etc., to an assessor appointed to such office by the lawful appointing power. Whether the board of appointment rightly or not found that there had been a failure to elect an assessor, which has been so prominently discussed in the argument, we do not conceive to be involved in this proceeding. We regard the only question here to be upon the *fact* of appointment, not upon the *rightfulness* of the appointment. The board of appointment here did expressly find that there had been a failure to elect an assessor, and filled the vacancy so found by appointment made in legal form.

A similar question arose in *Wood* v. *Peake*, 8 Johns. 69, where three justices of the peace had made an appointment of constable under a statute authorizing such appointment to be made in the case of a refusal to serve by a constable elected. In an action of trespass against such appointee, for taking goods as constable under an execution, the lower court admitted proof that there had been no refusal to serve by the officer elected. This was held in the Supreme Court to be error, and the judgment for the plaintiff below was reversed, because of the admission of such evidence to impeach the appointment. The same point was made there as here, that it was only in

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the case of refusal to serve that the appointing officers had jurisdiction to appoint; and it being shown there was no refusal to serve, there was no jurisdiction, and the appointment was void. It was there said:

"This appointment is a judicial act, for the justices must first determine and adjudge that there is a vacancy in the office, and that the town neglected to fill it up. It is not traversable in such a collateral action.

"The appointment remains valid until it be set aside or quashed in the regular course, upon *certiorari*. It is certainly sufficient to justify the constable. He comes to the office by an appointment, regular according to the forms of law, and made by a tribunal having jurisdiction in the case."

The doctrine of this case was sanctioned in *The People* v. *Seaman*, 5 Denio, 412; *Green* v. *Burke*, 23 Wend. 502; *Colton* v. *Beardsley*, 38 Barb. 51.

In the latter case, in reference to an analagous question, ROSECRANS, J., after reciting the statutory provisions authorizing the remaining trustees, in the case of a vacancy in the office of a trustee of a school district, to call a special meeting of the inhabitants to fill the vacancy, says: "Under these provisions of the statute, the question whether there is a vacancy in the office of a trustee must be determined *in limine* by the other trustees. It is a question calling for the exercise of their judgment and discretion, and their action upon it partakes of the character of a judicial act. . . . The test of jurisdiction in such cases is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong."

It must be conceded that a person assuming to discharge the duties of the office of assessor under such an appointment, as in this case, and being otherwise qualified, in accordance with the statute, was an assessor *de facto*.

In *Brown* v. *Lunt*, 37 Me. 428, an officer *de facto* is described as one who actually performs the duties of the office with apparent right, under claim of color of appointment or election.

In *ex parte Strang*, 2 Ohio Stat. 610, in speaking upon the subject of what will constitute an officer *de facto*, it is said: "The true doctrine seems to be that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give color."

In the *People ex rel. Bangs*, 24 Ill. 187, this court, after pronouncing that a law providing for the election of a circuit judge was not authorized by the constitution, and that the election was void, add: "It gave Judge BANGS (who had been elected under the law) color of office, no doubt; and, acting as he did, under color of office, his acts were as valid, of course, as if the law had been constitutional." To constitute an officer *de facto*, it is not necessary that he should derive his appointment from one competent to invest

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him with a good title to the office. *Fowler* v. *Beebe*, 9 Mass. 232; *Coman* v. *Fowler*, 10 id. 291.

A person actually obtaining office with the legal indicia of title is a legal officer until ousted, so far as to render his official acts valid, as if his title were not disputed. *Benoit* v. *Auditors of Wayne Co.*, 20 Mich. 176.

It is the well settled doctrine that the action of an officer *de facto*, who comes into office by color of title, are valid, as it concerns the public or third persons who have an interest in his acts.

A mere ministerial officer has no right to decide on the acts of such officer *de facto*, or adjudge them to be null. *The People* v. *Collins*, 7 Johns. 549.

These assessment books are in the hands of at least an assessor *de facto*, who, as respects the public and third persons, has authority, until ousted, to proceed in the discharge of the duties of assessor, and to make use of the books in so doing. When Mr. Gray, clothed with the appointment of assessor, which he possessed, appeared before the county clerk, and, as assessor, demanded the assessment books, it was not the duty of the clerk to inquire into and decide upon the right of the appointment, but he might act upon the fact of the appointment, and he was justifiable in regarding and treating the applicant as assessor, and in delivering to him the books; and in so doing he has discharged all the duty in that regard incumbent on him. His act and doings with such appointed assessor must be held as if with the rightful assessor. The reception of the books by Gray was an official act of an assessor in fact, to be held as a valid and proper act, and consequently the delivery of the books to him by the county clerk is to be sustained as a proper act. It would be to pervert this writ of *mandamus* to a most extraordinary purpose to issue a command to this clerk which would require him to get back these books out of the hands of the appointed assessor, who is now making use of them, and deliver them to another rival assessor. There can be no such duty incumbent upon the clerk as to prepare new assessment books, as the great expense and labor it would require, and deliver them to the petitioner; and, without the doing of one or the other of these things, the object sought for by the writ of *mandamus* could not be accomplished.

The respondent has once acted in delivering the books and blanks to one who was at least assessor *de facto*, and he is to be protected in so doing. There is no obligation of law to bind him further. He must be taken as having already discharged the full measure of his statutory duty in this respect. This court said, in *The People ex rel.* v. *Hatch*, 33 Ill. 140, that a *mandamus* should not issue in any case, unless the party applying for it shall show a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced; and it must be in the power of the party, and his duty also, to do the act sought to be done; and the writ is never awarded unless the right of the relator is clear and undeniable, and

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the party sought to be coerced bound to act. See, also, *The People* v. *Dubois*, id. 9; *The People* v. *C. & A. R. R. Co.*, 55 id. 95; *Menard* v. *Hood*, 68 id. 121; *The People* v. *Ill. Cent. R. R.*, 62 Ill. 510; *Universal Church* v. *Columbia Township*, 6 Ohio, 446.

As the writ of *mandamus* is not grantable as of absolute right in all cases, and the exercise of the jurisdiction in granting it rests to a considerable extent in the sound discretion of the court, the futility of a grant of the writ at this late hour, and the public inconvenience which would ensue if the object sought for by the writ should be attained, in leading to very great embarrassment in the assessment of property and collection of the taxes for the year 1876, might be dwelt upon as considerations to influence the exercise of a wise judicial discretion in the matter.

But it is unnecessary. In view of what has already been said, we are satisfied that, upon the facts set up in the answer, which stand admitted by the demurrer, there is here no proper case for the award of a writ of *mandamus*. The demurrer to the answer is therefore overruled and the writ refused. *Mandamus refused.*

SCOTT, J: I do not concur either in the reasoning or conclusions of this opinion.

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION. PRACTICE DECISIONS. MOTION HOUR.

TRANSCRIPT—Application for leave, upon affidavit already filed, to amend.

Counsel: Case No. 26 of the present term. At the last term of the court we had some misunderstanding about the signing of the bill of exceptions, the record being complete with the exception of the signature of Judge Epler to the bill of exceptions. That signature is now supplied, and my motion is, that the record in the case be amended *nunc pro tunc.*

DICKEY, J: In this case an application is made to the court for leave, upon affidavit, to amend a transcript which is already filed. This we conceive to be irregular, but the record here may be corrected by bringing a transcript from the clerk of the Circuit Court, showing wherein the record has been amended in the Circuit Court since the original transcript was brought here. It is not necessary that the entire record should be transcribed again. The amendment is simply the addition of the signature of the circuit judge to the bill of exceptions. It is only necessary that the clerk should transcribe the concluding sentence of the bill of exceptions as it was originally certified, and then certify the order making the amendment in the Circuit Court, and that amended record can be filed and accomplish the same ends, in accordance with the practice of this court.

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APPEAL—Motion to dismiss for want of jurisdiction.

Counsel: Number 172. I desire to submit a motion in that case to dismiss the appeal for want of jurisdiction in this court.

SCHOLFIELD, J: File the motion with the reasons for it in writing.

Counsel: May I be heard upon it now?

SCHOLFIELD, J: No, sir, not orally.

SHELDON, C. J: A motion to dismiss this appeal on the ground that it should have been taken to the Appellate Court instead of to this court. The appeal was taken since the 1st of last July. The question arises under the 123d section of the act amendatory of common courts, which provides that appeals and writs of error may be taken and prosecuted from the final orders, judgments and decrees of the County Court to the Supreme Court or Appellate Court, should such a court be established by law, in proceedings for the sale of ground for taxes or special assessments, and in all common law or attachment cases, and cases of forcible entry and detainer. We think the construction of this section is, that these appeals and writs of error would be taken to the Supreme Court in case no Appellate Court was established, but in case an Appellate Court was established, then they would be taken to the other court. The appeal is accordingly dismissed.

MOTION—To dismiss suit where it appears that since the appeal the judgment has been paid.

CRAIG, J: Number 85. A motion was made in this case by the appellant to dismiss the suit. The appellant presents a receipt from which it appears that since the appeal was taken the judgment has been paid, but we do not think evidence of payment of the judgment sufficient ground upon which we can dismiss the suit. If the appellant desires he can dismiss his appeal, but it is not ground to dismiss the suit. The motion is therefore overruled.

MANDAMUS—Return of summons.

SHELDON, C. J: Number 164. The motion there is for a *mandamus*. The relators claim to be elected aldermen of the city of Alton, and ask for a *mandamus* to compel their being declared to be elected and recognized as such. The question is whether the summons shall be returnable at the present or at the next term. As we understand it, the old mayor and aldermen will continue in office till their successors are qualified. We do not regard it as a matter of much importance as affects the public interest, but simply a matter of private interest to these individuals, who shall hold the office. Therefore we decline to make the writ returnable to the present term. It will be returnable to the next term if desired.

DICKEY, J: I think the writ ought to be returnable to this term.

BREESE, J: That also is my opinion.

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CIRCUIT COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF ILLINOIS.

CHARLES S. CRANE and JEFFERSON HODGKINS, *Petitioners*, *v.* ALBERT CONRO, WILLARD S. CARKIN, HARRY FOX and BRADFORD HANCOCK, Assignee, *Respondents.*

JURISDICTION—*Appellate jurisdiction of the Circuit Court over the action of the District Court—the second section of the original Bankrupt Law, Rev. Stat. U. S. sec. 4986, construed.*—A having become a bankrupt, and a provisional assignee having been appointed, on his application to the District Court he was directed to receive bids for the property of the bankrupt; and he accordingly received a bid from B, on the 2d day of July, 1875, for certain property of the bankrupt, for which B agreed to pay the sum of $40,000. An order *nisi* was thereupon entered by the District Court requiring all parties to show cause why that bid should not be received, and on the 9th of July following the same was confirmed to B. On the 12th of July following, on application of the assignee to the District Court, this order of confirmation was set aside, and another bid was received and confirmed to other parties, on an advance in the price, $40,500. and the sale was confirmed to them, and the money paid, and the property turned over to the new purchaser. It is these sales and confirmations made by the District Court that are the subject of controversy in this case. And the point is: whether or not there is provision otherwise made than in the second section of the Bankrupt Law for the appellate jurisdiction of the Circuit Court over the action of the District Court.

Held, that there is not; that this is simply a sale of the property of the bankrupt, which cannot stand as the act of the court, and the property of the bankrupt pass to the purchaser, and that the order of the District Court rescinding the order of confirmation and confirming a sale to other parties was wrong and should not stand.

APPEAL—Under the 8th section, etc.

Held, that this order of the District Court was not such a decree or judgment as is provided for in the 8th section of the original Bankrupt Law, which gives an appeal or writ of error, and that the statute gives the Circuit Court superintendence and jurisdiction over such cases.

COOPER, GARNETT & PACKARD and CRANE & TATHAM, *Attorneys for Petitioners.*

HENRY CRAWFORD, *of Counsel.*

TULEY, STILES & LEWIS and AYER & KALES, *Attorneys for Conro & Carkin and Henry Fox.*

TENNEYS, FLOWER & ABERCROMBIE, *Attorneys for Bradford Hancock.*

DRUMMOND, J., delivered the opinion of the court:

The consequences of delay in the decision of this case are so serious that I have come to the conclusion that I would dispose of the petition in review at the earliest practicable moment.

It is objected that it is improperly brought into the Circuit Court, under the second section of the original Bankrupt Law (sec. 4986, Rev. Stat. U. S.), which provides for a review of any decision of the District Court, and which declares:

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"The Circuit Court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the District Court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a Circuit Court have been conferred on such District Court or not, and except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved, hear and determine the case as in a court of equity."

This law provides for the superintendence and jurisdiction of the Circuit Court over all cases and questions arising under the act; and unless special provision is otherwise made, it declares how the court shall exercise this supervision and jurisdiction. Therefore, unless the law has provided elsewhere for an appeal from the decision of the District Court in this case, it must necessarily come up under the second section of the Bankrupt Law. Rev. Stat. sec. 4986.

It is not necessary that I should go into a history of the case; that has been done by the district judge. It is only of importance that I should state the fact that Fox & Howard, having become bankrupts, and a provisional assignee having been appointed, on his application to the District Court he was directed to receive bids for the property of the bankrupts; and he accordingly received a bid from J. Hodgkins, on the 2d day of July, 1875, for certain property of the bankrupts, for which Hodgkins agreed to pay the sum of $40,000. An order *nisi* was thereupon entered by the District Court requiring all parties to show cause why that bid should not be received, and on the 9th of July following the same was confirmed to Mr. Hodgkins. On the 12th of July following, on application of the assignee to the District Court, this order of confirmation was set aside and another bid was received and confirmed to other parties on an advance in the price, $40,500, and the sale was confirmed to them and the money paid, and the property turned over to the new purchasers.

It is these sales and confirmations made by the District Court that are the subject of controversy here. And the point is, whether or not there is provision otherwise made than in the section already referred to, for the appellate jurisdiction of the Circuit Court over this action of the District Court. I think there is not.

This is simply a sale of the property of the bankrupts; and the question is, whether the sale shall stand as the act of the court, and the property of the bankrupts pass to the purchaser. It is not such a decree or judgment as is provided for in the eighth section of the original Bankrupt Law (Rev. Stat. sec. 4980), which gives an appeal or writ of error; and unless there is an appeal or writ of error given elsewhere than is provided in the third section, then it necessarily follows that the Circuit Court must exercise superintendence and jurisdiction over the case under that section.

It is apparent that the question whether or not a sale of the estate of a bankrupt shall stand, is one of the greatest importance. Upon it may depend not only the rights of the bankrupts, but the rights

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of all the creditors. And it is manifest that the statute intends to give the Circuit Court superintendence and jurisdiction over such cases. It would be a serious matter to hold that the order of the District Court as to the validity of a sale of the property of a bankrupt is necessarily final, and that because the District Court has confirmed the sale and turned over the property to the purchaser, and received the money, therefore there is no power in the Circuit Court to interfere with it. That would be a very simple way of depriving the Circuit Court of jurisdiction over a case, and it might well happen that property might be sacrificed and the rights of creditors jeoparded by the action of the District Court.

It is manifest, I think, therefore, that it was the intention of the Bankrupt Law to allow the Circuit Court to have jurisdiction over all cases of this kind; and, inasmuch as an appeal or a writ of error is not elsewhere given, the right of supervision and jurisdiction must exist under the second section of the Bankrupt Law.

It is said that in this case there has been no record, or, at least, no full record brought into the Circuit Court, and that the court has not considered the full record upon which the District Court acted. That is true; but it is nothing more than fair to state the circumstances under which the record is brought before this court. A printed abstract of the testimony has been introduced, all of which the court has read. The court has not read all the original testimony, of which this is a full abstract; but the case has been submitted to the court upon this abstract, and was argued, in part, upon the abstract; and it was not until after the case was partially heard, that objection was taken by some of the counsel to the fact that this was not a full record; but, as I understand, it was submitted to the court upon this abstract for convenience, and to save labor and trouble to the court, with the understanding on both sides that, if there was any error or mistake in the abstract, it might be corrected by reference to the original depositions or testimony in the case. I so understand it. And if there is any material error in this record or abstract as it has been presented, of course I desire it to be rectified; and I wish to state to counsel upon both sides that this is the only testimony which this court has considered. But I ought to add, no material error has been pointed out.

That being so, the question is: whether the order of the District Court, made on the 9th of July, 1875, confirming the sale to Mr. Hodgkins, and that made on the 12th of July, rescinding the order of confirmation and confirming a sale to other parties, should stand—one or both? When the order was made by the District Court rescinding the sale to Mr. Hodgkins and confirming it to other parties, that action of the District Court was brought for review before this court, and this court remitted the case to the District Court with directions to open that order for the purpose of allowing Mr. Hodgkins or Mr. Crane, for whom it was claimed Mr. Hodgkins made the bid, to be heard, because the confirmation of the sale being made by the District Court to Mr. Hodgkins, he be-

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came a party in court, and before any order affecting his rights could be properly made by the District Court he was entitled to his day in court, to notice, and to be heard. The order of confirmation was set aside without any notice to him whatever, and without giving him an opportunity to be heard, upon the *ex parte* application of the assignee. This court decided that to be error, and remitted the case to the District Court, in order that Mr. Hodgkins and Mr. Crane might be heard upon their right to this property. They were accordingly heard, and the court affirmed its order of the 12th of July, rescinding the order of sale made to Mr. Hodgkins.

The material question is, whether that order was right, and should be affirmed by this court.

I think it should not, but that it must be reversed. And I will proceed to state the reasons why I so think.

The whole action of the assignee, Mr. Hancock, was under a misapprehension of the rights of the purchaser (the bidder) at the sale, which seems to have been shared by the District Court. He seems to have proceeded upon this hypothesis: That, as soon as the sale was made by the assignee and confirmed, it was the duty of the purchaser at once to pay to the assignee the $40,000 without any demurrer and upon a moment's notice. That was a mistake—a misapprehension of the law.

What was the position of the case as it stood after the bid was received by the assignee and confirmed by the court? This is the order:

"It is by the court ordered that the sale of the property to J. Hodgkins, for the sum of $40,000, mentioned in his bid therefor, and the said report of the said provisional assignee thereupon, be and the same are hereby, in all respects, approved, ratified and confirmed; and the said provisional assignee, upon the receipt by him of the sum of $40,000, is hereby authorized and directed to execute and deliver to the said J. Hodgkins all bills of sale or other transfers to pass to and vest in the said J. Hodgkins, his heirs or assigns, all the right, title or interest of said Fox & Howard in and to said property, and to deliver to the said Hodgkins the immediate possession thereof."

What was the effect of that order? It was that, upon the payment of the purchase money, certain acts should be done by the assignee. One of them was, the delivery of the property.

Now, it was the right of the purchaser to examine into the condition of the property—to ascertain where it was. He was not bound by this bid until the 9th day of July, when it was confirmed to him. He had the right to ascertain how and to what extent it could be delivered to him; whether or not the order of the court could be or was complied with, before he could be required to pay his money.

It may be said that the payment of the money and the delivery of the property, and the written transfers and bills of sale were simultaneous acts; but undoubtedly it was the right of the purchaser

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to look into this matter and to ascertain whether or not the order of the court would instantaneously be complied with.

Now, it is not pretended that in any of the conversations which took place between Mr. Hancock, the assignee, and Mr. Hodgkins or Mr. Crane, it was proposed that the order of the court on his part should be fully complied with. True, the assignee said that he was ready to deliver over the property; but some of the property was not only not in the district, but it was out of the state, and it might be a very serious question whether or not it was the duty of the assignee to deliver over the property to the purchaser here; but whether that be so or not, it was the right of the purchaser to take the opinion of the court upon that subject, and not allow the assignee to prescribe dictatorially a rule to him as to when and how he should pay the $40,000.

Undoubtedly the court might have prescribed, in the order that a certain sum of money, as a deposit, should be paid by the purchaser to satisfy the court that it was a bid in good faith. That was not done. The court required the whole sum of money to be paid down at once, under certain circumstances. Certainly it was the right of the purchaser to have the judgment of the court on any doubtful questions involved in the order of confirmation. The confirmation was made on Friday, and the order of recision was made on Monday. There was just one business day intervening between the day of the confirmation and the date of recision.

Now, I am obliged to say, on this evidence, that Mr. Hancock, the assignee, has not acted in good faith, either with the purchaser or with the District Court.

Let us see whether the facts do not bear that out. The assignee says that he did not know that Mr. Crane was interested in this bid until Saturday, the 10th of July. It is clear that he is mistaken upon that point. Numerous witnesses contradict him clearly; and there can be no doubt, in examining this testimony in a candid and impartial manner, he was, to say the least, under a misapprehension. He actually did know that Mr. Crane was interested in the bid, and that he was the responsible party, on the day that the bid was confirmed, namely, Friday, the 9th day of July. And yet he is very positive to the contrary. The assignee says, on page 271: "I say I hadn't heard Crane's name mentioned in this connection—in connection with this bid—up to and before Friday, July 9. I swear to that, as a positive, definite fact." Whether he means that he didn't hear it *until* the 10th, there perhaps might be some question.

"The reason I am so positive is, that they were all strangers, and they might have mentioned the name of Crane and of Smith or of Jones, or of any other man. What I mean to be understood is, that I never heard the name of Crane mentioned in connection with this matter in any way, so as to call my attention to it, at any time, up to Saturday, July 10."

It is first, "up to the evening of July 9," and then afterward, "up to Saturday, July 10."

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Then, on page 245, he says: "The first I heard that Crane had anything to do with this bid was from Mr. Hodgkins, on Saturday afternoon."

It is clear, upon the other testimony in the case, that Mr. Hancock was in error in this respect.

He says that he was in the habit of making memoranda, or keeping a sort of diary of his business, and especially, as I understand him, of his bankruptcy business. He generally put down, the very next day, what he had done the preceding day, but the inference is that he didn't do it always; and I think the experience of every person who undertakes to keep a diary is, that unless he keeps it regularly and promptly, or if he allows a few days to pass by without making the entry, he is very apt to confound what was done on one day with what was done on another; and it is clear that Mr. Hancock, in this case, did confound what took place on Friday with what occurred on Saturday; at any rate, the testimony is conclusive that he was notified on Friday, the day of the confirmation of the sale, that Crane was interested in it, and that he was the responsible party from whom the money was to come.

It is true that Mr. Hancock says that he made several demands on Mr. Hodgkins for this money, Friday and Saturday, and that he did not respond to them; but, as I have said, he made them under a false impression as to his right and that of the purchaser.

And again, whether he did or not, I hold that as soon as he was apprised that Mr. Crane was the responsible party from whom the money was to be received, that he should have done nothing affecting his rights without giving him notice. He says that he did not consider Mr. Crane as being the bidder; that he had nothing to do with Mr. Crane; that the only person that he had anything to do with was Mr. Hodgkins. That was a mistake—a misapprehension on his part. As soon as he was informed that Mr. Crane was the responsible party, he, the person who was making the sale and who was acting under the direction of the court, should have acted in entire good faith toward him.

Now, did he? There is one fact indisputable, namely, that on Saturday afternoon he was notified that the money was to come from Mr. Crane, and he had an interview with him, and he was told by him that the bid was a *bona fide* bid, and that the money would be paid. He didn't ask Mr. Crane at that time for the whole of the purchase money; he only asked him then that there should be a deposit made—which was the true view to take of it.

And they separated upon the understanding that a deposit would be made Monday morning—as agreed by both. The amount was not named, and properly so, because that was a matter for the court to determine—what the amount of the deposit should be—until the purchaser could have an opportunity of looking into the matter.

I am obliged also to differ from the District Court in holding that Mr. Crane was not bound by the bid. I think he was. Mr. Hodgkins was, confessedly, an irresponsible party; he had not the means

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or ability to raise $40,000. He was directed by Mr. Crane to make the bid (in whose name was not stated), and did it accordingly; but out of that personal sufficiency which we so often see, instead of putting it in in the name of his principal, as he ought to have done, he put it in in his own name; but still the principal who was behind was bound for the bid, for, though a contract under the statute of frauds must be in writing, yet the appointment of an agent who makes it may be by parol.

There is not any satisfactory testimony in this case to indicate any bad faith on the part of Mr. Crane throughout this whole business. On the contrary, as soon as he was notified by the assignee, he told him it was a *bona fide* bid, and that the money should be forthcoming Monday morning; and the whole conduct of Mr. Crane is consistent with this view. The negotiations which took place between him and other parties, by which they were to have an interest in the property purchased, proceeded upon the assumption that he was the responsible bidder, and that if his bid were accepted (as it had not then been when these negotiations occurred), he was to let the other parties have an interest—and Hodgkins among the rest.

Now, what was the conduct of Mr. Hancock? He was told by Mr. Crane that the money should be forthcoming Monday morning, *the first thing* Monday morning, as Mr. Hancock says, though that is denied by other testimony. But suppose that to be so, when was it to be forthcoming? Did not the circumstances require good faith from Mr. Hancock to Mr. Crane when he was told the money was to be forthcoming the first thing Monday morning? Certainly. How was his action after that? He went directly from Mr. Crane and entered into negotiations with other parties to make a bid for this property without waiting till Monday morning, or even Sunday morning, and said to them: "If you will put in a bid for $40,500 I will recommend its acceptance." Early Monday morning the assignee went to the judge and asked that the order of confirmation made on the 9th be rescinded, and that another bid should be accepted. Was that acting in good faith to Mr. Crane? The assignee was supplied with abundant information, not a particle of dissent arising from any quarter, and therefore knew Saturday night that Mr. Crane was an entirely responsible party, that he was good for the bid. After all this had taken place, the assignee negotiated with another party for a different and a higher bid, without notice to Mr. Crane, and went into court Monday morning and claimed that he had asked—not Mr. Crane, but Mr. Hodgkins—repeatedly for the payment of the purchase money, and that he had declined to pay; and the court, upon his *ex parte* statement, without notice to Hodgkins, or anybody else, rescinded the order.

Then I think it is clearly shown that Mr. Hancock did not act in good faith with the court, and, for the reasons and facts that I have stated, which are uncontradicted, and which are admitted by Mr. Hancock, because he admits that he parted from Mr. Crane on Saturday

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night under the expectation that the deposit would be made on Monday morning. Now it could not be expected a man would have the necessary amount by him. It is to be presumed, and I think we may take notice of the fact, that it was necessary for Mr. Crane to go to some bank on Monday morning and obtain this sum.

Before Mr. Crane had an opportunity of obtaining any considerable sum and tendering it to Mr. Hancock or to the court Monday morning, the application had been made by Mr. Hancock. He made application to the court, it seems, early; the court, at the moment, declined to make the order. Afterward, on a subsequent application, the court made the order, but still, all without notice to the purchaser.

At ten minutes after eleven o'clock on Monday morning Mr. Crane appeared before the assignee with two certificates of deposit of $10,000 each, which are conceded to have been good for the amount, and tendered them to Mr. Hancock in compliance with the agreement made between them on Saturday night, and Mr. Hancock said, "It is too late; I have sold the property to some one else, and the sale has been confirmed." This, all without any notice, or without any hint so far as appears, to Mr. Crane.

Now, was this acting in good faith? Was this properly discharging the duties of an assignee? Although this was a sale made by the court, it was—to speak more correctly—made by the assignee, under the direction of the court.

The assignee was the party who advertised and received the bids; he was the agent of the court. Of course he could do nothing without the consent and the ratification of the court, and as the agent of the court, and, therefore, intimately connected with the action of the court. Naturally, the purchaser had some right to rely on the declarations of the assignee, and to expect good faith from him.

Now, it is most clear, I think, that if the court had been notified on the morning of Monday, the 12th, that Mr. Crane was the responsible bidder, and that he had said Saturday night that he would bring a deposit upon the bid Monday morning, the court would not have made the order that it did. I still think that when the attention of the court was called to it immediately, as it was, and the court was informed of what had taken place, and of the understanding, it was the duty of the court to arrest all proceedings. The property had not then been delivered over. Whether the money had been paid or not, I do not know, but, at any rate, the money paid by the purchaser was in the control of the court, and I think it was the duty of the court, at that moment, to give Mr. Crane a hearing, in order that equity might be meted out to these parties, and that no unfair dealings should be practiced between them, especially by the assignee, an officer of the court.

It is for these reasons that the order which was made by the District Court on the 12th of July must be reversed, because it is apparent that Mr. Crane, who was the responsible party, had not been fairly dealt with in the purchase which he had made, and when he

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brought his money, as he did, as soon as it could be expected—he came and insisted it was nothing more than a reasonable time, between the confirmation of the bid and Monday morning, to give him an opportunity to ascertain the situation of the property and to see whether it was forthcoming, and whether the order of the court made on the 9th could be complied with.

I have considered this case independent, so far, of the rights of the purchasers. It is true that Conro and Carkin made a bid subsequently at the request of the assignee, and they paid their money into court, and the property was delivered over to them.

It is claimed, because that was done this court has no power over this sale; in other words, that the parties who may be affected by this sale; and this act of the District Court are obliged to go into a court of chancery and file their bill. How could they do that without admitting the validity of the sale, or without taking the confirmation to Conro and Carkin, as vested in them the title to this property? That was the objection made to the filing of a bill in chancery, which it was thought could not be done so long as there was the order of the District Court standing, confirming the sale to Conro and Carkin.

But, it is claimed that because when a judgment or decree is rendered, and a sale takes place under it, and a writ of error or appeal is taken to a higher court, and the judgment or decree reversed and that does not impair the validity of the sale, the same rule applies here.

The principle is well established. Why? Because the question is not there as to the validity of the sale, but as to the validity or right of the decree or judgment. It is the decree or judgment that may be set aside, and not the sale.

In this case, the very words of the order of sale, *ipsissima verba*, are the subject of controversy; whether the sale should stand as the order of the District Court. It is not a sale made under a decree of the District Court, but it is the order of sale itself by the District Court, in an ordinary bankruptcy proceeding, and the question is, whether this sale shall stand. I insist in all such cases the purchaser takes the property, if delivered over to him, and he pays the money, subject to the supervisory power of the Circuit Court over the sale.

As I said in a former part of this opinion, it would be a very easy matter to get rid of the supervisory power of the Circuit Court, to confirm a sale and deliver over the property and receive the money. That, certainly, was not the intention of the act of congress, as is apparent from the fourth section of the amendment of 1874.

There is one question which I have not considered, and which I shall leave open, because it was not discussed, and I desire to give the parties an opportunity to argue it. That question is as to the effect of the confirmatory order of the court made on the 9th of July, whether or not it was competent for the court, before the money was paid, if Hodgkins or Crane was ready to pay, upon the receipt

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of a higher bid, to set aside the previous order and to direct the assignee to transfer the property to the purchaser; that is, perhaps, not clear. It may be that it was the right of the first purchaser, upon the payment of the money, to hold the property, because it will be observed that this was not a case of the whole proceeding being *in fieri*, when the power of the court over the matter was plenary when bids were being received, but it was after a confirmation was made of the sale. I do not wish to foreclose the parties in relation to that question.

It is claimed that the bid which was made by Conro and Carkin was a higher bid and better for the estate, but if the court was inclined to receive a higher bid, and had a right to do so before the money was actually paid, and could do away with the confirmatory order of July 9, it was its duty to give that purchaser to whom the sale had been confirmed equal rights with the subsequent purchaser, because that was giving the subsequent purchaser an unfair advantage; it was saying to him after the order confirming the sale—"If you will come in and bid a higher price, the sale shall be made to you, without giving the other party the same opportunity of making a higher bid."

If the court allowed an increased bid, it ought to have permitted it to come as well from the party to whom the sale had been confirmed as from a stranger.

That also is a question I do not now decide. It was not discussed, and if the parties desire it I will leave that open; that is, whether this court shall direct the property to be resold, taking the bid of Mr. Crane at $40,000, or whether, upon the payment of the money, the court shall direct the sale to be directly confirmed to him. All that I now do, is to reverse the order of the District Court made on the 12th of July, with costs.

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APPELLATE COURT OF ILLINOIS.

WILLIAM T. HEWITT v. WILLIAM WALKER.

NEW TRIAL—*Excessive damages.*—In an action on a promissory note, where it appeared that a part of the consideration was a verbal contract, and all the evidence offered tended to show that the contract was broken, and the damages allowed by the jury under the evidence were excessive and not justified by the evidence, it was *held*, that a new trial should have been granted.

APPEAL FROM CHRISTIAN COUNTY.

W. M. PROVINE AND JOHN B. JONES, *Attorneys for Appellant*, cited: If a plaintiff, by the exercise of ordinary care and caution, could have avoided the consequences of defendant's negligence, and he fail to exercise that care and caution, he cannot recover. *Chicago & Alton R. R. Co.* v. *Becker, admr.*, 76 Ill. 31; *Dobbins* v. *DuQuid*, 65 Ill. 467, 468. In every case for breach of contract, whether special damages are alleged or not, there can be no recovery if the damages are not proximate. *Olmstead* v. *Burke*, 25 Ill. 86. In all cases the damage to be recovered must be the natural and proximate consequence of the act complained of. *Vedders* v. *Hildreth*, 2 Wis. 427. Proximate damages are such damages as could have been foreseen and expected, as a result of a breach of the contract, and not such as could not have been foreseen or expected, as a result of the breach. *Fent* v. *Toledo, Peoria & Warsaw R. W. Co.*, 59 Ill. 349; *Toledo, Wabash & Western R. W. Co.* v. *Muthersbaugh*, 71 Ill. 573.

MCCASKILL & BRO., *Attorneys for Appellant*, cited: *Haven & White* v. *Wakefield*, 39 Ill. 520; Sedgwick on Damages, 81, note; Sedgwick on Damages, 127-99, note; *Daniel Ward* v. *C. & A. R. R. Co.*, 16 Ill. 530; Sedgwick on Damages, 99, note; *Haven & White* v. *Wakefield et al.*, 39 Ill. 519; *David Becker, admr.*, v. *C. & A. R. R. Co.*, 76 Ill. 31; *Anderson* v. *Chicago Marine Fire Ins. Co.*, 21 Ill. 604; 2 Moak's Eng. Rep. 601, 602; 2 Greenleaf on Ev., 275, sec. 268.

DAVIS, J., delivered the opinion of the court:

This was an action of *assumpsit*, brought by appellant against appellee, to recover the amount of a promissory note for $375, dated 19th March, 1874, due seven months after date, with interest after maturity at ten per cent per annum.

The appellee filed two pleas, one of which set up the defense of a partial failure of consideration, and the other that of a total failure. To these pleas replications were filed and issue joined thereon.

On the trial the jury found a verdict for the appellee for $11. A motion was made by appellant for a new trial, whereupon the appellee remitted the $11, and the motion was overruled by the court, and a judgment for appellee against appellant was rendered. To reverse this judgment this appeal was taken.

Among the errors assigned by the appellant are, that the court below erred in overruling appellant's motion for a new trial, and in rendering a judgment against him in favor of appellee.

From the evidence, it appears that in the spring of 1874 appellant rented to appellee and one Samuel Cully 200 acres of land for a pasture, for which appellee executed the note sued on, and Cully gave his note also to appellant for $225.

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The evidence tended to show that appellant agreed to make a fence around the tract sufficient to turn stock, that the fence was in a bad condition and was to be repaired by the first of April; that appellant put in the pasture about 115 head of cattle and Cully 67. The proof also tended to show that the appellant failed to make the fence sufficient to turn stock, and that, in consequence of such failure, the cattle of appellee broke out of the pasture repeatedly and roamed about the country to their injury. It also tended to show that appellee was deprived of the water upon the premises for the use of his cattle by the action of appellant, and that by reason of the failure of appellant to repair the fence around the premises, and his action in depriving him of the water for the use of his cattle, the appellee removed them from the pasture before the expiration of his term of renting.

But while all the evidence offered tended to show that the contract was broken by appellant, yet it came far short of showing that the appellee had sustained damages by reason of such breach to the extent allowed by the jury.

Only such damages should have been given as were the natural and proximate consequence of the act complained of. *Shugart* v. *Eagan*, 83 Ill. 356.

The damages allowed by the jury were excessive and not justified by the evidence. The court below should, for that reason, have sustained the appellant's motion for a new trial. Not having done so, the judgment must be reversed.

Judgment reversed and remanded.

THE PEOPLE, ETC., USE, ETC., v. WILLIAM PRICE ET AL.

JUSTICE OF THE PEACE.—*Functions of the Office—money collected by*—When one justice retires and another succeeds to his office the statute requires that the docket, statutes and all papers relating to the business transactions before him, shall be turned over to the latter, who shall issue execution and proceed to the completion of all unfinished business. The functions of the outgoing justice entirely cease and those of the new one commence. All moneys shall be paid over by the justice taking upon himself the duties of his office, "collected on any judgment or otherwise by virtue of his office." The rule is the same whether the incumbent succeeds himself or another. The old justice does no act and is responsible for none done by the new justice after the succession.

JUDGMENT.—*Collection of—estoppel*—In an action on the official bond of I. H. Hess, a police magistrate, who was his own successor in office, and where the breaches assigned in the bond were the alleged defalcations of Hess in not paying over moneys collected by him, belonging to appellants, during his last term of office, part collected on judgments rendered by him and part without, and all, as was declared, collected by virtue of his office and during his last term, it was *held*, that the judgments rendered by Hess, and afterward collected by him, were collected by virtue of his office, and that both Hess and his securities, the appellees, are estopped in law from denying that fact.

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PRACTICE.—*Instructions.*—To instruct a jury that the defendants are not liable for any claims received by Hess, as justice of the peace, for collection prior to the 19th day of April, 1872, and also that the burden of proof is upon the plaintiffs to show by evidence that the claims here sued on were placed in the hands of Hess after the 19th day of April, 1872, and if the evidence fails to show when the claims were placed in the hands of Hess for collection, then in such case plaintiffs would not make out their case, was *held* erroneous. It was wholly immaterial as to when and in what way the claims were received by Hess. All money received by virtue of his office was to be paid over regardless of the time when the claims were received.

SAME.—Where the court instructed the jury in substance that appellants could not make out a case against appellees by proving that I. H. Hess collected money belonging to Farrar and Wheeler, but that they must show by a preponderance of evidence that I. H. Hess did not pay over the money to them, and that the law would presume that Hess, because an officer, would do his duty, and that he paid over the money collected, and that the burthen of proof was on appellants to overcome such presumption; the instructions were held erroneous. The law does not in this kind of a case compel the plaintiff to prove a negative. If the money were proved to have been collected by the justice it would make a *prima facie* case in favor of the appellants and shift the burthen of proof on the appellees to show that the money had been paid over.

APPEAL FROM CHAMPAIGN COUNTY.

THOMAS J. SMITH AND J. S. WOLFE, *Attorneys for Appellants*, cited: *Town of Lewiston* v. *Proctor*, 23 Ill. 533. When an intendant of a town acted as justice of the peace, and gave bond with sureties for the faithful discharge of his duties as justice, the fact that no law required him to give bond would not affect the validity of the instrument as a common law obligation. *Williamson* v. *Wolf*, 37 Ala. 298. The official bond of a justice of the peace, *de facto*, is binding on the sureties. *Green* v. *Wardwell*, 17 Ill. 278; *People* v. *Ammons*, 5 Gilm. 107. One who is appointed a justice of the peace by trustees of a village to fill a vacancy, and who qualifies and acts as such in good faith is a justice, *de facto*, and his official acts are valid, so far as the public and third persons are concerned, even though the trustees had no authority to make such appointment. *Laver* v. *McLachlin*, 28 Wis. 364; Rev. Stat. 1874, 654, sec. 113, and 652, sec. 104. Justices of the peace are liable for money collected by them without suit, if collected in their official capacity. *Ditmars* v. *Scott*, 11 Wright, 10 Am. L. Reg. 749. As to oral admissions, etc.: *Coleman* v. *Frazer*, 4 Richmond, 147; *White* v. *Chateau*, 10 Barb. 202; *Hinckley* v. *Davis*, 6 N. H. 210; *King* v. *State*, 15 Ind. 64; *Parker* v. *State*, 8 Blackford, 292. The acknowledgments of a principal are evidence against the surety, unless there is proof of combination. *Commonwealth* v. *Kending*, 2 Barr. The declaration of a deceased person against his interest and in regard to the subject-matter of the suit, may be given in evidence. *Pease* v. *Jenkins*, 10 Ind. 355; *Richards* v. *Swan*, 7 Gill. 366; *Samuel H. Magner* v. *John S. Knowles*, 67 Ill. 325. The material question is when and in what capacity did Hess receive the money? *Green* v. *Wardell*, 17 Ill. 280; *Morely* v. *The Town of Matamora*, 78 Ill. 394. When we show that Hess received the money, the burthen of proof is on the defendants to show that it was paid over. *Graves* v. *Burn*, 11 Ill. 431; *Johnson* v. *Maples*, 49 Ill. 101; *Heward* v. *Slagle*, 52 Ill. 336.

SWEET AND DAY, *Attorneys for Appellees*, cited, as to admissions: 1 Greenl. Ev., sec. 187, n. 1, p. 216, 12th ed.; *Blair* v. *Perpetual Ins. Co.*, 10 Mo. 559; *Cassity* v.

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Robinson, 8 B, Mon. 279; *Evens* v. *Beattie*, 5 Espinasse, 26; *Chelmsford* v. *Demorest*, 7 Gray, 1; *Lawrence* v. *Kimball*, 1 Metcf., Mass. 524; *Shelby* v. *Governor*, 2 Blackf. 289; *Munger* v. *Knowles*, 67 Ill. 325; As to money embezzled: *Larned* v. *Allen*, 13 Mass. 295; *Robey* v. *Turner*, 8 Gill. & J., Md. 125; *Colyer* v. *Higgins*, 1 Duv., Ky. 6. As to liability of sureties: *State* v. *Woodman*, 36 Ind. 511, 512, 513; *Pettyjohn* v. *Hudson*, 4 Harr., Del. 178; *Commonwealth* v. *Cole et al.*, 7 B, Mon. 250. The condition of a sheriff's bond does not extend beyond acts which he is required to perform officially. *Ex parte* Reed, 4 Hill, 572. The sheriff's sureties are not liable for his wrongful seizure of property when not made by him in his official character under process. *State* v. *Mann*, 21 Wis. 684; *Schloss* v. *White*, 16 Cal. 65.

LACY, J., delivered the opinion of the court:

This cause was tried at the September term of the Circuit Court of Champaign county, and resulted in a verdict and judgment for appellees.

The cause of action was the official bond of I. H. Hess, police magistrate of Champaign city, signed by appellees as his security. It was in the penal sum of $2,000, dated April 19, 1872, with the usual recitals, and with the following condition: "If the said I. H. Hess shall justly account for and pay over all moneys that may come to his hands under any judgment or otherwise by virtue of his said office, etc. . . . then this obligation to be void, otherwise to remain in full force."

In the fall or summer of 1875, Hess died; he was his own successor in office, having held a term prior to this one. The breaches assigned in the bond were the alleged defalcations of Hess in not paying over moneys collected by him, belonging to appellants, during his last term of office; part collected on judgments rendered by him and part without. All as was declared collected by virtue of his office, and during his last term.

The defense set up was that the claims were not collected by Hess by virtue of his office, but as the private agent of appellants. There was some uncertainty or want of evidence as to the time Hess received the claims, or at least a portion of them, for collection, whether during his first or last term of office. The court on the trial, at the request of appellees, gave the following instruction:

1. "The court instructs the jury that the defendants are not liable for any claims received by Hess, as justice of the peace for collection prior to the 19th day of April, 1872.

4. "The court instructs the jury that the burden of proof is upon the plaintiffs to show by evidence that the claims here sued on were placed in the hands of Hess after the 19th day of April, 1872, and if the evidence fails to show when the claims were placed in the hands of Hess for collection, then in such case plaintiffs would not make out their case."

The assignment of errors on the giving of these instructions for appellees against appellants' objections we think well taken. It was wholly immaterial as to when and in what way the claims were received by Hess. By the terms of his bond he was to pay over all

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moneys that might come to his hands under any judgment or otherwise by virtue of his office," not that he should pay over such moneys only as should be received on judgments or otherwise coming to his hands, subsequently to the commencement of his term of office. All moneys received by virtue of his office was to be paid over regardless of the time when the claims were received.

The evidence shows that all collections made by Hess were made subsequent to April 19, 1872, and the judgments rendered were subsequent to that time.

When one justice retires and another succeeds to his office the statute requires that the "docket, statutes and all papers relating to the business transactions before him, shall be turned over to the latter, who shall issue execution and proceed to the completion of all unfinished business. The functions of the outgoing justice entirely cease and those of the new one commence." Stat. 1874, 653, secs. 108-109. All moneys shall be paid over by the justice taking upon himself the duties of his office, "collected on any judgment or otherwise by virtue of his office." Stat. 1874, p. 638, sec. 5.

The rule is the same whether the incumbent succeeds himself or another. The old justice does no act and is responsible for nothing done by the new justice after the succession.

If these claims were received by Hess during his first term of office as justice, they passed to himself as his own success or when be qualified for the second term. The only issue is, did any money come to his hands by virtue of his office. *Green et al.* v. *Wardell*, 17 Ill. 280. *Marley* v. *Town of Metamora*, 78 Ill. 394.

Then again, the court below gave the jury, at the request of appellee and against the objection of appellants, instruction Nos. 8 and 10, which is claimed to be error. The instructions are in substance that appellants could not make out a case against appellees by proving that I. H. Hess collected money belonging to Farrar and Wheeler, but that they must show by a preponderance of evidence that I. H. Hess did not pay over the money to them.

That the law would presume that Hess, because an officer, would do his duty, and that he paid over the money collected, and that the burthen of proof was on appellants to overcome such presumption. The instructions were erroneous. The law does not in this kind of a case compel the plaintiff to prove a negative. If the money were proved to have been collected by the justice it would make a *prima facie* case in favor of the appellants and shift the burthen of proof on the appellees, to show that the money had been paid over. *Grove* v. *Brown*, 11 Ill. 431; *Johnson* v. *Maples et al.*, 49 Ill. 101; *Howard* v. *Slagle*, 52 Ill. 336.

One other question—We must hold, that the judgments rendered by Hess, and afterward collected by him, were collected by virtue of his office, and that both Hess and his securities, the appellees, are estopped in law from denying that fact.

As to whether the other claims collected by Hess and not paid over, were collected by virtue of his office, or as the private agent of

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appellants, we express no opinion, for the reason that the question may be passed upon by another jury.

The court below also erred in not admitting in evidence the judgment docket of Hess showing the two judgments in favor of appellants, the one against McNabb and Diviney and the other against Price.

This evidence and the evidence of constable Weller, tending to show that he paid them to Hess, should have been admitted to the jury, leaving them to pass upon the sufficiency of the proof. For these reasons the cause is reversed and remanded.

Judgment reversed and remanded.

CHARLES GRIFFIN *v.* GEORGE W. WERTS, ADMINISTRATOR, ETC.

ADMINISTRATOR.—*Whether he is a third person within the meaning of the Chattel Mortgage Act, which makes an unrecorded mortgage void as against third persons.*—There is some conflict in the authorities upon this question, but we are of opinion that both sound reason and the weight of authority are against this position. In the lifetime of the intestate no one would question the validity of the mortgage as against him, and we think it equally binding on his heirs and personal representatives. The administrator takes the personal property of deceased as his representative and acquires no better right than he had.

APPEAL FROM VERMILION COUNTY.

MANN & CALHOUN, *Attorneys for Appellant*, cited: Privity denotes mutual or successive relationship to the same rights of property. 1 Greenl. Ev. sec. 189. Even a fraudulent conveyance binds the administrator, and he cannot attack it unless authorized by express statute so to do. Bump on Fraud. Convey. 443. "Where a mortgage is made of personal property, whether it be valid or void as to creditors, if valid *inter partes*, it will be valid against the personal representatives." Herman on Chattel Mortgages, 348, sec. 139. "Between mortgagor and mortgagee a chattel mortgage is valid without delivery of possession or registration, and therefore binding on the administrator of the mortgagor." Herman on Chattel Mortgages, 159, sec. 75. A chattel mortgage is a conditional sale, becoming in law absolute upon condition broken, and vesting the legal title in the mortgagee. *Durfee* v. *Grinnell*, 69 Ill. 371; *Simmons* v. *Jenkins' Administrator*, 76 Ill. 480. Has the husband a right to sell or otherwise dispose of his personal estate, so as to defeat the claim of his widow for specific allowance? "There is nothing in our statute, which in the slightest degree prevents the husband from disposing of his personal property free from any claim of the wife, whether by sale, gift to his children or otherwise in his lifetime. *Padfield* v. *Padfield*, 78 Ill. 16. And this can be done even though with intent to defeat the wife. *Id.* The right to an award or specific allowance is contingent upon the husband's owning the property at the time of his death. In this case he did not *own* the property, but merely a qualified interest therein; which interest the widow may be entitled to, but that interest is the residuum after taking out the amount due the mortgagee. In the case of *Phelps* v. *Phelps*, 72 Ill. 547, the Supreme Court say: "Treating the provision which the law makes for the widow and children, as a means of support, it cannot be said to be an interest in the property of the husband. It comes within no definition of property.

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It is a benefit created by positive law and adopted for reasons deemed wise and politic."

EVANS & SWALLOW, *Attorneys for Appellee*, cited: As to mortgage lien, *Rhines* v. *Phelps*, 3 Gil. 463; *Hervey* v. *R. I. L. W.*, 9 Legal News, 225. Upon the grant of letters of administration to the appellee, the legal title to the property vested in him, in trust, for the benefit of the creditors of the estate, and related back to the time of the death of the mortgagor. *Makepeace* v. *Moore*, 5 Gil. 476; *Cross* v. *Carey*, 25 Ill. 564; *Reynolds* v. *The People*, 55 Ill. 333. The appellant's mortgage, not being recorded, was void as against the rights and interests of third persons. Rev. Stat. of 1874, ch. 95, sec. 1. *Frank* v. *Miner*, 50 Ill. 447; *Coryan* v. *Frew*, 39 Ill. 38; *Hervey et al.* v. *The Rhode Island Locomotive Works*, 9 Legal News, 225. As to trover for the conversion: 2 Greenl. on Ev., sec. 641. The administrator is not the representative of the decedent, but of the creditors and distributees of the estate. 2 Hilliard on Mortgages, ch. 46, 12. *Welch* v. *Bekey*, 1 Penn. 57; *Kater* v. *Steinruck*, 40 Penn. 501. Upon the death of the mortgagor, certain specific articles of his personal property vested absolutely in his widow, as her sole and exclusive property forever, and, in exclusion of debts, claims and charges. Rev. Stat. 1874, ch. 3, sec. 74. *York* v. *York*, 38 Ill. 522.

HIGBEE, P. J., delivered the opinion of the court:

It appears by the record in this case that Lewis in his lifetime was the owner of certain personal property, which he mortgaged to appellant to secure the payment of several promissory notes given by him to appellant. The mortgage contains the condition that until default is made the mortgagor shall retain the possession of the property, but upon the maturity of either of the notes and default in payment, the mortgagee was authorized to take and sell the property.

Lewis died before the maturity of either of the notes, in possession of the property, when appellee was appointed his administrator, and as such received the possession of the mortgaged property, and caused it to be inventoried and appraised as a part of the estate of said Lewis.

The mortgage was executed and acknowledged as required by the Chattel Mortgage Act, but was not recorded. Upon the maturity of the first note appellant took possession of the property under his mortgage, for which taking appellee brought this suit in trover and recovered a judgment in the Vermilion Circuit Court for the value of the property.

That an unrecorded chattel mortgage is binding and valid between the parties to the instrument is not open to question. By the statute, however, it is made void as against the rights and interests of third persons, and the only question presented in this case is, whether the administrator is a third person within the meaning of this statute. There is some conflict in the authorities upon this question, but we are of opinion that both sound reason and the weight of authority are against this position. In the lifetime of intestate no one would question the validity of the mortgage as against him, and we think it equally binding on his heirs and personal representatives. The administrator takes the personal property of de-

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ceased as his representative, and acquires no better right than he had. Herman on Chattel Mortgages, p. 159 and 348, and authorities there cited. *Chateau* v. *Jones et al.*, 11 Ill. 300.

For these reasons the judgment is reversed and the cause remanded. *Judgment reversed and remanded.*

Justice Davis, having tried this case in the court below, took no part in deciding it here.

FREEMAN P. KIRKENDALL ET AL. *v.* THOMAS KEOGH.

COVENANT—*Action of, to recover damages for breach of the covenants in a deed—constructive eviction before suit brought.*—A in his lifetime, being the owner in fee of certain lots sold them to B, and gave to him a bond for a deed. Afterward B sold and conveyed one of those lots to C, who subsequently sold, conveyed and warranted the same to D, and placed D in full possession of the premises, and D made improvements, and remained in uninterrupted possession until this suit was commenced. A, having departed this life, and B having failed to pay the purchase money in full, E, the administrator of A, commenced proceedings in chancery, to which D, B and others were parties to obtain the balance of the purchase money. Written notice was immediately given by D to C of the commencement of this proceeding, and D made all the defense that could be made in such case. On the final hearing a decree was rendered in favor of the complainant, and a decree entered that said administrator should tender to appellee a good and sufficient deed for the lot so sold and conveyed to him by C, and that D should, within twenty days after such tender, pay to the administrator a certain sum of money and one-third costs of the chancery proceeding. On default of such payment the master was ordered to sell. On the 10th day of May, 1877, some twenty days after D had commenced this suit, he paid to E, the administrator, the sum to be paid, and received from him a deed for the lot in controversy. On the 10th day of April, 1877, D commenced his action of covenant against C to recover damages for the breach of the covenants contained in the deed conveying the lot purchased by him. D obtained judgment. D now contends that the institution of the suit by E, the administrator, the entry of the decree in that case, and the agreement to pay the administrator for the lot, constitute a constructive eviction, which entitle him to sue. The evidence shows conclusively that, from the time D was first put in possession of the lot, under his deed from C, he has had actual and uninterrupted possession of the premises. The owner of the fee took no steps to remove him from such possession. *Held*, that, to recover for an eviction, D should have surrendered the possession to the holder of the paramount title, or remained till he was removed by due process of law. In this case D could have paid off and discharged the outstanding title before bringing his suit, but an agreement to pay is not equivalent to payment as claimed by D, and does not amount to a constructive eviction.

WARRANTY—*Against incumbrances—damages.*—On the covenant against incumbrances, it is *held*, that D, not having discharged the incumbrance when this suit was brought, was only entitled to recover nominal damages.

APPEAL FROM MCLEAN COUNTY.

WILLIAM E. HUGHES, *Attorney for Appellant*, cited: *Hamilton* v. *Cutts*, 4 Mass. 352; *Haynes* v. *Smith*, 63 Ill. 430; *Bostwick* v. *Williams*, 36 Ill. 65; *Moore* v.

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Vail, 17 Ill. 185; *Brady* v. *Spurck*, 27 Ill. 479; *Hacker* v. *Blake*, 17 Ind. 97; *Small* v. Reeves, 14 Ind. 164; *Copeland* v. *Copeland*, 34 Me. 446; *Stowell* v. *Bennett*, 34 Me. 422; *Noonan* v. *Ilsley*, 22 Wis. 27; *Mecklem* v. *Blake*, 22 Wis. 495.

WILLIAMS, BURR & CAPEN, *Attorneys for Appellees*, cited: An actual eviction is not necessary to enable a suit to be maintained upon the covenant of warranty. *Beebe* v. *Swartwout*, 3 Gilm. 162; *Moore* v. *Vail*, 17 Ill. 185; *Hardin* v. *Larkin*, 41 ib. 415; *McConnell* v. *Downs*, 48 ib. 271. This question is elaborately discussed in Rawle on Cov. for Title, p. 251, *et seq.*, in which the cases cited by appellants are commented upon. Wherever there is an outstanding superior title, and such title is asserted in a hostile manner so as to enforce it unless the party in possession pays, he has a right to pay, and an agreement to pay is as good as payment. *Buckler* v. *Northern Bank of Ky.*, 63 Ill. 268; and *vide* above cases. If a vendor has notice of a suit against his vendee, he is bound by the judgment or decree. Rawle on Cov. 226; *Sisk* v. *Woodruff*, 15 Ill. 15; *McConnell* v. *Downs*, 48 Ill. 271; and cases *supra*. "Anything of a grave and permanent character done by the landlord, with the intention of depriving the tenant of the enjoyment of the demised premises, is a constructive eviction." *Hayner* v. *Smith*, 63 Ill. 430, 435. And a vendee stands upon a much more favorable footing in this regard than a tenant, inasmuch as he owes no allegiance to his vendor, and is under no obligation not to dispute the grantor's title. A party has a right to yield to superior title without eviction in fact. See cases *supra*. It will be found by an examination of the cases cited in our brief from our own reports, that our Supreme Court has taken the very sensible modern view of this case, and holds strongly in favor of a constructive eviction. The whole doctrine is set forth in *Moore* v. *Vail*, 17 Ill., particularly on page 190, where the court say: "He (the covenantee) must act in good faith toward his covenantor, and make the most of whatever title he has acquired, until resistance to the paramount title ceases to be a duty to himself or his covenantor. While he is not bound to contest, where the contest would be hopeless, or resist, where a resistance would be a wrong, yet always, where he yields without a contest or resistance, he must take upon himself the burden of showing that the title was paramount, and that he yielded the possession to the pressure of that title." Rawle on Cov. for Title, 3d ed. 260, *et seq.*

DAVIS, J., delivered the opinion of the court:

Two questions only are presented by the parties to this case on the following facts, as shown by the record.

George Hinshaw, in his life-time, being the owner in fee of certain town lots in the city of Bloomington, sold the same to Chalkley Bell, and gave to him a bond for a deed on the payment of $1,250.

Afterward Bell sold and conveyed one of those lots, the lot in controversy in this suit, to the appellants, who subsequently sold, conveyed and warranted the same to the appellee, for the sum of $175, and placed him in full possession of the premises, and the appellee made improvements and remained in uninterrupted possession of the lot, and was in such possession when this suit was brought. George Hinshaw, having departed this life, and Bell, having failed to pay the full amount of the purchase money, agreed to be paid for the lots, Jehu Hinshaw, the administrator of George

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Hinshaw, deceased, commenced a proceeding in chancery, to which the appellee, Chalkley Bell and others, were parties to obtain the payment of the purchase money remaining due on said lots. Written notice was immediately given by the appellee to the appellants of the commencement of this proceeding, and the appellee made all the defense which could be made in such cause.

On the final hearing, a decree was rendered in favor of the complainant, and, among other things, the court decreed that the said administrator should tender to appellee a good and sufficient deed for the lot so sold and conveyed to him by appellants, and that appellee should within twenty days after such tender, pay to the administrator a certain sum of money which was by the agreement of the parties afterward fixed at the sum of $200 and one-third of the costs of the chancery proceeding. On default of such payment, the Master in Chancery was ordered to sell. On the 10th day of May, 1877, and some twenty days after the appellee had commenced this suit, he paid to the administrator the sum decreed to be paid, and received from him a deed for the lot in controversy.

On the 10th day of April, 1877, the appellee commenced his action of covenant against the appellants to recover damages for the breach of the covenants contained in the deed conveying the lot purchased by him. In this action the court below gave a judgment in favor of appellee against appellants for $191. To reverse this judgment appellants appealed. The two questions presented by the parties for the determination of this court, are:

Was the appellee evicted from the premises conveyed by the appellants, before the commencement of this suit? And, second, on the warranty of appellants against incumbrances, was the appellee entitled to recover more than nominal damages when he brought his suit?

Appellee contends that the institution of the suit by the administrator of Hinshaw, the entry of the decree in that case, and the agreement to pay the administrator for the lot, constitute a constructive eviction, which entitled him to sue.

The evidence shows conclusively that, from the time the appellee was first put in possession of the lot under his deed from appellants, he has had actual and uninterrupted possession of the premises.

The owner of the fee has taken no steps to remove him from such possession. To recover for an eviction, the appellee should have surrendered the possession to the holder of the paramount title, or remained until he was removed by due process of law. Certain acts have been held as being equivalent to an actual eviction. As, "where the grantee, out of possession, is unable to obtain possession in consequence of an existing possession by a person claiming and holding under an elder title," or where "the grantee is hindered or prevented by any one having a better right, from entering and enjoying the premises granted," or "where there is a union of acts of disturbance and lawful title." *Beebe* v. *Swantwout*, 3 Gilm. 162; *Moore* v. *Vail*, 17 Ill. 185.

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But we are not aware of any case in which it has been held that a person in possession can retain that possession and recover from his grantor on the mere claim of the holder of the better title.

In this case the appellee could have paid off and discharged the outstanding title before bringing his suit, but we do not consider that an agreement to pay is equivalent to payment as claimed by appellee, or that it amounts to a constructive eviction.

On the covenant against incumbrances it is clear that the appellee, not having discharged the incumbrance when this suit was brought, was only entitled to recover nominal damages in the court below.

The judgment given below must be reversed.

Judgment reversed and remanded.

The case of same appellants *v.* John McGrath, and same *v.* Hugh Corrigan, having been submitted on the same abstracts and briefs, and the facts being identical, and similar judgments having been rendered in the court below, the judgment in each case is reversed and the cases remanded.

EDITOR'S NOTES.

CONVEYANCES.—Our attention has been attracted to the case *Frazer* v. *Supervisors of Peoria county*, 74 Ill. 282, on the doctrine of contingent remainders, etc. We will give a resume of it in connection with the above case. The action was in covenant for breach of covenants of title. M, who was seized in fee of two lots in Peoria, conveyed them to H, his unmarried daughter, "To have and to hold unto her and the heirs of her body forever." This conveyance was in consideration of $1, and intended by the father as a gift to the daughter; subsequently it became desirable to change the intended gift. To do this, the daughter and her husband, she having in the meantime intermarried with G, and yet without issue, quit-claimed the lots to M, her father, who afterward deeded them with the cevenants of title, etc., to Peoria county, and the county afterward, for value, transferred them by warranty deed with full covenants, to F, the plaintiff below and in error. F entered into possession, and for a time enjoyed the rents, etc., but on discovering that H took only a life estate with the remainder to the heirs of her body, and therefore had no power of alienation of the fee, tendered back a deed of the lots with possession to the county, and demanded the repayment of his purchase money, which was refused, hence the controversy. Mr. Chief Justice Walker gives a lengthy and learned opinion in the case. Mr. Freeman states the whole law of the case in a nutshell. His syllabus is as follows: 1. "A conveyance of land to an unmarried woman, to have and to hold unto her and the heirs of her body forever, vests in her an estate for life only, and creates a contingent remainder in favor of the heirs of her body who, when born, will take the absolute fee. 2. A grantor who conveys to an unmarried woman real estate, to have and to hold to her and to the heirs of her body forever, thereby deprives himself of all estate, but a contingent reversion, dependent upon the grantee's dying without having had issue, and it is not in the power of the grantee, by a reconveyance before issue born, to defeat the contingent remainder in favor of such issue." This case takes us back to the reign of Edw. III, and provokes renewed interest in the older treatises, a reperusal of Littleton's Tenures, after reading Judge Walker's opinion in this case, is refreshing, and Fearne on Remainders, becomes absolutely indispensable. In this connection the following cases are of interest:

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RULE OF CONSTRUCTION OF A GRANT.—All the language of the grant must be considered and effect given to it, unless it is repugnant or meaningless, in which case it may be rejected as surplusage. *Cooper* v. *Cooper*, 76 Ill. 57. See as to uses and trusts. *Lynch* v. *Swayne*, 83 Ill. 336.

TENANCY BY THE ENTIRETY.—Under the recent changes of the laws, husband and wife now take by conveyance to them, as tenants in common instead of jointly with right of survivorship. *Cooper* v. *Cooper*, 76 Ill. 57.

Conveyance for school purposes does not give the directors and trustees the right to sell the land and appiy the proceeds to such purposes. It may be occupied as a school site, or rented and the rent applied to school purposes. *Trustees etc.* v. *Braner*, 71 Ill. 546.

DOCTRINE OF RELATION.—Where several acts concur to make a conveyance, the original act will be preferred; to this the other acts will have relation. *Welch* v. *Dutton*, 79 Ill. 465.

The fiction of relation is, that the intermediate *bona fide* alienee of the incipient interest may claim that the grant inures to his benefit by an *ex post facto* operation. In this way he receives the same protection at law that a court of equity could afford him. *Welch* v. *Dutton*, 79 Ill. 465.

INURING OF TITLE.—Where one makes a conveyance of an estate in fee simple to another, and by decree of court his title is confirmed and perfected, it will pass to his grantee under the statute. *Wadhams* v. *Gay*, 73 Ill. 415.

A deed for land, without the name of the grantee, when it is acknowledged and delivered, is invalid. *Whitaker* v. *Miller*, 83 Ill. 381.

A deed takes effect only from its delivery. *Skinner* v. *Baker*, 79 Ill. 496.

AUGUSTUS E. HARMON ET AL. *v.* D. L. RISK ET AL.

EVIDENCE—*Admissibility of.*—A witness testified that he was acquainted with the Magee breed of hogs, and that he was a farmer, and had had experience in such matters. There was also other evidence tending to sustain the truth of the hypothesis of this question: "Supposing a lot of fifty head of Magee hogs weighed on an average 160 lbs. at the middle of April, and then put on a fine and abundant clover pasture and kept till the middle of the September following, and all the time fed all the corn, old and new, they could eat, and also eight acres of matured oats, and well cared for and watered, what do you say such hogs, with such care, would gain in weight per day?" *Held*, that the court should have allowed the questions to have been answered; if answered they might have elicited evidence that would have had a direct tendency to show that the hogs were not weighed at too high a figure at Tolono, which was directly in issue in this case. The jury should have been allowed to consider it, and give it such weight as in their judgment it deserved.

PRACTICE—*Instruction.*—On the trial below, the attorney for the appellant asked the court to give the following instruction: "The court instructs the jury for the defendant that if they believe from the evidence that the plaintiffs knew before they paid the defendants for the hogs in controversy that said hogs had been incorrectly weighed, then in such case the plaintiffs are not entitled to recover the price so paid for said hogs, or any part thereof, back from the defendants, and in such case the jury will find for the defendants." The court refused to give this instruction as asked, but modified it by adding these words: "But this would not be so if plaintiff only believed a mistake had been made in weigh-

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ing such hogs, and that they did not certainly know that a mistake had been made." *Held*, that the modification by the court excluded the proper issue from the jury. It told them in substance that if money had been paid on account of mistake in the weight of the hogs, even if the appellees believed, but did not certainly know, that at the time of the payment there was a mistake, then they should recover. The above modification directs a recovery, even though appellees paid the money without reference to any mistake in weights, and intended to accept the weights as a final settlement, waiving all errors.

MISTAKE—*In matter of fact as to payment of money—estoppel of vendee.*—Upon all principles of justice, if a party be about to pay money on a supposed state of facts, and he apprehends such facts do not exist, and makes his objection to the payment on account of mistake, and the party about to receive the money proposes to have the matter tested and the truth ascertained, and the vendee refuses to apply tests at hand, and chooses to pay the money notwithstanding, he ought to be forever estopped from recovering it back; if he refuses to correct the matter himself, having an opportunity, he ought not afterward ask the courts to do it for him.

APPEAL FROM CHAMPAIGN COUNTY.

J. S. LATHROP, *Attorney for Appellants*, cited: Money paid with the knowledge of the facts, or with the means of such knowledge, cannot be recovered back. *Mowatt* v. *Wright*, 1 Wend. 359; *Bisbane* v. *Darces*, 5 Taunt. 155–144; *Buckley* v. *Stuart*, 1 Day. 133; *Clark* v. *Dutcher*, 9 Cow. 181, and authorities there cited; *Supervisors* v. *Briggs*, 2 Den. 26; *Marriot* v. *Hampton*, Smith's Leading Cases, 334–342; *Bilbie* v. *Lumley*, 2 East, 469, S. P.; *Dew* v. *Parsons*, 2 B. and A. 562, 1 Chit. 295; *West* v. *Houston*, 4 Har. 170; *First National Bank* v. *Haight*, 55 Ill. 192. Where a party had the means of knowledge at hand and neglected to avail himself of them, and pays money under such circumstances, he cannot claim he paid by mistake. *Clark* v. *Dutcher*, 9 Cow. 681; *Supervisors* v. *Briggs*, 2 Den. 26; *Marriot* v. *Hampton*, Smith's Leading Cases, 334–342; *Lucas and Worswick*, 1 M. and Rob. 293. The party paying must avail himself of the means of knowledge within his reach, or he cannot recover. *Miles* v. *Duncan*, 6 B. and C. 671; 9 D. and R. 731; *Cox* v. *Prentice*, 3 M. and S. 344; *Gormry* v. *Bond*, 3 M. and S. 378. A mistake, arising from the negligence of a party to examine and take notice of information within his reach, will not entitle a party to recover. *West* v. *Houston*, 4 Har. 170. To enable a party to recover on the ground of mistake, rests upon this principle, that a party pays money under the belief of the existence of a state of facts which do not exist, or the belief of the non-existence of a state of facts which do exist. *Marriot* v. *Wright*, 1 Wend. 255–362. If the hogs were taken and paid for under the belief that they were correctly weighed, which afterward proved to be a mistake, then appellees could have recovered back by first tendering or offering to return the hogs. *Cox* v. *Prentice*, 3 M. and S. 344. Apply these principles to the case at bar. Appellees did not pay the money under the belief the scales in Tolono were correct, or that the hogs were correctly weighed—see testimony of appellees and Frambers. Appellees believed the hogs were incorrectly weighed, and with other scales close by, had the means at hand of knowing whether correct or not. The testimony of all the witnesses shows other scales at hand, and the evidence is that appellees were invited to use them. They did not then pay the money by mistake. The payment was wholly voluntary, and they cannot recover. *Falls* v. *City of Cairo*, 48 Ill. 404; *City of Chicago* v. *Stuart*, 53 Ill. 84; *Stover* v. *Mitchell*, 45 Ill. 213; *Union Building Association* v. *Chicago*, 61 Ill. 439; *Jones* v. *Wright*,

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71 Ill. 61. The verdict was against the weight of the evidence. *First Nat. Bank* v. *Haight*, 55 Ill. 192.

THOMAS J. SMITH, *Attorney for Appellees*, cited: Whenever one party has obtained money of another, which in equity and good conscience he ought not retain, the same may be recovered back under the common counts in *assumpsit*. *Taylor* v. *Taylor et al.* 20 Ill. 650; *Duncan, Sherman & Co.* v. *Niles*, 32 Ill. 532; 15 Cal. 344; 41 N. H. 185; *Eddie* v. *Eddie*, 61 Ill. 134; *Bradford* v. *City of Chicago*, 25 Ill. 411; *Trumbull* v. *Campbell*, 3 Gilm. 502; *Watson* v. *Woolverton*, 41 Ill. 241.

LACY, J., delivered the opinion of the court:

In September, A.D. 1874, appellants sold to appellees 49 head of fat hogs at the agreed price of $6.75 per hundred, to be paid for on delivery. On the 14th day of September, A.D. 1874, the hogs were taken to the stock yards of the Illinois Central Railroad at Tolono by J. A. Risk, representing appellees, and David O. Frambers, representing appellants, to be weighed, they both believing at the time that the scales were correct. The hogs were weighed on the scales by one Morgan, a disinterested party, they both standing by looking on. When the hogs were weighed there were found to be by those scales 15,120 lbs.

When the hogs were weighed, J. A. Risk claimed at once that they did not weigh that amount. Some controversy ensued about the matter. J. A. Risk requested that Frambers should go to Chicago and they would have the hogs weighed there, and he, Risk, would pay his expenses. Frambers contended that the hogs were weighed correctly, and refused to go; and thereupon J. A. Risk paid him the sum of $200 on account of the hogs. On the next day J. A. Risk and Frambers went to Champaign to see D. L. Risk about the matter. As soon as they informed Risk of what the hogs weighed, D. L. Risk at once said that they "could not have weighed that much." The appellees then requested appellant Frambers to go to Chicago with them, and see the hogs weighed; but he refused, and said the hogs should not be moved till he was paid. Appellees claimed, and testified on the trial below, that while they believed the hogs did not weigh that much, they had no way of disputing it, so they paid appellants the balance of the money — some $800 — and then shipped the hogs to Chicago. Appellant Frambers testified in addition, that when each one of the Risks raised objections to the weight of the hogs, that he proposed to them to have the hogs re-weighed at Tolono on other scales, there being other scales there; that D. L. Risk said he was too busy, and upon Frambers refusing to go to Chicago, Risk paid him the balance of the money.

The evidence shows that the appellees received the returns from Chicago, showing the hogs only weighed there 10,750 lbs.; that after adding to that 10 lbs. each for shrinkage, there was a difference between the Tolono weights and Chicago weights of 3,880 lbs., and appellees claimed the right to recover back the sum of $261.90 on account of mistake in the weight of the hogs. The cause having been submitted to the jury, they found a verdict for appellees for

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the sum of $247.81, upon which judgment was rendered. The court below overruled a motion for a new trial, and the cause was brought to this court.

Upon the question as to whether there was really any mistake in the weight of the hogs at Tolono, there was a sharp contest, and the evidence was quite conflicting.

On the trial of the cause below, appellants called as a witness John Loueks, and propounded to him the question: "Supposing a lot of fifty head of Magee hogs weighed on an average 160 lbs. at the middle of April, and then put on a fine and abundant clover pasture and kept till the middle of the September following, and all the time fed all the corn, old and new, they could eat, and also eight acres of matured oats, and well cared for and watered, what do you say such hogs, with such care, would gain in weight per day?" This question was objected to by appellees' counsel, and the objection sustained, the appellants excepting. The witness had testified that he was acquainted with the Magee breed of hogs, and that he was a farmer, and had had experience in such matters. There was also evidence tending to sustain the truth of the hypothesis of the question.

The refusal of the court to allow the witness to answer this question, and one of similar purport put to Frambers, which was also refused by the court, is assigned for error.

The court should have allowed the questions to have been answered; if answered they might have elicited evidence that would have had a direct tendency to show that the hogs were not weighed at too high a figure at Tolono, which was directly in issue in this case. The jury should have been allowed to consider it and give it such weight as in their judgment it deserved.

On the trial below, the attorney for the appellant asked the court to give the following instruction, No. 5: "The court instructs the jury for the defendant that if they believe from the evidence that the plaintiffs knew before they paid the defendants for the hogs in controversy that said hogs had been incorrectly weighed, then in such case the plaintiffs are not entitled to recover the price so paid for said hogs, or any part thereof, back from the defendants, and in such case the jury will find for the defendants."

The court refused to give this instruction as asked, but modified it by adding these words: "But this would not be so if plaintiff only believed a mistake had been made in weighing such hogs, and that they did not certainly know that a mistake had been made." To the giving of this instruction so modified the defendant objected and excepted. And this is also assigned for error.

The instruction as originally drawn was unquestionably the law. Where payment is made with a full knowledge of all the facts in the case, it cannot be recovered back by the party making it.

But it is laid down in the law as a general rule, that if money is paid under the impression of the truth of a fact which is untrue, it may be recovered back, however careless the party paying may have

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been in omitting to use due diligence to inquire into the fact. Story on Sales, sec. 146; *Kelly* v. *Solari*, 9 Meeson & Wellsby, p. 59.

"But if indeed the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it." See case last cited, page 59. Lord Obinger, C. B., says in the same case: "There may also be cases in which, although he might by investigation learn the state of facts more accurately, if he declines to do so, and chooses to pay the money notwithstanding, in that case there can be no doubt he is equally bound." Ib., last case above cited, page 57.

After full consideration of all the facts in this case, and the law bearing thereon, we think that under the peculiar facts and circumstances the last two propositions of law ought to apply in this case. That is, if certain facts are proven — if the appellees believed, although they did not certainly know that at the time the hogs were weighed at Tolono there was a mistake in the weights, and appellants proposed to have the hogs weighed on other scales which were in the same place, and have the matter fully tested, and refused to let the hogs go without the test or the payment of the contract price according to the Tolono weights, and that appellees, rather than submit to such test, chose to pay the money — we think, in such case the appellees ought not to be allowed to recover the money paid under such circumstances. There was evidence to show the above state of facts existed.

If the jury found this state of facts to exist they should have found for the appellants.

Upon all principles of justice, if a party be about to pay money on a supposed state of facts, and he apprehends such facts do not exist, and makes his objection to the payment on account of mistake, and the party about to receive the money proposes to have the matter tested and the truth ascertained, and the vendee refuses to apply tests at hand, and chooses to pay the money notwithstanding, he ought to be forever estopped from recovering it back; if he refuses to correct the matter himself, having an opportunity, he ought not afterward ask the courts to do it for him.

The modification by the court excluded such an issue as this from the jury. It told them in substance that if money had been paid on account of mistake in the weight of the hogs, even if the appellees believed, but did not certainly know, that at the time of the payment there was a mistake, then they should recover. The above modification directs a recovery, even though appellees paid the money without reference to any mistake in weights, and intended to accept the weights as a final settlement, waiving all errors. Certainly the evidence in the case tends to prove such was the intention.

The jury should have considered this question as an important issue in the case, in determining the rights of the parties, as well as the other issues above mentioned. For these reasons the cause is reversed and remanded. *Judgment reversed and remanded.*

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SUPREME COURT OF THE UNITED STATES.

ALBERT CONRO AND WILLARD S. CARKIN, APPELLANTS, *v.* CHARLES S. CRANE AND JEFFERSON HODGKINS.

APPEAL—*From the decisions of the Circuit Court.*—It is settled law that an appeal does not lie to the Supreme Court from the decisions of the Circuit Courts in the exercise of their supervisory jurisdiction under the Bankrupt Law.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

AYER & KALES, *Solicitors for Appellants.*
COOPER & GURLEY AND CRANE & TATHAM, *Solicitors for Appellee.*
HENRY CRAWFORD, *of Counsel.*

WAITE, C. J., delivered the opinon of the court:

Fox & Howard were adjudged bankrupts by the District Court for the Northern District of Illinois, June 5, 1875. Bradford Hancock was appointed provisional assignee, June 16, and, June 19, an order was entered in the bankruptcy proceedings directing him to receive bids for the purchase of certain personal property belonging to the estate of the bankrupts which had come into his possession. Under this order bids were tendered by various persons, and among others one by Jefferson Hodgkins for $40,000. All were reported by Hancock to the District Court, July 2, with the recommendation that the one of Hodgkins be accepted, and thereupon an order was made that all persons interested show cause by July 9 why this recommendation should not be complied with. Notice of this order was given by mail and publication, and, on the day named, the bid was accepted, the sale approved, and Hancock authorized, on the receipt of the purchase money, to execute an appropriate bill of sale and deliver possession of the property. Hancock again reported, July 12, that although demanded, the purchase money had not been paid, and that he had received another bid from Conro & Carkin, the present appellants, for $40,500. He thereupon asked that the order of confirmation to Hodgkins be set aside, the sale revoked, and that he be authorized to sell and deliver the property to Conro & Carkin at their bid. An order was made to this effect on the same day, and Hancock at once received the purchase money, executed a bill of sale, and delivered the property to Conro & Carkin.

On the 18th of August, Hodgkins and Charles S. Crane (for whom, as is alleged, Hodgkins acted as agent in the purchase) filed their petition in the bankrupt court, asking that the order of July 12 be set aside, and Conro & Carkin, Hancock, and the bankrupts directed to deliver the property to them and account for the moneys realized by its use. Upon the filing of this petition a rule was entered requiring Hancock, Conro & Carkin, and the bankrupts, to show cause by August 27 why the order asked for should not be granted. Hancock and Conro & Carkin appeared in obedience to this rule and answered.

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The matter was then referred to one of the registers in bankruptcy to take testimony, and on the 6th of March the District Court, upon full hearing, dismissed the petition. On the same day Hodgkins and Crane presented to the circuit judge of the circuit their petition, under sec. 4986 Rev. Stat., for "the revision and reversal of the action of the District Court sitting as a court of bankruptcy." The Circuit Court, April 24, after hearing, reversed the order of July 12, and continued that of July 9 in force. The District Court was also directed to order the assignee to execute and deliver to Hodgkins the necessary papers to show title, and to cause the property to be delivered to Hodgkins or Crane. The District Court was also ordered to return to Conro & Carkin, subject to certain specified conditions, the purchase money paid by them.

From this order an appeal by Conro & Carkin was allowed to this court, which Hodgkins and Crane move to dismiss for want of jurisdiction.

It must now be considered as settled that appeals do not lie to this court from the decisions of the Circuit Courts in the exercise of their supervisory jurisdiction under the Bankrupt Law. At the present term, in *Wiswall* v. *Campbell*, we held that "a proceeding in bankruptcy from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are . . . but parts of the suit in bankruptcy from which they cannot be separated." And again: "Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding." And in *Sandusky* v. *National Bank*, 23 Wall. 293, it was decided that "any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by the vacation."

These principles are decisive of this case. The rights of the parties grow out of a sale made by the court under the authority of sec. 5065 Rev. Stat. The bids were received by the provisional assignee, but the court determined which should be accepted and gave directions as to the transfer of title. Clearly, then, what was done, both as to the first and second sale, was in the course of the bankruptcy proceeding and part of that suit. As such, it was subject to revision in the Circuit Court under its supervisory jurisdiction.

Both Hodgkins and Conro & Carkin submitted themselves to the jurisdiction of the court to the extent that was necessary for the completion of their respective purchases. Conro & Carkin were parties to the proceeding by which the sale to Hodgkins was set aside and that to them made. Having been in court when the order under which their claim was made, they can properly be brought in to answer a motion to set it aside. Such a motion would not be a new suit, but a new proceeding in the old suit in bankruptcy, and, therefore, not subject to revision here upon appeal.

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This was evidently the understanding of the parties at the time, for the original petition of Hodgkins and Crane was filed in the District Court sitting in bankruptcy, and the petition for review purports on its face to be filed under sec. 4986 Rev. Stat., which confers the supervisory jurisdiction.

The appeal is, therefore, dismissed. *Appeal dismissed.*

SUPREME COURT OF THE UNITED STATES.

No. 104. OCTOBER TERM, 1877.

THE GERMANIA FIRE INS. CO., THE HANOVER FIRE INS. CO., THE NIAGARA FIRE INS. CO., AND THE REPUBLIC FIRE INS. CO. *v.* DILLER THOMPSON AND THOMAS WALSTON, PARTNERS, AS THOMPSON & CO.

INSURANCE — *Full ownership of the property.*—Where the only interest of the assured is the full and perfect ownership of the property, that is the interest insured, and the amount to be recovered on the policy of insurance is that full value, or such sum less than that as the insurer stipulates to be liable for.

SAME — *Partial ownership of property.*—Where the interest is not that of full ownership, as the interest of a trustee, executor, or some other representative character, the recovery will be in accordance with the nature of the contract.

SAME—Where A and B, defendants in error, recovered a joint judgment against C on a policy of insurance on whisky in a distiller's bonded warehouse, which was owned by D, the spirits being distilled for and owned by A and B at the time the policy was issued, and where A and B were also sureties on D's distillery bond, and as such were liable for the tax on the whisky if not paid by D, or made out of the whisky; it was *held*, that A and B had two distinct interests in the whisky — the general ownership of it, and their liability for the tax on it which D had assumed to pay; it was also *held*, that A and B had another than a proprietary interest, which, it must be presumed, was known to the insurers; that the whisky which they owned was liable to the government for a tax, which D was primarily liable to pay, and that they had become bound with D on his bond for the payment of this tax, and that the company had agreed to give this indemnity, and that the interest was an insurable interest, and that the moment the whisky was lost they became liable.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

MILLER, J., delivered the opinion of the court:

The defendants in error recovered in the Circuit Court of the United States for the district of Kentucky a joint judgment for $3,317.58 on a policy of insurance on whisky in a distiller's bonded warehouse. The distillery and warehouse were owned and conducted by George H. Deaven, but the spirits were distilled for and owned by the defendants in error at the time the policy was issued. They were also sureties on Deaven's distillery bond to the United States, and as such were liable for the tax on the whisky if not paid

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by Deaven, or made out of the whisky. It will be thus seen that Thompson and Walston had two distinct interests in the whisky, namely, the general ownership of it and their liability for the tax on it which Deaven had assumed to pay, and which, if he did not pay, might fall upon them in either of two ways, to wit, by a seizure and sale of the whisky for the tax by the government, or by a suit on the bond on which they were sureties. The policy which was manifestly designed to protect both these interests of the assured from loss or damage by fire was for that reason peculiar and special in its provisions. By its terms the companies bind themselves to "insure Messrs. Thompson & Co. against loss or damage by fire to the amount of eight thousand dollars, for the term of one year, upon whisky, their own or held by them on a commission, including government tax thereon for which they may be liable, contained in the log bonded warehouse of G. H. Deaven."

After the whisky was burned, these companies paid their share with others of the loss on the value of the whisky apart from the tax; but by the receipt which they took it was stated that the claim for liability on account of tax remained undecided. Thompson & Co. were sued on their bond with Deaven for this tax, and they notified the insurance companies of the suit, and asked them to defend it, which was declined. Judgments were obtained in each case on the bonds, and Thompson & Co. replevined the judgments. By this is meant that they gave bail, which operated as a stay of execution for the period which the law of Kentucky allowed in such cases. The present action was brought by Thompson & Walston to recover the amounts of these judgments.

On the trial evidence was given tending to show that before the fire Walston had sold to his partner, Thompson, all his interest in the partnership, and that Hite Thompson had become interested with the other Thompson in the business to the extent of one fifth. And on the hypothesis that the jury believed this, the counsel for the companies asked the court in several forms to instruct the jury that plaintiffs could not recover. This proposition was based on a provision in the policy that it should be void "if the property be sold, or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance."

The refusal of the court to do so, and the charge of the court to the effect that this change in regard to the ownership, if true, did not defeat the right to recover the amount of the judgments against plaintiffs for taxes, are the errors on which a reversal is asked.

The argument of counsel on the effect of a mere change in the title by one partner selling to another his interest in the property assured, and the authorities presented on both sides, are very able and full, and the decisions are conflicting. So, also, the effect of the introduction of a new part-owner, in a case like the present, where the possession and care of the goods remain unchanged, are well considered; but in the view we take of the case it is not necessary that this court should decide these questions.

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We are of opinion that a careful consideration of the facts in this case in their relation to some of the most elementary principles of the contract of insurance, will enable us to dispose of it without much difficulty.

It is to be observed that whether insurance be against fire, or marine loss, or loss of life, it is neither the property nor the life that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss, either of property or life, has occurred, and to give compensation to some one interested in the life or the property for the loss of that life or injury to the property.

In regard to property, this compensation is intended by the fundamental principles of insurance, to bear a direct relation to the moneyed value of the interest which the party insured had in the property. Where the only interest of the assured is the full and perfect ownership of the property, that is the interest insured, and the amount to be recovered on the policy of insurance is that full value, or such sum less than that as the insurer stipulates to be liable for.

But it often occurs that the interest of the party insured is not that of full ownership. His interest may be that of a trustee, or executor, or some other representative character, in which case the recovery will be in accordance with the nature of the contract. The policy before us is a striking illustration of this. The interest of the plaintiffs in the whisky which is insured is threefold — their own, or held on a commission, and the government tax, for which they may be held liable. If the makers of this policy intended to insure no other interest of Thompson & Co. in the whisky than their proprietary interest, the interest which at the time of the loss they had as owners of the whisky, the enumeration of the two other interests was useless and misleading. The facts already stated show that they had another interest, and since they insured it, it must be presumed that it was known to the insurers. The whisky which they owned was liable to the government for a tax, and this Mr. Deaven was primarily liable for and had promised to pay, but if he did not, the whisky could be sold for it. They had also become bound with Deaven on his bond for the payment of this tax. In the event of the whisky being destroyed by fire, the danger of their personal liability was greatly increased. They were, therefore, right in wishing to be secured against this loss also, if the whisky was burnt. It is impossible to give any other construction to the policy than that the company agreed to give this indemnity. The language, when brought into relation with the conceded facts of the case, admits of no other.

This interest was an insurable interest, as much as freights at sea, or profits in an adventure. The whisky stood between them and their loss. The whisky when in the warehouse was loaded with this tax. It would sell for as much less as the tax, unless the tax

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was paid. So long as it was in the warehouse, plaintiffs were not liable for the tax. The moment it was lost they became liable. This was a fair subject of insurance. *Fireman's Ins. Co.* v. *Powell*, 13 B. Mon. 321; *Gordon* v. *Mass. Ins. Co.*, 2 Pick. 249; *Roderback* v. *Germania Ins. Co.*, 62 N. Y. 53.

In regard to this interest, Walston had never parted with it. His sale of the partnership interest did not release him from his liability on Deaven's bonds. Nor did the subsequent purchase of Hite Thompson of one fifth interest in the whisky have that effect, or destroy Walston's interest to that extent in the whisky. As to him it is very clear that he had the strongest interest that the whisky should be secure from fire until the tax on it was paid, since its continued existence was his best if not his only security against liability on the bonds.

It is to be observed that no other interest of Thompson & Co. is in issue in this suit. They never held the whisky on commission, and the loss in regard to the proprietary interest had been paid by the companies. This was another and different interest in the same property. A man might insure his interest in property as an executor, and his interest as a legatee. His removal from the office of executor by the proper court might, within the terms of this policy, prevent his recovering in that character, but if his interest in the property as legatee was one sixth, would the change of executorship bar his recovery as legatee? This would hardly be asserted by any one.

It is objected further to a recovery, that plaintiffs have not actually paid the judgment. The answer to this, if any were necessary, is, that by the law of Kentucky, the replevin bond is a satisfaction of the judgment. It is as to this obligor a debt discharged. It is said that in case of a loss like this the government cannot collect the tax from the bondsmen. The answer is that the government has sued and obtained judgment for the tax, and defendants were asked to defend that suit and declined to do so.

We see no error in the judgment of the Circuit Court, and it is affirmed. *Judgment affirmed.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877. (ALB. L. J.)

PHŒNIX INSURANCE COMPANY *v.* PECHNER.

PETITION FOR REMOVAL OF CAUSE.—A petition for the removal of a cause from a state to the federal court under the Act of 1789 must expressly state that the parties were citizens of the respective states *at the time the suit was commenced*.

IN ERROR to the Court of Appeals of New York. The decision of the Court of Appeals is reported 65 N. Y. 195.

WAITE, C. J., delivered the opinion of the court:

On the 1st of June, 1867, Pechner, the defendant in error, sued the Phœnix Insurance Company, plaintiff in error, a Connecticut

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corporation, in the Supreme Court of Chemung county, in the State of New York, upon a policy of insurance. On the 8th July, in the same year, and at the time of entering its appearance, the company presented to the court a petition, accompanied by the necessary security, for the removal of the cause to the Circuit Court of the United States. The petition, when taken in connection with the pleadings, set forth sufficiently the citizenship of the defendant in the State of Connecticut, but as to the citizenship of the plaintiff, the statement was that "as your petitioner is informed and believes, Isidor Pechner, the plaintiff in said action, is a citizen of the State of New York." The petition bears date June 11, 1867, and was sworn to June 12. Upon its presentation the court approved the security, but denied the application for removal.

On the 5th of June, 1869, the plaintiff filed an amended complaint, to which the defendant answered June 21, 1869. On the 2d of February, 1872, the cause coming on for trial, the defendant again presented its original petition for removal, which remained upon the files, and requested the court to proceed no further with the trial; but this request was denied, for the reason that the petition did not state facts sufficient to remove the cause. A jury was thereupon called, which returned a verdict in favor of the plaintiff, and judgment was in due form entered thereon against the defendant. The case was then taken to the Court of Appeals, where the judgment of the Supreme Court was affirmed, the Court of Appeals deciding that the petition for removal was not sufficient in law to effect a transfer of the cause, for the reason that it did not state affirmatively that Pechner was a citizen of the State of New York when the suit was commenced.

To reverse this judgment the present writ of error has been brought, and the only error assigned is predicated upon this decision.

The application for removal in this case was made under sec. 12 of the Judiciary Act of 1789. (1 Stat. 79.) That section, so far as it is important for the determination of this case, reads as follows: "If a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state, . . . and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next Circuit Court, . . . it shall then be the duty of the state court to . . . proceed no further in the cause. . . ." Clearly this had reference to the citizenship of the parties when the suit is begun, for the language is: "If a suit be *commenced* by a citizen of the state in which the suit is brought against a citizen of another state, the defendant may, *when he enters his appearance*, petition for its removal." The phraseology employed in the Acts of 1866 (14 Stat. 307), 1867 (id. 558), and 1875 (18 Stat. 470), and in the Revised Statutes (sec. 639), is somewhat different, and we are not now called upon to give a construction to the language there used. As to the Act of 1789, we entertain no doubt in this particular.

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This right of removal is statutory. Before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal when filed becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitled him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot "proceed further with the cause." Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended.

It remains only to apply this rule to the facts as they appear in this record. The suit was commenced June 1, 1867. At that time there was nothing in the pleadings or process to indicate the citizenship of the plaintiff. The defendant, in its petition for removal, bearing date June 11, simply stated that the plaintiff *is* — that is to say, *was at that date* — a citizen of New York. This certainly is not stating affirmatively that such was his citizenship when the suit was commenced. The court had the right to take the case as made by the party himself and not to inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause. We think, therefore, that the Court of Appeals did not err in its decision, and the judgment is consequently affirmed. *Judgment affirmed.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877. (ALB. L. J.)

AMORY v. AMORY.

PETITION FOR REMOVAL OF CAUSE.—A state court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed which upon its face shows the right of the petitioner to transfer it.

SAME—*Under the Act of 1867.*—A petition for removal must state the personal citizenship of the parties, and not their official citizenship.

IN ERROR to the Supreme Court of the city of New York.

WAITE, C. J., delivered the opinion of the court:

These cases are substantially disposed of by the decision in *Phœnix Ins. Co.* v. *Pechner*, just announced. They each present the question of the sufficiency of a petition for removal under the Act of 1867. 14 Stat. 558. The suits were in New York by the defendants in error as executors, against the plaintiff in error, a citizen of New Jersey. The petitions for removal set forth sufficiently the citizenship of the plaintiff in error, but as to the defendants in error the allegations are "that said plaintiffs, as such executors, are citizens of the State of New York." Clearly this is not sufficient. Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the

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parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, if there can be such a thing. From the language here employed the court may properly infer that as persons the plaintiffs in error were not citizens of New York. For all that appears they may have been citizens of New Jersey, as was the defendant. Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed which upon its face shows the right of the petitioner to the transfer, it was not error for the court to retain these causes. We need not, therefore, consider whether the Act of 1867 limits the right of removal to the citizenship of the parties at the time of the commencement of the suit, or whether the state court had the right to call upon the defendants in error to show cause against the application.

The judgment of the Court of Appeals in each of these cases is affirmed. *Judgment affirmed.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877. (ALB. L. J.)

McHenry et al., *Plaintiffs in Error*, *v.* La Société Française.

Bankrupt—*Jurisdiction of state court to foreclose mortgage of creditor.*—The creditor of a bankrupt whose debt was secured by mortgage proved the same against the estate. *Held*, that the jurisdiction of the state courts for the purpose of foreclosing the mortgage was not, as to the bankrupt and his wife, divested by the bankruptcy proceedings, but the creditor might foreclose in such courts with the leave of the bankruptcy court and the consent of the assignee.

In Error to the Supreme Court of the State of California.

The action was brought by La Société Française, D'Epargnes et de Prévoyance Mutuelle against John McHenry and wife, and others. The necessary facts appear in the opinion. The judgment below was in favor of plaintiff.

Waite, C. J., delivered the opinion of the court:

In *Claflin* v. *Houseman*, 93 U. S. 130, we decided that under the law as it stood previous to the adoption of the Revised Statutes, the courts of the United States did not have exclusive jurisdiction of suits for the settlement of conflicting claims to property belonging to the estate of a bankrupt, and that an assignee in bankruptcy might sue in a state court to collect the assets. In *Mays* v. *Fritton*, 20 Wall. 414, we also held that if an assignee in bankruptcy submitted himself to the jurisdiction of a state court, in a suit affecting the estate which was pending when the proceedings in bankruptcy were commenced, he was bound by any judgment that might be rendered. And in *Eyster* v. *Gaff*, 91 U. S. 525, Mr. Miller, J.,

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speaking for the court, said: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of his rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent and does not divest that of the state courts."

The principles upon which those cases rest are decisive of this. The complainant, having a debt against the bankrupt secured by mortgage, proved the claim against the estate. This, under sec. 20 of the bankrupt law (14 Stat. 526; Rev. Stat., sec. 5075), admitted the complainant as a creditor of the general estate only for the balance of the debt after deducting the value of the mortgaged property, to be ascertained by agreement, sale, or in such other manner as the bankrupt court might direct. The assignee is not required to take measures for the sale of mortgaged property unless its value is greater than the incumbrance. His duties relate chiefly to unsecured creditors, and he need not trouble himself about incumbered property, unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the general estate. If he does, and it becomes necessary to adjust the liens before his sale, he may, under the ruling in *Claflin* v. *Houseman*, institute the necessary proceedings for that purpose in the courts of the United States, or of a state, as he chooses. If he does not, and the secured creditor wishes to make his security available, the creditor must act, and, having obtained leave of the bankrupt court to bring his action for that purpose, he may proceed in the state court, if the assignee does not object, or in the courts of the United States, at his election. Here the necessary leave to sue was obtained before the decree was rendered, and the assignee, instead of objecting to the jurisdiction of the state court, consented to that mode of proceeding. The bankrupt and his wife alone objected, but as to them, as we held in *Eyster* v. *Gaff*, the jurisdiction of the state court was not divested by the proceedings in bankruptcy.

The judgment is affirmed. *Judgment affirmed.*

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SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION. PRACTICE DECISIONS.

N. W. EDWARDS ET AL. *v.* THE PEOPLE.

JANUARY TERM, 1878.

JUDGMENT—Application to permit other persons against whom the judgment was rendered to become parties plaintiff in error.

WALKER, J: Number 10 on the people's docket.

In this case there is an application to permit other persons against whom the judgment was rendered for taxes to become parties plaintiff in error in the case. The decisions of this court have held that while the proceeding is against all the delinquent lands, the judgment against each tract of land is separate and distinct, and that it is not a joint judgment, but a several judgment. The practice is not to admit parties in other cases to come in and make themselves plaintiffs in error, while they were not joint defendants in the court below, in the case that is brought to this court. We are not willing to establish a practice that parties who are parties to another suit, a several judgment, distinct from the judgment before the court, should come in and make themselves parties plaintiff to a writ of error brought to this court. The motion will therefore be denied. The parties to other several judgments have the right of course to prosecute error. *Motion denied.*

DICKEY, J: In this case, in which Justice Walker has announced the decision of the court, I desire to say that in my own view it is a common judgment, although separate, twofold in its character, and that it is competent for several of those against whom judgment has been rendered to unite in an appeal and writ of error, and that the application ought to be allowed.

T. W. & W. R. R. CO. *v.* LLOYD L. GRABLE.

JANUARY TERM, 1878.

CONTINUANCE—Application for—that the record may be reformed as to the form of the judgment.

DICKEY, J: In number 65.

Application is made by the appellee for a continuance, that the record may be reformed as to the form of the judgment. This application is resisted by the appellant. It is alleged that due diligence might have reformed the record before this time. The court does not see how the appellant can be injured by the delay. The appellee is the one whose collection or judgment is delayed by continuance. And there are several errors assigned, and among them there is an error assigned which changes this judgment on account of its form. If the appellant desires to waive that exception or

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ground of error, which is merely technical and formal, of course there will be no ground of continuance.

Attorney for appellant: I take the liberty to withdraw that exception, ground of error.

DICKEY, J: Then of course the motion will be overruled.

MILLER ET AL. v. BECKLEY ET AL.

JANUARY TERM, 1878.

INJUNCTION—Motion to withdraw bond — papers filed.

CRAIG, J: Number 141.

Motion is made in this case by appellant to withdraw the injunction bond which was filed. It has not been the practice of this court to allow papers filed to be withdrawn, but in this case the controversy between the parties has been settled, and there is a stipulation which is signed by both parties that the appellant may have leave to withdraw this original injunction bond. We cannot see that it will work any damage to any one. The case has been settled. We will allow it to be withdrawn upon leaving a copy on the files.

ISAAC J. KETCHUM v. SERVETUS N. THORP.

JANUARY TERM, 1878.

APPEAL—Motion to dismiss upon a clerical error of clerk.

DICKEY, J: Case number 214.

A motion in this case is made to dismiss the appeal. It was founded upon a clerical error of the clerk in preparing the transcript, which is corrected by an amendment on record. The motion is overruled.

EDITOR'S NOTE.—*Vide*, Practice Decisions from November, 1863, to September, 1867, both inclusive, 40 Ill. 25 to 130.

ADDISON C. TAYLOR ET AL. v. COMMISSIONERS OF HIGHWAYS, ETC.

JANUARY TERM, 1878.

APPEAL—Motion to dismiss for want of sufficient bond.

SCOTT, J: Number 116 on the civil docket.

There was a motion on the part of the appellee to dismiss the appeal for want of a sufficient bond. Part of the appellants not being parties to the same and also a cross motion on the part of the appellants for leave to amend said bond, for the purpose of adding the parties, the motion to dismiss would be denied and the cross motion allowed, with an extension of time to the 9th inst., within which to make the proposed amendment.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1876.

JOHN C. McCORD *v.* WILLIAM W. CROOKER.

(To appear in 83 Ill. 556).

PRACTICE—*Refusing leave to plead after demurrer.*—Where the plaintiff files with his declaration, under section 37 of the Practice Act, the requisite affidavit, and the defendant demurs, and his demurrer is overruled, the question whether the court abuses its discretion in refusing leave to the defendant to plead, depends on whether his affidavit accompanying his plea shows a substantial defense to the merits.

If the affidavit accompanying the plea proposed to be filed after the overruling of a demurrer to the declaration, does not show facts necessarily constituting a defense, the court is warranted in refusing leave to file the plea.

SAME—*Of defendant's affidavit of merits.*—Where a defendant undertakes to set up, by affidavit, the facts relied on to sustain his plea, he will be held to the same strictness in matters of substance as in pleading.

SET-OFF—*Expenses incurred to remove an apparent incumbrance on land bought.*—Where real estate is bought under a warranty deed, and there is an apparent incumbrance found not satisfied of record, and the grantor proposes to allow the expenses of removing the same, a plea of set-off as to such expenses, to a suit upon notes given for the purchase money, which fails to show that the defendant accepted the offer and expended his time and money on the faith of it, and shows no consideration for the promise, and does not distinctly aver that the amount of the proposed set-off is then due and unpaid, is substantially defective.

CONTRACT—*Notes not void because given for too much.*—The fact that notes are given for a larger sum than was agreed by the parties to be due for land purchased, does not render them void, but goes to the consideration, partially, and there may be a recovery *pro tanto*.

COMMON COUNTS—*When recovery may be had under.*—If a note given for the purchase money of land is held void for any cause, a recovery may be had, under the common counts, of the sum actually due.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

SLEEPER & WHITON, *Attorneys for Appellant.*
HOLDEN & MOORE, *Attorneys for Appellee.*

This was an action of *assumpsit*, by appellee, against appellant, on certain promissory notes which the latter had executed to the former.

The declaration contained special counts on the promissory notes, and also the common counts.

Accompanying the declaration, appellee filed his affidavit, showing that there was $1,800 due him, on account of the notes sued on, after deducting all just credits, demands and set-offs of appellant, together with interest, etc.

The appellant filed a general demurrer, which being decided

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against him, he asked leave to withdraw, and to file the plea of *non-assumpsit*, accompanied with a notice and affidavit, as follows:

"The above plaintiff will also take notice that the defendant, on the trial of this cause, will give in evidence and insist that the plaintiff, at the time this suit was commenced, was, and still is, indebted to the defendant in the sum of $500, for work and labor, and for money paid, laid out and expended by the defendant for the plaintiff, at his request, and under the circumstances set forth in the affidavit accompanying this plea and notice, and filed therewith, and that on the trial of this cause the defendant will set off the said sum so due and owing the defendant from the plaintiff, against any demand of the plaintiff which shall be proven on said trial.

SLEEPER & WHITON,
Defendant's Attorneys.

"John C. McCord, being first duly sworn, on oath, says that he is the defendant in the above action, and that he verily believes he has a good defense to said suit, upon the merits, to a portion of the plaintiff's demand, and according to the best of his judgment and belief, to the extent of $500, and the circumstances out of which the said partial defense (which deponent proposes to set off against the plaintiff's demand) arose, were as follows:

"Deponent, admitting the execution of the notes, copies of which are attached to the declaration in this cause, says they were made in connection with a trust deed, for a part of the purchase money on the purchase of certain real estate by this deponent from the said Crooker, but that said notes were made for fictitious sums, and said trust deed securing said notes was for a fictitious amount, as will appear from the stipulation delivered to the deponent by said Crooker, at the same time that the deponent delivered to said Crooker the said notes mentioned in the notice attached to said declaration, and the other notes of the same series. Such stipulation was in the words and figures following:

CHICAGO, *April* 25, 1873.

This is to witness that John C. McCord has this day executed to me (secured by trust deed on property this day conveyed by me to him) the following notes, bearing date this day, and interest, after due, at ten per cent:

Note for $800, due October 25, 1873; note for $800, due April 25, 1874; note for $800, due October 25, 1874; note for $800, due April 25, 1875; note for $800, due October 25, 1875; note for $800, due April 25, 1876; note for $800, due October 25, 1876; note for $800, due April 25, 1877; note for $20,000, due April 25, 1877.

Now if the said McCord shall pay $4,000 in one year, $3,000 in two years, $3,000 in three years, and $5,000 in four years, with interest semi-annually at eight per cent, on all sums of said $15,000 from time to time remaining unpaid, then I agree to surrender to said McCord all the said enumerated nine notes for $20,000 of principal, and semi-annual installments of interest thereon at eight per cent, there being due me really only $15,000 of the amount mentioned to be paid on said notes.

(Signed) WM. W. CROOKER.

"And the defendant says that the real sum unpaid by him on the said purchase from the said Crooker was $15,000, and not $20,000, as is falsely made to appear by the notes mentioned in the said notice attached to said declaration, and that such notes were made

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for such enhanced sum merely to create a penalty to enforce against this deponent, if he should not pay such purchase money as rapidly as set forth in said stipulation, and so this deponent insists that said notes being invalid for their full amount, the said Crooker cannot purge their invalidity as notes, by voluntarily remitting from them in this action, and so collect upon notes which have no existence, instead of the notes referred to in his said notice attached to his said declaration, but this deponent claims that said Crooker has no remedy at law on any of the said fictitious notes, and is limited to foreclosing the said trust deed for the collection of his unpaid purchase money, as a court of equity may find the amount due to be.

"But deponent further says, that if an action at law can be sustained by said Crooker upon the said fictitious notes, yet deponent claims a set-off, as aforesaid, to the said amount of $500, by reason of the following facts, viz: After deponent had made his aforesaid purchase of land from the said Crooker, and taken from the said Crooker a warranty deed for the same, it appeared, from the abstract of title thereto, that such land was subject to an apparent incumbrance, by mortgage, in favor of a party who was afterward ascertained to reside in Boston, Mass. When this defect in the title appeared, the said Crooker being liable to deponent, upon his covenants against incumbrance in the said deed, and bound to protect deponent from all loss growing out of said apparent incumbrance, proposed to deponent that he, deponent, should hunt up the holder of such apparent incumbrance, and procure a release thereof, on the best terms possible, and that for so doing, he, the said Crooker, would pay this deponent the expenses attending the business, and a reasonable sum for deponent's time and trouble, if he was successful.

"And in pursuance of this proposal, deponent, after considerable inquiry, discovered the place of residence of the said holder of the said apparent incumbrance, in Boston, aforesaid; and secured from him a release of such apparent incumbrance, which was voluntary on the part of the holder, it turning out that such apparent incumbrance had in fact been paid some time previously, though not discharged of record.

"But before deponent succeeded in finding said holder of said apparent incumbrance, he was detained at hotels in Boston several days, and deponent's actual expenses on said journey, before his return, were near $200, and deponent believes that the further sum of $300 would be only a fair compensation for deponent's services and loss of time in that behalf. John C. McCord."

But the court refused to allow the demurrer to be withdrawn, and the plea and notice filed, and appellant excepted, and thereupon the court gave judgment in favor of appellee, against appellant, for the amount of his damages, which were assessed at the sum of $1910, as well as for costs of suit.

Scholfield, J., delivered the opinion of the court:

Whether the court abused the discretion with which it was in-

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vested in refusing to allow appellant to plead over, after the demurrer was overruled, depends entirely, in our opinion, upon whether the appellant was thereby deprived of interposing a meritorious and substantial defense to appellee's cause of action, which he was ready and offered to interpose without material delay to the court.

If the defense proposed to be made did not go to the merits of the case, but was not well taken, or was purely technical in its character, we are aware of no authority which would warrant us in holding that the court had abused its discretion in refusing to listen to it.

Appellee having filed an affidavit with his declaration, in conformity with the 37th section of the Practice Act, Rev. Stat. 1874, p. 779, to entitle appellant to plead to the declaration, it was incumbent on him to accompany his plea with an affidavit of merits.

In the present instance, the affidavit accompanying the plea proposed to be filed, undertakes to set up the facts constituting the defense, and, as we have held in another case at the present term, if those facts, as thus stated, do not necessarily present a defense, the court is warranted in holding the affidavit insufficient, and in refusing to allow the plea to be filed.

There is no dispute as to the amount actually due from the appellant to the appellee, on the promissory notes described in the declaration, which embody appellee's claim. The affidavit of appellant concedes this amount to be as stated in the affidavit of appellee, but he claims a technical defense that because the principal note was given for a larger amount than was agreed by the parties to be due, it is void and inadmissible as an instrument of evidence. We are not inclined to indorse the correctness of this position. The question would seem only to go to the consideration of the note partially, and in such cases it is well settled there may be a recovery on the instrument *pro tanto*. But if the position were correct, it would only prevent a recovery on the special count in which that note is declared on, and there might still be recovery under the common counts, of the amount actually due, about which, as before observed, there is no disagreement between the parties.

The only question, then, is, whether the proposed set-off of $500 is shown by the affidavit of appellant to have legal merit.

It is very clear it cannot be sustained as originating from damages sustained by reason of a breach of covenant, because neither the existence nor breach of a covenant warranting such a claim is shown. *Willetts* v. *Burgess*, 34 Ill. 494; *Vining* v. *Leeman*, 45 id. 246; *DeForrest* v. *Oder*, 42 id. 500.

Treating the claim as originating in a new and independent contract, there seem to be several objections not removed by the language of the affidavit. It is not shown there was any sufficient legal consideration for the promise of appellee. It does not appear that appellant accepted the offer of appellee, and, in good faith, expended his time and money upon the faith of it. Nor is it distinctly and positively alleged that the amount of the proposed off-set was then due and unpaid, which has been held essential in a plea of

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set-off. *DeForrest* v. *Oder*, *supra*. And we are of opinion, where the party undertakes to set up, by affidavit, the facts relied on to sustain his plea, he must be held to the same strictness in matters of substance as in pleading.

We are, therefore, of opinion the court did not abuse its discretion, in refusing to allow the proposed defense. The party has been denied no substantial defense; but even if he should have a meritorious claim, which, through inadvertence, he has failed to properly set up, he may sue upon it in an independent action.

The judgment is affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

In connection with the above interesting case on practice, we give a résumé of several late decisions on practice, pleading, evidence, etc.

CHANCERY PRACTICE — *Reference, for account.*—On bill for an account, where large sums of money are involved in the account, and the business covers a considerable time, and the testimony as to the rights of the parties is conflicting and unsatisfactory, the cause must be referred to a master to render a concise and accurate statement of the account, so that the same may be easily comprehended, and any objection taken passed upon understandingly. *Quayle* v. *Guild*, 83 Ill. 553.

USURY — *How pleaded in chancery.*—A general charge of usury in an answer to a bill in chancery, will amount to nothing, unless facts are alleged showing wherein the usury consists. *Mosier* v. *Norton*, 83 Ill. 379.

SAME — *Pleading and proof.*—The defense of usury is regarded as in the nature of a penal action, and not only is great strictness required in the pleadings, but the contract must be proved as alleged, by a clear preponderance of the evidence. Ib.

SAME — *Sale of lots at fictitious price.*—If a party loans money, and at the same time sells lots to the borrower at a fictitious value, taking a note for the whole, merely to secure an unlawful rate of interest on the loan, the transaction will be usurious. But the fact that a party sells property and loans the consideration to the purchaser, with other funds, affords no presumption that the transaction is usurious. Ib.

PLEADING AND EVIDENCE — *Variance.*—The rule is the same in chancery as at law, that a contract must be proved as stated in the pleadings. If the contract is alleged to be usurious, the usury must be proved as charged. Ib.

MORTGAGE — *Foreclosure—tacking prior lien paid.*—If a mortgagee redeems from a mortgage which is a prior lien, upon bill to foreclose his mortgage he will have the clear right to tack the amount so paid by him, to protect his rights, and if the mortgage redeemed from bore interest at ten per cent, the same rate will be allowed to the party redeeming. Ib.

SAME — *Liability of mortgagee in possession.*—Ordinarily a mortgagee in possession is only required to account for the actual receipts less such sums as he may have paid out for taxes and necessary repairs, unless it is shown that more could have been realized by reasonable diligence. He will be responsible for gross negligence resulting in loss to the mortgagor. Ib.

CHANCERY — *Stating account.*—Where an account is to be taken of the rents and profits of lands in the possession of a mortgagee, and the taxes paid and repairs made by him, the court should first declare, by interlocutory decree, the rights of the parties, and the rule to be adopted in stating the account, and then refer the cause to the master in chancery. Counsel will not be permitted to impose upon

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this court, by stipulation or otherwise, the performance of the duties that pertain to the office of master in chancery. Ib.

See also on this subject the following cases: *Dunham* v. *Tucker*, 40 Ill. 519; *Frank* v. *Morris*, 57 Ill. 138; *Moore* v. *Pitman*, 44 Ill. 367; *McConnel* v. *Holobush*, 11 Ill. 61; *Moss* v. *McCall*, 75 Ill. 190; *Steere* v. *Hoagland*, 39 Ill. 264; *Bresler* v. *McCune*, 56 Ill. 475; *Rinor* v. *Tousler*, 62 Ill. 266; *Groch* v. *Stenger*, 65 Ill. 481.

PLEADING—*Where suit is brought in the wrong county.*—The statute prohibiting a defendant being sued out of his county, except in certain cases, confers a mere privilege on him, which he will be considered as having waived, unless he specially relies upon it by plea.—*Drake* v. *Drake*, 83 Ill. 526.

ABATEMENT—*That defendant is sued out of his county.*—A plea in abatement that the defendant is improperly sued out of his county, arising from privilege of person, strictly speaking, should be classed as a plea to the jurisdiction, and conclude whether the court ought to have further connusance of the suit; but, according to previous rulings of this court, the plea will not be obnoxious to a demurrer if it improperly concludes by praying judgment of the writ and declaration. Ib.

SAME—*Right to amend.*—Under the present statute allowing amendments to pleadings, all formal or technical objections may be obviated by amendment; and a plea that the defendant is sued improperly in a county other than that of his residence, or where found, is of that substantial and meritorious character that amendments, either in form or substance, should be allowed to fairly present the defense. Ib.

Vide Henney v. *Greer*, 13 Ill. 432; *Tiffany* v. *Spalding*, 22 Ill. 493; *Howe* v. *Thayer*, 24 Ill. 246, 1 Chit. Pl. 478; *Humphrey* v. *Phillips*, 57 Ill. 132; Rev. Stat. 1874, p. 778, sec. 23, Pr. Act.

REPLEVIN—*Power of court to order restoration of property taken from plaintiff before trial.*—Where property is replevied before a justice of the peace, and an appeal taken to the circuit court, if the defendant in replevin and another take the same from the plaintiff and place it beyond his reach, the circuit court will have the rightful power to enter a rule upon them to restore it to the plaintiff, and punish them by fine and imprisonment for disobedience. *Knott* v. *The People*, 83 Ill. 532.

PRACTICE—*Affidavits too late after rule.*—After a party has been ruled to restore property taken by him from a party replevying the same, and has refused to obey the order, and has entered into a recognizance to appear and answer for contempt, it will be too late to present affidavits in respect to the propriety of the rule. Ib.

CONTINUANCE—*Party absent as a member of the legislature.*—Where a continuance is sought on the ground of the absence of a party then in attendance upon the general assembly, as a member thereof, it is sufficient for the affidavit to state that the attendance of such party in court is necessary to a fair and proper trial. The statute does not require that it shall so appear by affidavit setting out the circumstances and facts. *Wicker* v. *Boynton*, 83 Ill. 545. *Vide* also: Tidd's Practice, 772; *Day* v. *Sansom*, 2 Barnes' Notes, 353; Rev. Stat. 1874, p. 780, ch. 110, secs. 43–46; *Duncan, S. & Co.* v. *Niles*, 32 Ill. 541; *St. Louis & S. R. R. Co.* v. *Teters*, 68 Ill. 144.

EVIDENCE—*To overcome certificate of deposit as to sum deposited.*—A certificate of deposit is evidence of so high and satisfactory a character as to the sum deposited, that, to escape is effect, the maker must overcome it by clear and satisfactory evidence. Where the testimony aside from the certificate is balanced as to the amount deposited, the certificate will turn the scale. *The First National Bank of Lacon* v. *Myers*, 83 Ill. 507.

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

JOHN L. BEVERIDGE, FOR USE OF OLIVER SMITH, *v.* ESTATE OF M. O. WALKER.

BAIL.—Where a claim on a bail bond is made against the estate of the security in the bond, the evidence should show that the bond required by the statute was taken according to the requirement of the law, or it will be illegal and void, and where the evidence, as in this case, shows affirmatively that it was not so taken such claim will not be allowed.

MILLER & FROST, *Attorneys for Plaintiff.*
E. A. SMALL, *Attorney for Defendant.*

ROGERS, J., delivered the opinion of the court January 14, 1878:

The statute in force when the bail was taken, in the original suit of *Smith* v. *Aylesworth*, required (1) an affidavit setting out the nature and cause of action, with the facts in relation thereto, to be delivered to the clerk of the court, who (if upon examination thereof he was satisfied that sufficient cause was shown) issued (2) a *capias ad respondendum* for the arrest of the defendant, (3) with an indorsement thereon of an order specifying in what amount the defendant should be required to give bail; (4) which writ the sheriff was required to serve and to take bail accordingly; that is, (5) a bail bond to himself, with sufficient security in a penalty double the sum for which bail was required; (6) and this bond was to be returned with the writ on the first day of the term of the court to which the writ was returnable. (7) The bail so taken was deemed special bail, and could be proceeded against by action of debt, in the name of the plaintiff in the original action, except when the bail was adjudged insufficient by the court; but no suit could be commenced upon such bail bond until a *capias ad satisfaciendum* had been issued against the defendant in the original suit and been returned that the defendant was not found in the county in which he had been arrested. In this case, a claim on bail bond, filed in the County Court by *Smith* v. *The Estate of M. O. Walker, deceased*, security in the bond, which is here on appeal from that court, it appears, by proof satisfactory to me, that the plaintiff filed an affidavit (in the original suit) for the purpose of procuring a writ for the arrest of Aylesworth; that the clerk issued the writ, with an order thereon specifying *some* amount for which the defendant should be required to give bail, but there is no sufficient proof of the *actual sum* (the evidence leaving it indefinite)—either $3,000 or $3,500, but which it is altogether uncertain, while the presumption arising from the amount of the bail bond, $3,000, is that the order on the writ specified $1,500 as the amount of bail required. It also appears that the sheriff, under that writ, arrested the defendant, and that he gave a bail bond, with M. O. Walker as security, in the penal sum of $3,000, with conditions as required by law, and substantially as

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those in the copy of bond filed as the foundation of plaintiff's claim in this case; and that this bond was returned to the court with the writ. This bond, together with the writ and all other parts of the record,—affidavit, declaration, etc.,—were destroyed in the great fire in this city on the 8th and 9th of October, 1871.

The original records of this suit of *Smith* v. *Aylesworth* being thus destroyed, the plaintiff filed a petition in June, 1873, under what is commonly known as the "Burnt Records Act," to have them restored; or rather, in the language of the petition, he presented a "*draught* affidavit and declaration substantially the same in matter and form as the originals on file in said cause, and which were destroyed as aforesaid," and prayed "for an order declaring the said *draught* affidavit and declaration be a substitute for the said original record, so far as the same may extend in supplying the defect caused by the destruction of the same."

The act under which he filed this petition required the party interested (plaintiff) to make a written application to the court, verified by affidavit showing the destruction thereof and the substance of the record so destroyed, and that such destruction of such record, unless supplied, would result in damage to the party, and thereupon the court should order such application to be entered of record and *due notice* of said application to be given that it would be heard by the court. And upon hearing, said court should make an order reciting what was the substance and effect of said destroyed record; which order was to be entered of record, and have the same effect which said original record would have if the record had not been destroyed, *so far as concerns the party* making the application and the *person who had been notified* as provided for in the act. Upon this application the court made an order in substance, "that the case be and it is hereby restored."

There was no order entered of record reciting what was the *substance and effect* of said destroyed record, but the substituted declaration and affidavit were filed, and thereby, it is claimed, were made records. But copies of the original writ, the order thereon fixing amount of bail required, the return on the writ and the bail bond, were not filed, and no order made reciting the substance and effect thereof.

If it was necessary to have the destroyed records restored, in order to charge the parties, then there is a fatal omission in not restoring the bond, writ, order fixing amount of bail and the sheriff's return on said writ. And, even if this had been restored, still as to Walker they would not have the same effect as the originals would, because he was not notified of the application or hearing as required by the statute, in order to charge him, or that they should have that effect. He was no party to the suit, and it is true that it was not necessary to restore the suit and the records thereof, that he should have notice; that is, it could proceed to trial and judgment as it did, and be effectual as against Aylesworth, who had notice of the application, and who in fact appeared and defended it. But if Walker

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was to be charged on the bond and held as bail, he should have been served with, and was entitled to, notice of the proceeding before his interests could be affected. If notified, he could have appeared—could have had a day in court—to see that the copy of the bond was a correct copy of the one he executed and that the bond was such as was required by the statute, and if not, to have the bond quashed or himself released therefrom by reason of its invalidity.

But suppose it was not necessary to restore the bond, writ, order fixing amount of bail and return of the sheriff on the writ, and that Walker or his administrator could be sued upon it as a lost or destroyed bond, as in the loss or destruction of any record, bond or note (as I am inclined to think), still the question remains, has a case been made out to charge his estate?

As to the execution of a bond, substantially such as is sued on, and that it was taken as bail on the arrest of Aylesworth, I have no doubt. But was it a valid bond? Was it taken for the amount required by the order of the clerk, indorsed on the writ? There is no proof that it was; the precise amount of bail required not having been shown. This is necessary to show the validity of the bond. It devolved on the plaintiff, not only to prove the execution of a bond and its contents (the original being lost), but the prerequisites, according to the allegations of his affidavit of claim filed in this case.

The claim having been objected to, the affidavit stands in the place of a declaration in an ordinary suit, and the claimant is required to prove all its material allegations.

In the affidavit, the claimant has averred that Smith brought suit against Aylesworth, filed his affidavit for a *capias ad respondendum*, that *the court* (should have been, that the *clerk*) ordered that the defendant be held to bail in the sum of $3,000; that the writ was issued, bail was given in the sum of $3,000, and that the writ was returned, etc. Those were material allegations, necessary to show the liability of Walker's estate, and as such the claimant is required to prove them. He has failed in this, that he did not show the amount of bail required, nor the return of the officer on the writ.

But it is insisted by claimant's attorneys that it was sufficient to prove the bond — its execution and conditions; that it was given to release Aylesworth; that it was returned to court; that judgment was rendered; that a *ca. sa* was issued and returned that the defendant was not found. If Walker was alive and this was an ordinary action of debt on the bond, with such averments as are contained in the affidavit of claim, and he had put in issue, by pleas, those averments, then such proof, alone, would not have been sufficient to authorize a finding in the plaintiff's favor. But here he is dead, and this proceeding is by claim filed against his estate, and all defenses may be interposed without technical pleading. The claim is objected to, and it becomes necessary for the claimant to make all the proof that would be required on pleas of *nul tiel record*, *non est factum*, or

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that the bond was void because it was not taken for the amount indorsed on the writ.

In *Stafford* v. *Low*, 20 Ill. 152, in an action on a bail bond, the defendant plead that the affidavit in the original suit upon which the writ was issued, and upon which the defendant was held to bail, did not comply with the statute, and was insufficient in law, in not stating facts, etc., and that the arrest under the writ was illegal, and the bail bond was therefore void. The Supreme Court held the plea to be good. The requirements of the statute had not been complied with, and the bond was void. So here, there is no proof of the exact amount of the bail required by order of the clerk indorsed on the writ of *capias ad respondendum*, nor of the precise return of the sheriff.

We are asked to presume that the officer did what the law required; that he made a return of the arrest, the giving of bail, and that the bail bond was filed with his writ so returned; but it is dangerous to render judgments on mere presumptions of compliance with official duty. And if such presumptions are allowed with such serious effect, then we must presume, also, that as the bond was for $3,000, the order on the writ requiring bail was in the sum of $1,500; for the statute required the sheriff to take bond with a penalty *double* the amount of bail required, and he in fact took it for $3,000. Then there is a variance between the proof on presumptions and the allegation in the affidavit, that the amount required by the clerk by his order on the writ was $3,000. But in view of the evidence of Mr. Rockwell, the presumption that the sheriff took the bond required by law cannot arise, because his testimony (and there is no other in the case upon that point) is, that by the order of the clerk the amount of bail required was either *$3,000* or *$3,500;* then of course, under the statute, the sheriff should have required bail in double the amount, and the penalty of the bond would have been either $6,000 or $7,000. So in any point of view the bond required by the statute was not taken; or, to say the least of it, it is not shown by the evidence that it was according to the requirement of the law, or the order of the clerk.

If not the bond required, then it was and is illegal and void.

So far from the evidence showing that the bond was in accordance with the requirements of the statute, I am satisfied it shows affirmatively that it was not.

I must therefore disallow the claim, and sustain the order of the County Court, from which this appeal was taken.

Order sustained.

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

GEN. NO. 27,234. PENDING. DEC. 24, 1877. IN CHANCERY.

MARTIN *v.* FEE.

PRACTICE—*Motion for a restraining order—affidavit not entitled in the case, etc.—amendment.*—Where an affidavit is made and filed in a case, and duly entitled therein, before an amendment to the bill is made and filed, it is properly entitled in the cause and will stand as to a subsequent amendment. One good affidavit supporting the facts in the bill is sufficient to ground a motion for a restraining order.

Mr. KERR: Your honor, I wish an injunction or a restraining order.

Mr. KING: His bill is not good for anything. It is not verified. The so-called amendment is not embodied in it.

Mr. KERR: There are affidavits in support of the amendments.

Mr. KING: The amendment has no venue or jurat. You might as well file a newspaper.

FARWELL, C. J: He says that the facts herein stated are verified by affidavit.

Mr. KERR: We don't make any defense as to the title to these goods. They are simply pledged. One man has the custody and the other the warehouse receipts. What we want is to have the goods remain in *statu quo*. We want a restraining order for our protection.

Mr. KING: The affidavits are neither of them entitled in the case. The last don't appear to be entitled in either case.

FARWELL, C. J: What is the objection to the first affidavit?

Mr. KING: The objection to the first is that it is not entitled in the case; and to the second one, that it is not entitled in any court.

FARWELL, C. J: The first one is entitled in the case as it was before the amendment. This affidavit was made before the amendment in fact was made, and when the affidavit in fact was made, there was such a suit in court, so that they would be bound by the affidavit. He took leave to amend and did not amend. I think it will stand. If there is one good affidavit stating the facts, that will probably be sufficient. The first one, I think, is entitled in the case as it then was. He will be guilty of perjury if that was not true when made. I don't know why they can't use a paper filed in a case before the amendment. It would not be necessary, because of an amendment, to have the parties all sworn over again.

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SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

GEN. NO. 69142: PENDING DEC. TERM, 1877.

MAX STERN *v.* GEORGE EAGER ET AL.

PRACTICE—*Application to plead over in an action of debt on an appeal bond where there is a demurrer to the declaration.*—The privilege to withdraw a demurrer and plead over, will not be permitted unless there is an actual defense shown by affidavit. The affidavit must set up the extrinsic facts relied upon by the defense, before leave will be granted to amend in a case of this sort.

APPEAL BOND—*Dismissal of—new and sufficient bond.*—The 70th section of the Practice Act provides that where a good and sufficient appeal bond shall be filed within a reasonable time, to be fixed by the court, no appeal shall be dismissed by reason of any insufficiency or informality of such bond.

PHILIP STEIN, *Attorney for Plaintiff.*
RICABY & LANDIS, *Attorneys for Defendant, Curtis.*

Mr. LANDIS: Your honor, this is a demurrer to the plaintiff's declaration. I ask leave to withdraw the demurrer and file a plea.

GARY, J: I would not permit any pleading over unless there was an actual defense shown.

Mr. LANDIS: This was an action on an appeal bond, on an appeal to the Appellate Court.

GARY, J: Then you have got your objection on the record. If the bond is an invalid one, then you have your objection on the face of the record. If the question is one of law on the face of the bond, you don't need to plead over. If the question is one of fact, why then, unless he (plaintiff's counsel) consents, you can show by affidavit what the extrinsic facts are, before I can give leave to amend in a case of this sort. You will have to set up what the circumstances are in order to get leave to amend. The plea and the affidavit must be presented first.

Mr. LANDIS: I think this is a case where we ought to be allowed to plead over, etc.

GARY, J: I believe the declaration recites that the Appellate Court made a rule that you should file an additional and further appeal bond, which you did not do. Under the 70th section of the Practice Act, "Hereafter no appeal to the Supreme Court shall be dismissed by reason of any informality or insufficiency of the appeal bond, if the party taking such appeal shall, within a reasonable time, to be fixed by the court, file a good and sufficient appeal bond in such cause, to be approved by said court." Now the declaration avers that the case was taken to the Appellate Court, and that you did not file any *new* bond. Now whether the bond which procured the stay of execution from the time that the bond was filed by the Circuit Court until the appeal was dismissed in the Appellate Court is a binding obligation which may be collected from the defendants is a question of law which appears upon the record. You

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don't need to appeal. If it is bad, then upon the demurrer the judgment should be a bar to the defendants. So there is nothing to plead.

MR. LANDIS: We want to show wherein it is bad.

GARY, J: Whether it is good or bad appears on its face. If you have any case showing that the neglect to put in that bond to the first district—that is the apparent defect, that it don't recite an appeal to the first district,—it simply recites an appeal to the Appellate Court,—then I will hear you. If not, then let the demurrer be overruled and judgment go for the plaintiff. Leave to plead denied.

Motion denied.

PRACTICE—*Leave to reply double—replication de injuria, when allowable.*

COUNSEL: I ask leave to reply double.

GARY, J: Have you given any notice of the application to reply double?

COUNSEL: You gave me leave to reply.

GARY, J: I gave you leave to reply, but that was not a *double application*. Why don't you reply generally? The replication *de injuria* would be applicable in that case. Look in Smith's Leading Cases as to the replication *de injuria* as to the action of *assumpsit*. Crogate's case, 1 Smith's Leading Cases, part I, pp. 247-262. I don't make any order without notice to the other side. I don't give leave to reply double without notice. *Whenever there is necessity to apply to the court there must be notice to the other side.*

TROVER.—No affidavit of merits required in action of trover.

MR. COWEN: Your honor, 6360. I want to move the court for a default in that case for want of a plea and affidavit of merits. It is an action of trover.

GARY, J: There is no affidavit of merits wanted in an action of trover. The statute don't require it.

MR. COWEN: Yes, but there is a contract there your honor.

GARY, J: That don't matter. An action of trover can't be based upon a contract for the payment of money. There is nothing in that.

Motion overruled.

APPEAL.—To Superior Court by one defendant.

GARY, J: Where an appeal is taken to the Superior Court by one of several defendants, there must be *service* on the other defendants before you can proceed in that court.

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JANUARY 5, 1878. CASE PENDING.

CONTINUANCE—By stipulation of counsel after a suit is set down for trial by the court.

Plaintiff's counsel asked for a continuance until the following morning at 10 A.M.

GARY, J: The case has been set for trial and I have no right of my own motion to grant a continuance. If you will stipulate for a continuance you may arrange it between yourselves. If you will stipulate not to non-suit, the other side can safely consent to a continuance.

Mr. STORRS: We will stipulate not to non-suit or get beat either.

GARY, J: You had better stipulate not to non-suit first.

Mr. STORRS: We will, your honor.

EDITOR'S NOTES.

SECURITY FOR COSTS—*May be filed without leave first had.*—If a non-resident brings suit without filing a bond for costs, and afterward files one without first obtaining leave of court, this will be a substantial compliance with the law, and the denial of a motion to dismiss the suit amounts to leave to file the same. *Baker* v. *Palmer*, 83 Ill. 568.

PLEADING—*Plea of discharge under insolvent law.*—In an action on a foreign judgment, a plea of discharge under the insolvent laws of the foreign country, which fails to show that the order freed him from liability under the judgment, and fails to set out the foreign law, so that it can be seen whether the discharge was from the indebtedness or from imprisonment for debt, is entirely defective. Ib.

FOREIGN JUDGMENT—*Conclusive as evidence.*—A judgment of a foreign court having jurisdiction of the subject-matter and of the parties, is conclusive evidence in the courts of this state, and can be impeached only for fraud. Evidence to show that the plaintiff had no cause of action in a suit on such judgment, is inadmissible. Ib.

This is under the revision of 1874, p. 297, sec. 3. Formerly, under the act of 1827 (Rev. L. 1833, 165–6; Rev. Stat. 1845, 126), relative to costs, the court was required to dismiss the suit whenever a non-resident commenced an action without first having given security for costs. *Ripley* v. *Morris*, 2 Gilm. 381; *Hickman* v. *Haines*, 5 Gilm. 20. See also, *Smith* v. *Rosseter*, 11 Ill. 119. *Vide: Tarleton* v. *Tarleton*, 4 M. & S. 20; *Godard* v. *Gray*, L. R. 62, B. 139; *Castrique* v. *Imrie*, L. R. 411, L. 414; *Lozier* v. *Westcott*, 26 N. Y. 146.

CHANGE OF VENUE—*Excuse for not applying in vacation.*—Where a petition for a change of venue states that knowledge of the existence of the cause stated came to the applicants within the last preceding ten days, and on the hearing of the application, the party offered to prove, as an excuse for not applying to the judge at chambers, that he was absent from the circuit and engaged in holding court in Chicago during the preceding ten days, which the court refused to hear, and denied the motion: *Held*, that the excuse was sufficient, and that the court erred in refusing the evidence. *Harding* v. *Town of Hale*, 83 Ill. 501.

It is not within the letter or spirit of the statute, that a party desiring a change of venue shall be subject to the expense of following a judge, who may have left his circuit, for the purpose of obtaining such an order. Ib.

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APPELLATE COURT OF ILLINOIS.

RICHARD H. TEESSEN, ADMR. ETC., *v.* ELIZABETH CAMBLIN.

STATUTE OF LIMITATIONS—*New promise sufficient to take the case out of.*—Where a decree was offered in evidence on the part of the plaintiff, in a suit for divorce by the complainant against the defendant, dissolving the bands of matrimony existing between them, also awarding to the complainant the possession of the lands and some personal property which she formerly owned, and after reciting that the complainant "had stipulated that she should pay to K. the amount due upon the building of a house on said land," which decree was admitted against the defendant's objection; it was *held*, that this evidence, if properly admitted, failed entirely to establish a new promise to pay a debt barred by the statute of limitations, K. being a stranger to the record, and from anything that appears to the contrary, wholly unacquainted with the proceedings in that case. It was no promise to him, nor to any one acting on his behalf. This was necessary to prevent the bar of the statute. The promise must be made to the party seeking its benefit, or to some one authorized to act for them. A promise to a stranger is insufficient to establish a promise to the plaintiff or the party whom he represents.

SAME—*How the new promise should be considered.*—Notwithstanding a party may promise to pay a debt barred by the statute, still, if the promise is a conditional one, or the person promising it at the same time protesting against the payment of it, or that he has a set-off which ought to be deducted, such a promise is sufficient to take the case out of the statute. The promise to pay should be considered in connection with the refusal to pay, as well as the claim of set-off, and the whole admission taken together.

SAME—*Conditional promise.*—A promise to pay a debt barred by the statute when the promisor can, or is able, is a conditional promise, and cannot be enforced without proof of the means or ability to pay. *Held*, that this record is destitute of any such proof, and that the promise made was casual, and wrung from an illiterate woman, in unguarded moments, by two shrewd persons, one of them an attorney, who did the principal part of the talking; and that this did not amount to an absolute and unconditional promise, such as is necessary to sustain the action.

SAME—*Consideration.*—A previous consideration must be proven to sustain an action upon a new promise founded on a debt barred by the statute of limitations.

APPEAL FROM PEORIA COUNTY. Filed January 16, 1878.

S. D. PUTERBAUGH, *Attorney for Appellant*, cited: The court erred in permitting Frederick Koozier to testify as a witness on behalf of the defendant, his former wife. It was claimed on the trial below, and the court ruled, that he was rendered competent under the 5th section of the chapter entitled "Evidence and Dispositions." Rev. Stat. 1874, page 489. *Trepp* v. *Baker*, 78 Ill. 146; *Reeves* v. *Herr*, 59 Ill. 81. In England it has been held that no stranger to the consideration of an agreement could maintain an action on such agreement, although made expressly for his benefit. In this country the right of a third party to bring an action on a promise made to another for his benefit is generally asserted, and is the prevailing rule. *Hind* v. *Holdship*, 2 Watts, Penn. 104; *Arnold* v. *Lyman*, 17 Mass. 400; *Hall* v. *Morton*, ib. 575; *Hinkley* v. *Fowler*, 15 Me. 285; *Carnegie* v. *Morrison*, 2 Metc. 381. The case of *Bristow* v. *Lane*, 21 Ill. 194, is in point. The same rule has been recognized by the Supreme Court in this state in *Eddy* v. *Rob-*

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erts, 17 Ill. 505, and *Brown* v. *Strait*, ib. 89. *Vide: Delaware & Hudson Canal Co.* v. *The Winchester County Bank*, 4 Denio, N. Y. 97; *Farron* v. *Turner*, 2 A. K. Marshall, Ky. 496. Instructions must be based on the evidence. *Goodwin* v. *Durham*, 56 Ill. 239; *Holden* v. *Hulburd*, 61 Ill. 280; *Paulin* v. *Hauser*, 63 Ill. 312. The instructions of the court are required to conform to the pleadings as well as the facts in the case. *Keightlinger* v. *Eagan*, 65 Ill. 235; *Diversy* v. *Kellogg*, 44 Ill. 114; *Sickle* v. *Scott*, 56 Ill. 106.

I. E. LAMBERT, *Attorney for Appellee.*

SIBLEY, J., delivered the opinion of the court:

Uhtje Krefting brought his action in the Peoria Circuit Court against Elizabeth Camblin and Frederick Koozier, to recover for labor and materials furnished in the construction of a house upon Mrs. Camblin's land, about 1865; afterward the death of Krefting was suggested, and Richard Teesen, as administrator, substituted as plaintiff in place of the deceased, and the suit was dismissed as to the defendant Koozier. Mrs. Camblin filed pleas of *non assumpsit*, statute of limitations and notice of set-off. The notice of set-off was subsequently withdrawn and the cause proceeded to trial by a jury, upon issues formed upon these pleas, when a verdict was rendered for the defendant. Teessen appealed to this court, and assigns for error that the court below admitted improper testimony to go to the jury; gave improper instructions for the defendant, and refused to set aside the verdict and grant a new trial. The real question in the case was, whether there had been a new promise on the part of the appellee sufficient to take the case out of the statute of limitations (it being conceded that the original cause of action accrued more than five years previous to the commencement of the suit). The first evidence offered on the part of the plaintiff, on the trial in the Circuit Court, was a decree rendered by the Tazewell Circuit Court, March, 1871, in a suit for divorce by Elisabeth Koozier (now Camblin), complainant, against Frederick Koozier, defendant, dissolving the bands of matrimony existing between them; also awarding to the complainant the possession of the lands and some personal property which she formerly owned, and after reciting that the complainant "had so stipulated, in open court decreed, that she should pay to Grafton (who it seems was the same as Krefting) the amount due them upon the building of a house on said land." The decree was admitted against the defendant's objection. This evidence, if properly admitted (which we do not concede), failed entirely to establish a new promise on the part of appellee to pay Uhtje Krefting a debt barred by the statute of limitations, Krefting being a stranger to the record, and from anything that appears to the contrary, wholly unacquainted with the proceedings in that case. It was no promise to him, nor to any one acting on his behalf. This was necessary to prevent the bar of the statute. The court says in *Keener* v. *Crull and wife*, 19 Ill. 191, "the promise must be made to the party seeking its benefit, or to some one authorized to act for them. A promise to a stranger is insufficient to

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establish a promise to the plaintiff or the party whom he represents." *Kyle* v. *Wells*, 17 Penn. State, 12, 286; *Braidsford* v. *James*, 3 Strob, 12, 171; *Martin* v. *Brooch*, 6 Ga. 12, 21.

This doctrine is recognized and approved in *Norton* v. *Colby*, 52 Ill. 198, and again in *Caroll et al.* v. *Forsyth*, 69 ib. 128; *Watchen* v. *Albee*, 80 Ill. 47; *McGrew et al., exrs.*, v. *Forsyth*, ib. 596.

The authorities referred by the counsel for appellant on this branch of the case are not in point. They were suits brought upon original undertakings by a third party to pay for the benefit of the creditor the debt of the debtor, while the promise in the decree read in evidence, if promise at all, was made by the appellee to the party of record in that case to extinguish a liability then existing between her and a stranger to it.

The other evidence in the case to establish a new promise is contained in the testimony of the witness Daniel R. Sheen (who was afterward employed as attorney in the case), and Richard Teessen, the appellant, who, in April, 1877, called on appellee for the purpose of collecting this bill. The former says the items of the bill were read over to her, and that she at first refused to pay it because she had no money; we then offered to give her time if she would give her note; she said that she could not write, and would not give her note to anybody, etc. etc.; she said that I might sue if I wanted to, that I could not scare her, and "if you sue the bill, I will put in a bill for boarding his men." On his cross-examination he testified that she promised to pay the bill as soon as she could. The other witness testified to the conversation substantially as related by Sheen.

Leaving out of view the testimony of Mrs. Camblin, who swears positively that she never saw the bill, and never promised to pay it, is the evidence then, when taken altogether, sufficient to establish an absolute and unconditional promise such as the law requires to take a case out of the statute? We think not. Notwithstanding a party may promise to pay a debt barred by the statute, still, if the promise is a conditional one, or the person promising it at the same time protesting against the payment of it, or that he has a set-off which ought to be deducted, such a promise is sufficient to take the case out of the statute. The promise to pay should be considered in connection with the refusal to pay, as well as the claim of set-off, and the whole admission taken together. It was said in *Kemmel* v. *Schwartz*, Breeze, 281, that the promise to pay must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise. See also *Bell* v. *Morrison*, 1 Pet. 360. In *Read* v. *Wilkinson*, 2 Wash. C. C. R. 517, the court remark: "But anything added going to negative a promise or acknowledgment must be considered as qualifying every other expression, and as the whole must be taken together, it amounts to a refusal to pay which can never be construed into a promise to pay." Besides, Angell, in his work on limitations, 236, remarks on good authority that a promise to pay a debt barred by

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the statute when the promisor can, or is able, is a conditional promise, and cannot be enforced without proof of the means or ability to pay. This record is destitute of any such proof. Then does the evidence in this case, when considered in the light of the authorities, amount to an absolute and unconditional promise, such as is necessary to sustain the action? Clearly not, and the jury properly found for the defendant. They may, and doubtless did, conclude that whatever promise was made was casual, and wrung from an illiterate woman, in unguarded moments, by two shrewd persons, one of them an attorney who did the principal part of the talking. The error assigned respecting the admission of the testimony of Frederick Koozier (if an error at all, which may well be questioned, since he, although the husband of the appellee, when the indebtedness accrued, had at the time of the trial no interest whatever in the result of the suit), we do not deem it material to the merits of the case. The only portion of his testimony that was against the appellant related to the set-off, and inasmuch as that was out of the case, it worked no injury to him. The first instruction given by the court for the defendant, as we have shown, stated the law correctly, and the same may be said of the second.

That a previous consideration must be proven to sustain an action upon a new promise founded on a debt barred by the statute of limitations is so well settled as to render the citation of authorities in support of it quite needless. The fourth instruction given for the defendant was concerning a matter not before the jury, and hence irregular. But, as the jury could not well come to any other conclusion than the one arrived at, the instruction was harmless, therefore being satisfied with the verdict the judgment of the Circuit Court is affirmed. *Judgment affirmed.*

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD CO. *v.* SAMUEL MCMATH.

CONTRACT—*Permission to state particular facts relating to the execution of the contract in evidence.*—Where the court permitted the witness A, on his cross-examination, to answer whether B built that portion of the railroad lying between certain points, the witness having testified, on his examination in chief, that the road was built in January, 1871, from and to the points mentioned in the contract, it was held to be pertinent to allow him, on the cross-examination, to answer who built it, when and how it was constructed. There could be no objection, on cross-examination, to the inquiry of how many notes and how much he had collected upon transactions similar to the one in dispute, for the purpose of affording the jury the means of determining whether a person who had been engaged in many transactions of this nature would be as likely to remember the particular facts relating to the execution of the contract in evidence, as the other witness who had been connected with this one only.

SAME—*Witness a party in interest—discretion of the court.*—Where the witness was the party in interest, greater latitude is allowed on cross-examination than to a person wholly free from feeling or interest. This, however, is a matter

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greatly in the discretion of the judge who tried the case, to be exercised by him according to the circumstances in each particular case, and we cannot see wherein this discretion has been abused, or how the rights of the appellant have been prejudiced by the admission of the testimony. Nor do we see any serious objection in allowing the witness, when recalled, to state on his re-examination the reasons that induced him to make a proposition of settlement, if, as is indicated, a settlement had been the subject of a conversation.

NEW TRIAL—*Motion for, where no points are filed with the motion.*—An Appellate Court will take notice of nothing not specifically stated in the record as a ground of exception. No point, having been filed in the court below with the motion for a new trial, as required by the statute, we cannot now consider them, when for the first time they are made in this court, for the appellant is deemed to have acquiesced in the finding of the jury.

APPEAL FROM LA SALLE COUNTY. Filed January 16, 1878.

EDWIN U. LEWIS, *Attorney for Plaintiff*, cited: McMath cannot break the force of his acts of ratification and his seven years' consent by setting up ignorance of the law. It was his business to know that he could repudiate Whitfield's act in signing the subscription note if he wished. His ignorance on that point is no defense. Parson, Cont. 398. Ignorance of law is not a defense to an action of this kind, and would not be even in equity. See the following decisions: *Schæfer* v. *Davis*, 13 Ill. 395; *Campbell* v. *Carter*, 14 Ill. 286; *Gordere* v. *Downing*, 18 Ill. 492; *Wood* v. *Price*, 46 Ill. 439. A contract made by an unauthorized agent must be disaffirmed within a reasonable time. *Saveland* v. *Green*, 40 Wis. 16; Law Reg. 183. McMath's mere acquiescence was a ratification. *Francis* v. *Kerker*, No. 54. Filed at Ottawa, June 22, 1877. *Williams* v. *Merritt*, 23 Ill. 623. The latter case also establishes the fact that *acts* of ratification create a *conclusive presumption* of intention to ratify. It is no matter whether McMath *intended* to ratify Whitfield's act or not,—if his acts were in law ratification he cannot be heard to say that he did not *intend* to ratify. The presumption created by his acts is *conclusive*.

D. P. JONES, *Attorney for Appellee*, cited: The acts of McMath did not create an estoppel. In order to create an estoppel by conduct, all of the following elements must be present: (1) There must have been a representation concerning material facts. (2) The representation must have been made with a knowledge of the facts. (3) The party to whom it was made must have been ignorant of the truth of the matter. (4) It must have been made with the intention it should be acted upon. (5) It must have been acted upon. The representation must be external to, and not necessarily implied in, the transaction; and fraud or something tantamount thereto, is the distinctive character of this kind of estoppel. *The People* v. *Brown et al.*, 62 Ill. 436; Bigelow on Est. 437. 1st. McMath has not made any representations to the plaintiff, or any of its agents, or to Jackson, that he authorized or affirmed the act of Whitfield in signing the firm name to the contract, or from which they had a right to infer that he had authorized or affirmed it. A representation to be sufficient to create an estoppel must be plain, and not a mere matter of inference or opinion. *Certainty* is essential to all estoppels. The courts will not easily suffer a man to be deprived of his property or security where he had no intention to part with it. Bigelow on Est. 441; *Preble* v. *Conger*, 66 Ill. 370. The conduct and declarations of McMath were not such as would naturally lead to the belief that he authorized or intended to confirm the execution of the contract by Whitfield. Bigelow on Est. 441; *Hefner* v. *Vanderlah*, 62 Ill. 525. The declarations of McMath were not made to the appellant or its agents or privies, and they

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cannot take advantage of them. Bigelow on Est. 442. 2d. McMath acted in ignorance of the facts and of the law. The execution of the contract having been obtained by fraud, the representations of McMath made while he was ignorant of that fact would not estop him even if had made the representations with the full intention of ratifying the contract and allowing the appellant to act upon them. Bigelow on Est. 450; *Wilcox* v. *Howell*, 44 N. Y. 401. Nor do representations made under a mistake of the law estop the party making them. *Charleston* v. *Co. Com'rs*, 109 Mass. R. 270. 3d. McMath did not *intend* that his acts and declarations should be acted upon as a ratification of the contract. To conclude, a party by an equitable estoppel, or estoppel *in pais*, there must be fraudulent purpose of the party against whom it is applied, or his acts must produce a fraudulent result, and there must be a change of conduct induced by the act of the party estopped to the injury of another in order to prevent him from showing the truth. If the element of fraud or injury is wanting there is no estoppel. *Flowers et al.* v. *Elwood*, 46 Ill. 447; quoting *Davidson* v. *Young*, 38 Ill. 145, *Smith* v. *Newton*, ib. 230. There was no consideration for the indorsement of $126 on the contract. It was not a payment but a mere voluntary release of a part of the appellant's claim. There was no express agreement to pay any portion of the claim in consideration of the release of the remaining portion, and no such agreement can be implied from the acquiescence of McMath in the indorsement, if there was such acquiescence. 4th. Neither appellant nor Jackson relied upon any representation or act made or done by McMath. All of the acts and declarations by which it is claimed he ratified the contract, were done and made after the contract was executed and delivered. Declarations made by the alleged maker of a note after it has been executed or purchased do not estop him from contesting the validity of the note in the hands of the payee or purchaser. In order to create such an estoppel the party estopped must have induced the other party to occupy a position he would not have occupied but for such declarations. *Hefner* v. *Vandolph*, 57 Ill. 524. Jackson having, by fraud, procured Whitfield to execute the contract in the name of the firm, and having concealed that fact from McMath, does not stand in a position to enforce an estoppel against McMath. He cannot take advantage of his own wrong. The doctrine of estoppel concerns conscience and equity, and the party that would avail of it must, himself, have acted in good faith toward the party on whose conduct he relied, or it will not constitute a bar to the assertion of the truth. *Hefner* v. *Vandolph*, 57 Ill. 525. Sec. 87 of the Practice Act of 1857 directs that: "If any final determination of any cause . . . shall be made by the Appellate Court as the result wholly or in part of the finding of the facts concerning the matter in controversy, different from the finding of the court from which such cause was brought by appeal or writ of error, it shall be the duty of the Appellate Court to recite in its final order, judgment or decree, the facts as found, and the judgment of the Appellate Court shall be final and conclusive as to all matter of facts in controversy in such cause."

SIBLEY, J., delivered the opinion of the court:

This action was brought by the Ottawa, Oswego & Fox River Railroad Company, for the use of *Joseph Jackson* v. *Samuel McMath*, on a contract purporting to be executed by him and his copartner, Volutfield, to pay the said railroad company $1,000 when the iron was laid on the roadbed from Wenona, in Marshall county, to within one-half a mile of Milford, in certain installments, and to receive in consideration thereof an equal amount of the capital stock of the

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railroad company. There were three special counts in the declaration declaring upon the contract, and a plea of the general issue filed by the defendant, sworn to denying the execution of the instrument sued on. The trial before the court and jury resulted in a verdict for the defendant. A motion was made by him for a new trial and overruled by the court. No reasons were filed with the motion specifying the grounds for it. The plaintiff appealed to this court and has assigned several errors for reversing the judgment. The first two of which are substantially the same and are pointed out in his brief. First, that the court below erred in permitting the witness Jackson, on his cross-examination, to answer whether the Vermilion Coal Company built that portion of the railroad lying between Streator and Wenona. He having testified, on his examination in chief, that the road was built in January, 1871, from and to the points mentioned in the contract, it would seem to be pertinent to allow him, on the cross-examination, to answer who built it, when and how it was constructed. There could be no objection, on cross-examination, to the inquiry of how many notes and how much he had collected upon transactions similar to the one in dispute, for the purpose (if nothing else) of affording the jury the means of determining whether a person who had been engaged in many transactions of this nature would be as likely to remember the particular facts relating to the execution of the contract in evidence, as the other witness who had been connected with this one only. The question that he was permitted to answer, as to whether the road was owned and constructed by the O. O. & F. R. V. R. R. Co., may not have been quite so pertinent to the issue. But the witness was the party in interest, and in such and like cases greater latitude is allowed on cross-examination than to a person wholly free from feeling or interest. This, however, is a matter greatly in the discretion of the judge who tried the case, 1 Greenl. 456, to be exercised by him according to the circumstances in each particular case, and we cannot see wherein this discretion has been abused, or how the rights of the appellant have been prejudiced by the admission of the testimony. Nor do we see any serious objection in allowing the witness when recalled to state on his re-examination the reasons that induced him to make a proposition of settlement, if, as is indicated, a settlement had been the subject of a conversation.

There being no error assigned on the record for the action of the court in giving or refusing instructions to the jury, the only remaining question to be considered is, whether the court erred in overruling the appellant's motion for a new trial.

In ch. 110, sec. 57 of the Rev. Laws of 1874, will be found the following words: "If either party may wish to except to the verdict, or for other causes to move for a new trial, or in arrest of judgment, he *shall*, before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court."

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It is obvious that this provision of the statute was intended to require the party that made the motion to direct the attention of the court to the specific reasons for granting a new trial. If as now insisted by counsel, that the verdict of the jury was against the law and the evidence, and the attention of the court had been called to that specific objection, it would doubtless have sustained the motion. How could the court know, under that general request, whether the causes for it were misconduct or error of the jury, newly discovered evidence, or various other reasons that may be assigned for a new trial, was the subject of the complaint?

Previous to the act of 1872, the person moving for a new trial was only required to give the opposite party the points in writing, particularly specifying the grounds for such motion. This change in the law would appear to indicate that something further was necessary to be done before the party making the motion would be in a condition to urge his objections to the verdict, and that was to file the points particularly specifying the grounds to be relied on. If this is not done the court might very properly treat the motion as waived. Aside from any such statute as this it was ruled in *Taylor* v. *Geger*, Hardin 586, *Reed* v. *Mullen*, 1 Bibb. 142, *Goldsburg* v. *May*, 1 Litt. 254, *Brown Ex.* v. *Swan*, 1 Mass. 202, that the grounds for the application for new trial should be filed with the motion in order to give the opposite party an opportunity to meet them, and none other ought to be considered by the court. So in *Emory* v. *Addis*, 71 Ill. 274, and *Jones* v. *Jones*, ib. 562, in the latter case it is said: "On the motion for new trial in the court below there was no objection urged that the damages were excessive. That was not stated as a ground for setting aside the verdict. The court below not being asked to do so, had the right to suppose that appellant acquiesced in the amount of the finding, but relied on the grounds specified alone for a new trial."

That an Appellate Court will take notice of nothing not specifically stated in the record, as a ground of exception, seems to be well settled. In *Whiteside* v *Jackson*, 1 Wend. 419, the court states the rule to be well settled that on a bill of exceptions the party excepting is confined to the points excepted to. *Dean* v. *Gridly*, 10 Wend. 254, *Pechett* v. *Allen*, 10 Conn. 141, *Hide* v. *Langworth*, 11 Wheat. 199, *Neusum* v. *Neusum*, 1 Leigh, 86, *Cox* v. *Field*, 1 Green, 215. No point, having been filed in the court below with the motion for a new trial, as required by the statute, we cannot now consider them when for the first time they are made in this court, for in the language of Mr. Justice Walker, in *Jones* v. *Jones*, the appellant is deemed to have acquiesced in the finding of the jury; therefore the judgment of the Circuit Court is affirmed. *Judgment affirmed.*

LELAND, P. J., took no part in this decision of this case.

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ABRAM A. WILLETTS ET AL. *v.* THOMAS G. WOODHAMS ET AL.

HIGHWAY—*Equity jurisdiction to prevent taking private land for public use.*—A court of equity has jurisdiction to afford preventive relief by injunction where commissioners of highways are threatening to appropriate a man's land to the use of the public for a highway, when there is no highway.

SAME—*Continuing trespass—ground of jurisdiction.*—Proposed acts of this kind would constitute a continuing trespass and might cause irreparable injury; hence the necessity of the exercise of such jurisdiction. This jurisdiction must, however, in the first instance, rest upon the necessity for an injunction.

INJUNCTION—*Preventive relief in case of tort.*—Preventive relief by way of injunction in case of tort, like waste and trespass, is the primary equity; and if the threatened danger be not real and its prevention urgent, the jurisdiction will not attach, but the party will be left to the courts of law to settle his legal right. A party seeking relief by way of injunction must specifically pray for such relief, otherwise the court will not aid him.

DEMURRER—*To bill, where there is no prayer for relief.*—The bill here is for preventive relief, without any prayer for injunction. *Held*, the court below properly sustained the demurrer, but under the admitted allegations of the bill we deem it advisable to so modify the decree of the court, that the dismissal of the bill shall be without prejudice to complainants if the defendants shall attempt to put their threats into execution.

*ERROR TO MERCER COUNTY. Filed January 16, 1878.

BASSETT & WHARTON, *Attorneys for Plaintiffs in Error*, cited, as to cloud upon title: *Alexander et al* v. *Pendleton*, 8 Cranch's R. 462; *Rucker* v. *Dooley et al.*, 49 Ill. 378; *Conklin* v. *Foster*, 57 Ill. 104; *Smith* v. *Hickman*, 68 Ill. 314; *Moore* v. *Munn*, 69 Ill. 591; *Connell* v. *Watkins*, 71 Ill. 488; *Groves* v. *Webber*, 72 Ill. 606; *Phillips* v. *Pitts*, 78 Ill. 72; *Sea* v. *Morehouse*, 79 Ill. 216; Story's Eq., vol. 2, secs. 928 and 929; *Green* v. *Green*, 34 Ill. 320; *McIntyre* v. *Storey*, 80 Ill. 127; *The People* v. *City of St. Louis*, 5 Gilm. 351; Story's Eq., vol. 2, sec. 923-924, and n. 35, sec. 929; Eden on Inj., p. 259-262; Gross' Stat. of 1872, ch. 382, sec. 1; see Rev. Stat. of 1874, ch. 121, sec. 1, p. 913; also Laws of 1877, p. 178.

PEPPER & WILSON, *Attorneys for Defendants in Error*, cited: *Gentleman* v. *Soule*, 32 Ill. 271; *Hamilton* v. *Stewart*, 59 Ill. 331.

PILLSBURY, J., delivered the opinion of the court:

Bill in equity filed by the complainants, Abram A. Willett, Charles W. Swanson and William Fry, alleging that they respectively were owners of certain lands in Mercer county, and that there had been a trail or pathway used occasionally over said lands, varying from year to year as to location and use for the period of eight or ten years prior to the year A.D. 1874, the lands prior to said year being vacant and unoccupied. That in that year the said complainants inclosed their respective lands with substantial fences, erecting gates for their own convenience where said pathway crossed the line of their respective fences, and permitted other persons to pass through said gateways.

That in the year A.D. 1873 the commissioners of highways for Rivoli township, claiming that said pathway had been used as a public highway for twenty years, caused a survey to be made of the

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same by right of prescription, and caused the same to be recorded as a public highway.

The bill further alleges that Thomas G. Woodhams, Sidney Dwiston and J. G. Sextan, commissioners of highways for the township of Rivoli, are threatening to break down and remove the fences of complainants, and throw open their inclosures to the public; and that Thomas Surplus, pretending to act as overseer of highways or as agent of said commissioners, did on the sixth day of August, A.D. 1877, remove the gates and fences that inclosed the said land of complainant, Abram A. Willett; and is threatening to remove it again, said Willett having rebuilt the said fences and gates. Alleges that there is no public highway over said lands either by location, dedication, prescription or, *or* otherwise, and prays for answers, and that, upon final hearing, defendants may by decree be restrained from removing the gates and fences, and that said survey may be declared illegal and void.

Demurrer was interposed to said bill by defendants, which was sustained by the court and the bill dismissed, whereupon the complainants sued out the writ of error herein. The jurisdiction of a court of equity to afford preventive relief by injunction where commissioners of highways are threatening to appropriate a man's land to the use of the public for a highway, when there is no highway, is clear and undoubted. *Green* v. *Green*, 34 Ill. 320; *McIntyre* v. *Story*, 80 Ill. 127.

Proposed acts of this kind would constitute a continuing trespass and might cause irreparable injury, hence the necessity of the exercise of such jurisdiction. This jurisdiction must, however, in the first instance, rest upon the necessity for an injunction. Hilliard on Inj., sec. 9.

Preventive relief by way of injunction in case of tort, like waste and trespass, is the primary equity; and if the threatened danger be not real and its prevention urgent, the jurisdiction will not attach, but the party will be left to the courts of law to settle his legal right.

A party, therefore, seeking relief by way of injunction, must specifically pray for such relief, otherwise the court will not aid him. Lubis, Eq. Pl., page 74; Story, Eq. Pl., sec. 41; *Savory* v. *Dyer*, Rmb. 70; *Wood* v. *Bradell*, 3 Sim. 273; 2 Green's Ch. Dec. 245; Dan. Ch. Pr., pages 447 and 1834.

In *Lewiston Falls Mfg. Co.* v. *Franklin Co.*, 54 Maine, 402, the bill alleged that the defendants stopped the water of the river from flowing to complainants' mills by closing gates and sluiceway, erected by defendants above the mills of complainants, thereby wrongfully depriving complainants of the use of said water greatly to their loss and injury. Further, that respondents ought to be compelled forthwith to open said gates and sluiceway, and be forever restrained from closing the same; and opposing any other obstruction to a free and full flow of the water to their mills by injunction.

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Prayer for answer and general relief before demurrer to the bill, the court say: "The only relief sought to be obtained by this bill is by way of injunction. The bill, however, does not specifically pray for an injunction. The law seems to be well settled in such case. The prayer for an injunction must not only be in the prayer for relief, but in the prayer for process.

"When a bill prays for relief by way of injunction, but does not pray for the process of injunction, the process cannot be granted."

These authorities are decisive of the question in this case. The bill here is for preventive relief, without any prayer for injunction.

The court below properly sustained the demurrer, but under the admitted allegations of the bill we deem it advisable to so modify the decree of the court, that the dismissal of the bill shall be without prejudice to complainants if the defendants shall attempt to put their threats into execution.

The decree of the court will, therefore, be modified to that extent, and each party will pay their own costs in this court.

Decree modified.

EDITOR'S NOTES.

HIGHWAY—*Laying out, a mixed question of law and fact.*—An instruction is erroneous which leaves it to the jury to determine whether a public highway was laid out, without calling their attention to the steps necessary to the laying out of the same. The question is a mixed one of law and fact, and not purely of fact. Ib.

SAME—*Evidence of, as to its location, etc.*—The fact of a party signing a petition for a road, has no tendency to show where it was located with reference to a fence claimed to be an obstruction, nor to show that he dedicated land to the public to widen the road, when the proof shows he then did not own the same. Ib.

SAME—*Of its dedication.*—A party not having title to land cannot dedicate any part of it to the public for a road; and proof that a person in building a fence left ground for such road, without proof of title in him to the land, is no evidence of a dedication. Ib.

HIGHWAY.—Any obstruction of a public highway for an unreasonable length of time, however lawful the business, is indictable as a public nuisance, although room might still be left for the accommodation of the public. *Davis* v. *Mayor N. Y.*, 14 N. Y. 525; *King* v. *Russell*, 6 East. 427; *King* v. *Ward*, 4 Ad. & El. 384; *Fowler* v. *Saunders Cro.*, James, 446; *Rex* v. *Carlisle*, 6 Carr & Payne, 636; *Commonwealth* v. *Passmore*, 1 S. & R. 219; *King* v. *Moore*, 3 Banne & Adolph, 184.

AUGUSTUS M. VANDERSLICE *v.* SOLOMON H. MUMMA.

CONTRACT—Where A agreed that he would plow and sow a certain tract of land, would harvest and thresh the grain and deliver one-half to B, and B contended that A agreed that if he did not remain on the farm B was to have the grain and pay A for his work and labor, it was *held*, that A was entitled to recover what one-half the grain was worth when severed.

APPEAL FROM PUTNAM COUNTY. Filed January 16, 1878.

W. H. CASSON & F. S. POTTER, *Attorneys for Appellant*, cited: *Alwood* v. *Ruckman*, 21 Ill. 200; *Creel* v. *Kirkham*, 47 ib. 244; *Warner* v. *Hoisington*, 42 Vt. 94;

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Hilman v. *Mehlgarten*, 19 Ill. 91; *Bates* v. *Courtwright*, 36 ib. 520; *Tripp* v. *Grouner*, 60 ib. 474; *Dyckman* v. *Valentine*, 42 N. Y. 561; *Daniels* v. *Brown*, 34 N. H. 454; 2 Hilliard on Torts, 135; *Tittsworth* v. *Stout*, 49 Ill. 78; *Hall* v. *Piddoch*, 21 N. J. Eq. 311; *Bruner* v. *Dyball*, 42 Ill. 36; *Williams* v. *Bemis*, 108 Mass. 91; Rev. Stat. 1874, ch. 80, sec. 31 and 33; *Secrest* v. *Stevens*, 35 Ia. 580; *Kœster* v. *Esslinger*, 44 Ill. 476; *Haycroft* v. *Davis*, 49 ib. 455; *Alwood* v. *Ruckman*, 21 Ill. 200; *Oreel* v. *Kirkham*, 47 Ill. 344; *Appling* v. *Odorn*, 46 Ga. 583; *Warner* v. *Hoisington*, 42 Vt. 94.

BANGS, SHAW & EDWARDS AND FRANK WHITING, *Attorneys for Appellee.*

LELAND, P. J., delivered the opinion of the court:

This was an action commenced by appellee before a justice of the peace of Putnam county, against appellant, in September, 1877. The summons was in the usual form. On the trial, however, before the justice, the plaintiff claimed, according to the transcript, $200 for trespass, and the defendant plead not guilty. On the trial in the Circuit Court in October last, the case was considered one in trespass, and the court, at the request of the appellant, instructed the jury that appellee could not recover for his labor, but would have to seek his remedy in some other form of action.

The appellant was the owner of land, and the appellee had occupied a portion of it as tenant during the year 1874. On the portion not occupied by the tenant appellant had, in the fall of 1874, done some plowing, and had commenced to sow it with rye. The land intended for rye was about thirty-five acres. This arrangement was thereupon made: It was agreed that appellee should complete the plowing and sowing of the thirty-five acres; should harvest and thresh the grain and deliver one-half to appellant in his granary and retain one-half for himself; appellant was to furnish a hand to help harvest. So far the parties agree. Appellant, however, contends that it was agreed that if appellee did not remain on the farm appellant was to have the rye and pay appellee for his work and labor. Appellee, in the winter next after the sowing, moved into a house of his own in Granville, not far from the land.

The only real point of controversy was, whether appellee or appellant had the right to harvest and thresh the rye. Appellant claimed that the arrangement was that if appellee left the farm, appellant might harvest and thresh the grain and pay appellee for his labor, and that appellee had acquiesced in such arrangement. Appellant harvested and threshed the rye, claiming the right to do so. Appellee denied that there was any such arrangement that he might do it. It is clear that appellant claimed to harvest and thresh the rye because he had the right to, for the reason aforesaid.

There is nothing tending to show that appellee having the right had voluntarily abandoned it and neglected to cut the rye, though it was his right and duty to harvest it. Appellee claimed that he intended to harvest it, and that appellant wrongfully did it without giving him an opportunity. The gist of the controversy therefore being, which one had the right to harvest it under the agreement of

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the parties. The instructions asked for by appellant, and refused, on the subject of abandonment of the rye and the right of appellant to save it because of the abandonment and neglect of appellee, were properly refused as unnecessary and perhaps irrelevant. The fifth instruction given on the part of appellant was all that was necessary. This was to the effect that if in case appellee left the farm, appellant was to own and harvest the crop and pay appellee for his labor. Appellee could not recover anything in this action. There may be error in that part of the instruction which states, as to the claim of appellee for labor, that he would have to seek his remedy in some other form of action, but this, if so, was an error to the prejudice of the appellee. The third refusal, instructions of appellant, is merely to the effect that, by the original arrangement, the relation of the parties was not necessarily that of landlord and tenant. We do not think it important whether this was so or whether the relation was that of tenants in common, as contended for by appellant, under the authority if the case of *Alwood* v. *Rackman*, 21 Ill. 200. By it, by whatever name called, appellee, if right in his view of it, was to have the control of the grain till he harvested, threshed and delivered one-half to appellant, and if the latter wrongfully harvested the grain against the will of the former, and appropriated it all to his exclusive use, he would be a trespasser, and appellee would be entitled to recover one-half the value of it when severed. It is said that it depends on the intention as to whether the relation is that of landlord and tenant, or tenants in common in cases like the present one. It might perhaps appear to appellant's counsel that the former relation was intended, if it was desired to distrain under sec. 29 of ch. 80, Rev. Stat., for rent due payable in products, if appellee after threshing, should appropriate what is usually called the landlord's share to his own use. If the relation was that of tenants in common, trespass or trover might be maintained for the appropriation by appellant of the rye to his exclusive use against the will of appellee. Rev. Stat. ch. 76, and the decisions of the Supreme Court under it in the 13 and 28 Ill. and elsewhere. It may be that the measure of damages, as laid down by the court below, was wrong in an action of trespass. The court instructed that it was the full value of the rye when threshed, deducting the landlord's share, allowing him nothing for the expense of harvesting and threshing. The rule in trespass would seem to be the value of the rye with the straw immediately after it was severed from the land. *Robertson* v. *Jones et al.*, 71 Ill. 405. If the threshed rye had been demanded and appellant had refused to deliver, the measure would be as laid down below. So perhaps if sold and converted into money, the tort could be waived and the money recovered. Notwithstanding the instruction, however, and it may be because of the limit of the jurisdiction of the justice to $200; the jury have not allowed more than what the value of the rye was when severed from the land; we think, according to the decided weight of the evidence, less than it was proved to be worth when severed. We do not deem it necessary to recapitu-

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late it all. Appellee says the half was worth $300 threshed, $200 standing. Jacobs says that there were 780 bushels when threshed, that it was then worth 75 cents a bushel. Jacobs says appellant told him he got 75 cents for the first lot sold, and appellant, though a witness, says nothing on the subject. Livingstone says 55 or 60 cents. Take any reasonable view of the evidence, and the jury came to the jurisdiction at limit of $200 before they had allowed all the actual damages under the rule of the value of the rye with the straw when severed from the land. As the trial in the Circuit Court was *de novo*, appellee could, we think, recover whatever the evidence entitled him to, without regard to the form of action. *Mompen* v. *Satton*, 51 Ill. 213, but it is not necessary to determine this in this case. It does not matter whether the relation was that of landlord and tenant or tenants in common. The appellee was clearly entitled to recover what one-half the rye was worth when severed, if the appellee and not the appellant had the right to harvest and thresh it, and if appellant wrongfully prevented him from so doing, and appropriated the whole of it to his own use, to the exclusion of appellee. This must have been so found by the jury, or they could not have otherwise found for appellee under the ruling of the court below, and this was the only real controversy in the case. We cannot say the verdict was against the weight of the evidence, and distrust it for that reason. Whether appellant or appellee had the right to harvest and thresh was the question before the jury. They have decided it in favor of appellee, and that must terminate the matter, even though the jury may not have arrived at the right conclusion. Though there may have been some erroneous rulings below, they are not of a character requiring that the judgment should be reversed, and the case tried again. *Judgment affirmed.*

THE CITY OF MENDOTA v. MARY F. FAY.

NEGLIGENCE—*Personal injury—sidewalk.*—In such action it must affirmatively appear from the evidence that the defendant was negligent, and that at the time of the injury the plaintiff was in the exercise of due care.

DUE CARE.—Due care is that degree of care that a reasonable and prudent person would exercise under all the circumstances of the case. It is a question of fact, and not a presumption of law.

BURDEN OF PROOF.—The burden of proof is upon the plaintiff to affirmatively show, in the first instance, that he was exercising due care at the time of the injury. Due care must appear affirmatively, as a fact in the case; otherwise, independent proof must be introduced upon that point.

PRESUMPTION.—Whatever fact is presumed by the law to exist in a given case is, in the absence of proof overcoming such legal presumption, established, and the jury can find the fact from such presumption alone. The party, therefore, against whom such presumption arises must overcome the same by evidence, or the presumed fact will be found against him; or if the evidence be equally balanced, the presumption prevails, and the like result must follow.

INSTRUCTION.—Where a jury were authorized by an instruction to find the existence

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of the fact of due care from the legal presumption alone, without proof, the instruction was erroneous.

APPEAL FROM LA SALLE COUNTY. Filed January 16, 1878.

BUSHNELL, GILMAN & COOK and G. S. ELDREDGE, *Attorneys for Appellant*, cited: There was such contributory negligence on the part of appellee as to absolutely bar a right of recovery for the alleged injury. *City of Centralia* v. *Crouse*, 64 Ill. 19; *City of Aurora* v. *Palfer*, 56 Ill. 270; *C. & A. R. R. Co.* v. *Becker*, 76 Ill. 25; Warton on Negligence, secs. 130-300; *C. & A. R. R. Co.* v. *Jacob*, 63 Ill. 178; *C. & A. R. R. Co.* v. *Gretzner*, 46 Ill. 74; *C. B. & Q. R. R. Co.* v. *Lee*, 68 Ill. 578; *City of Quincy* v. *Barker*, 81 Ill. 300. The verdict should be set aside. Where it is apparent that a necessary element to sustain the case is wanting, it is the clear duty of the court to give such an instruction to the jury as will necessitate a finding for the defendant; or to set aside the verdict if rendered in favor of the plaintiff. *Wilds* v. *H. R. R. Co.*, 24 N. Y. 432; *Johnson* v. *H. R. R. Co.*, 20 N. Y. 65; *Warner* v. *N. Y. C. R. R. Co.*, 44 N. Y. 465; *C. & N. W. R. R. Co.* v. *Coss*, 73 Ill. 394; *Parker* v. *Adams*, 12 Met. (Mass.) 415; *Lane* v. *Crombie*, 12 Pick. 177-8; *Moore* v. *R. R. Co.*, 4 Zabriskie, 284; *Button* v. *H. R. R. Co.*, 18 N. Y. 257, and authorities cited. The record failing to show any evidence of the exercise of proper care on the part of appellee, but, on the contrary, negligence on her part being established by her own evidence, the rule is well settled that the appellant was not liable. *Spalding* v. *C. & N. W. R. R. Co.*, 33 Wis. 591; *Jackson* v. *Betts*, 9 Cowen, 225; *C. R. I. & P. R. R. Co.* v. *Austin*, 69 Ill. 426. An instruction as to what the presumption of law is upon a disputed question of fact is erroneous. *Guardian etc. Ins. Co.* v. *Hoban*, 80 Ill. 35; *Sparhook* v. *City of Salem*, 1 Allen, 30. Cities and towns are under no obligation to light highways. *Randall* v. *Eastern R. R. Co.*, 106 Mass. 276; *Newcomer* v. *City of Taunton*, 100 Mass. 255.

L. B. CROOKER and CHARLES BLANCHARD, *Attorneys for Appellee*, cited: *City of Quincy* v. *Barker*, 81 Ill. 303; *City of Joliet* v. *Verlly*, 35 Ill. 58; *City of Bloomington* v. *Bay*, 42 Ill. 509; *Emory* v. *Addis*, 71 Ill. 275; *Jones* v. *Jones*, 71 Ill. 562; Laws of 1872, 347, sec. 56.

PILLSBURY, J., delivered the opinion of the court:

Action by appellee against appellant to recover damages for injuries received by her through the alleged negligence of the city in the construction of a sidewalk.

Trial was had in the court below, and verdict in favor of appellee for $1,200.

Judgment was rendered thereon by the court, and the city appeals.

Motion for a new trial was made in the court below, but no points in writing were filed as required by the 56th section of the Practice Act, and the objection is here interposed by appellee, that in such case we cannot examine the errors assigned, questioning the action of the court below in overruling such motion.

Viewing the case as we do, it is unnecessary to determine whether this court will review the action of the court below in not setting aside the verdict for errors of the jury when no points are filed particularly calling attention to such errors.

Errors of the court below are always subject to review upon

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appeal, when its action is preserved by bill of exceptions properly taken during the progress of a trial, although a motion for a new trial be not made.

This was the established practice prior to the statute of 1837, allowing parties to assign for error the overruling a motion for a new trial.

The same rule is still in force. *Smith* v. *Gillett*, 50 Ill. 290. In that case the court below excluded all the evidence from the jury, and the plaintiff excepted to the action of the court in that regard, and although no motion was made for a new trial, the Supreme Court considered the error assigned, and reversed the judgment.

The court say: "It is error of law of which appellant complains, and to which he excepted at the proper time. No question whatever is made upon the propriety of the verdict, but upon the action of the court. Surely such errors can claim and receive the attention of the Appellate Court as errors of law which a motion for a new trial could not have reached or remedied."

In *McClurkin* v. *Ewing*, 42 Ill. 283, it was held that if the bill of exceptions shows that exception was taken to the giving of instructions, the ruling in that regard may be assigned for error, although it does not appear upon what grounds the motion for a new trial in the court below was based.

Such being the rule, it is clear that the Appellate Court must examine the evidence in the record in order to determine whether the court erred in the admission or exclusion thereof, or in instructing the jury properly upon the issues raised thereon.

In this action, to entitle the plaintiff to recover it must affirmatively appear from the evidence, first, that the defendant was negligent, and second, that at the time of the injury the plaintiff was in the exercise of due care of her personal safety.

Due care is that degree of care that a reasonable and prudent person would exercise under all the circumstances of the case.

Examination of the evidence in this record discloses a very sharp conflict upon the question whether the injury received by appellee was not the result of her own negligence; and the jury could have found either way upon that point, without doing violence to the testimony.

In such state of the evidence it is essential that the jury should be accurately instructed. *C. B. & Q. R. R. Co.* v. *Van Patten*, 64 Ill. 510.

Upon the trial below the appellant asked the court to give the following instruction to the jury:

"The jury are instructed that in order that plaintiff should recover in this case, it should appear that at the time of the alleged injury she was exercising ordinary care to avoid injury, and that it was owing to the improper and unsafe manner in which said sidewalk and street crossing in question, at the intersection of Main street with the crossing, was constructed, that she was injured." This instruction was modified by the court adding thereto the

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words, "If, however, there is no proof of a want of care on the part of plaintiff, it should be presumed that she was careful rather than that she was careless."

To which modification the appellant at the time excepted, and assigns the same for error in this court.

While this instruction was not strictly formal, in that it did not require it to appear "from the evidence" that she was careful, yet we are forced to the conclusion that the learned judge erred in attaching thereto the above modification, and then giving it to the jury. Whether the plaintiff was at the time of the injury exercising due care, under all the circumstances, was a question of fact for the jury to find from the evidence, the law presuming nothing in that regard.

Although the decisions are somewhat conflicting, we believe the decided weight of authority is that the burden of proof is upon the plaintiff to affirmatively show, in the first instance, that he was exercising due care at the time of the injury.

In 21 Pick. 147, it was held, "that, to maintain an action upon the statutes for damages, occasioned by want of repair, two things must concur, first, that the highway was out of repair, and secondly, that the party complaining was driving with ordinary care and skill.

"Otherwise, although the way be out of repair, it would not follow that the plaintiff's loss was occasioned by it. Such being the facts necessary to establish plaintiff's case, the burden of proof is, of course, on the plaintiff to show not only defects in the highway, but that he was using due care and skill."

The same court, in a case in many respects like this, say: "It is well settled that *that* the burden was on plaintiffs to show that Mrs. Wilson used ordinary care." *Wilson and Wife* v. *City of Charleston*, 8 Allen, 138; and in *Allyn* v. *Boston & Albany R. R. Co.*, 105 Mass. 77, the court is even more emphatic. "The burden is upon him, the plaintiff, to show affirmatively that he was exercising due care. The question of due care is generally for the jury to determine, but where the uncontroverted facts in a case show negligence on the part of plaintiff, or where there is no evidence to show that he used due care, it is the duty of the court to instruct the jury to return a verdict for the defendant."

It is not intended to establish as an absolute rule, in all cases, that the plaintiff must introduce independent evidence of due care upon his part, but that it must appear affirmatively, as a fact in the case; and if from all the facts and circumstances in proof surrounding the transaction it thus appears, it will be sufficient; otherwise independent proof must be introduced upon that point.

In case of *Warner* v. *The N. Y. Central R. R. Co.*, 44 N. Y., the judge below charged the jury that the plaintiff will be presumed to be free from fault if nothing else appears in the case, because it cannot be supposed that a man would bring an injury upon himself. The Court of Appeals, in passing upon this charge, say: There is no presumption of negligence against either party.

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"It is the duty of the plaintiff to prove, and the right of the defendant who is charged with negligence causing an injury that he should prove by satisfactory evidence that he, the plaintiff, did not contribute to the injury by any negligence upon his own part. This proof, in some form, constitutes a part of plaintiff's case. It must appear, either from the circumstances of the case, or from evidence directly establishing the fact to the satisfaction of the court and jury, that the plaintiff is free from fault contributing to the injury."

To the same effect are the decisions of our own Supreme Court. In *Dyer* v. *Talcott*, 16 Ill. 300, the judgment below was reversed because the Circuit Court refused to instruct the jury on behalf of defendant, "That the burden of proof in this action is upon the plaintiff to show not only that the defendant was guilty of negligence, but that he himself was not guilty of negligence or carelessness." Also in *C. B. & Q. R. R. Co.* v. *Gregory*, 58 Ill. 272, the language of the court is: "Undoubtedly the general rule is that it must affirmatively appear that the injured party was in the exercise of due care and caution.

"This material fact may be made to appear by circumstantial as well as by direct evidence. It is immaterial how the proof is made, so the fact is made distinctly to appear."

Authorities above cited sufficiently sustain the doctrine above announced, that whether the plaintiff is in the exercise of due care at the time of the injury is purely a question of fact to be found by the jury from all the evidence, and not a presumption of law.

Whatever fact is presumed by the law to exist in a given case is, in the absence of proof overcoming such legal presumption, established, and the jury can find the fact from such presumption alone. The party therefore against whom such presumption arises must overcome the same by evidence, or the presumed fact will be found against him; or if the evidence be equally balanced, the presumption prevails, and the like result must follow.

Such was the condition of the defendant below under the instruction in question; and while it is true that the jury were told in the other instructions that they must find that the plaintiff was exercising due care at the time of the injury, yet they were authorized by this instruction to find the existence of such fact from the legal presumption alone, in absence of proof of want of care upon her part, thereby casting the burden of proof upon defendant of overcoming such presumption.

The seventh instruction was properly refused, as it does not submit the question to the jury whether taking the other route would be a proper regard for personal safety under all the circumstances of the case, as there was evidence tending to prove that the route on Sixth street was more dangerous than the route taken by plaintiff.

We see no other error in the record of sufficient importance to notice; but for the error indicated, the judgment must be reversed, and cause remanded. *Judgment reversed.*

LELAND, P. J., took no part in the decision of this case.

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EDITOR'S NOTES.

NEGLIGENCE—*Instruction excluding negligent acts of deceased.*—An instruction which, in effect, excludes from the consideration of the jury any negligence of the deceased, except the fact of her being a trespasser upon the track of the defendant's railroad, in an action by her personal representative to recover damages for her death by being struck by an engine, where the proof tends to show negligence on her part in other respects, is erroneous, as being calculated to mislead. *Illinois Central R. R. Co.* v. *Hetherington*, 83 Ill. 510.

SAME—*Recovery, when plaintiff is guilty of gross negligence.*—If the conduct of one killed while walking upon a railroad track amounts to gross negligence, no recovery can be had of the company, unless it was guilty of willful or criminal negligence. Ib.

SAME—*Jury not confined to any one particular act.*—In determining whether a person killed while traveling upon a railroad track was guilty of negligence contributing materially to the injury, and the degree of such negligence, as compared with that of the company, the court, in its instructions, should not confine the jury to the consideration of the fact that the deceased was simply a trespasser, but they should also consider her each and every other act and omission proved, materially contributing to the injury. Ib.

SAME—*When that of injured person prevents a recovery.*—Where a person walking along the track of a railroad in a city, without right, is struck by a train coming in, and killed, at a place not a public crossing, and it appears such person used no precaution to guard against danger, although he knew he was in a place of danger, not even looking back to see if a train was approaching, no recovery can be had, notwithstanding the company may have been guilty of negligence in running the train at a speed greatly in excess of that fixed by ordinance. Ib.

The fact that persons residing in the locality where an accident occurs have been in the habit of traveling upon the right of way of a railway company, without any measures being taken to prevent such acts, will not change the relative rights or obligations of one injured while upon the track, or of those of the company. Such person will still be a trespasser. Ib.

SAME—*Persons crossing railroad should use proper precautions.*—It is the duty of persons about to cross a railroad track to look about them and see if there is danger; not to go recklessly upon the track, but to observe the proper precautions themselves to avoid accident. Ib.

SAME—*Rule when both parties are negligent.* Although a recovery may be had by a party guilty of contributory negligence, where his is slight and that of the defendant is gross, yet it is indispensable to a right of recovery that the injured party shall have exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property, or that the injury be willfully or wantonly inflicted by the defendant. Ib.

SAME—*What amounts to willful or wanton.*—Where the ordinances of a city prohibit railway companies from running their trains, in the city, at a greater rate of speed than six miles an hour, the running of a train at the rate of fifteen miles an hour, resulting in the death of one wrongfully upon the track, will not make the injury willful or wanton on the part of the company. Ib.

The following authorities are commented on in the opinion in this case: *I. C. R. R. Co.* v. *Hetherington*, 71 Ill. 500; *I. C. R. R. Co.* v. *Baches*, 55 Ill. 379; *Chi. & R. I. R. R. Co.* v. *Still*, 19 Ill. 500; *G. & Chi. U. R. R. Co.* v. *Dill*, 22 Ill. 264; *C. & A. R. R. Co.* v. *Gretznor*, 46 Ill. 74; *I. C. R. R. Co.* v. *Godfrey*, 71 Ill. 500; Sherm. & Rulf. on Negligence, 488; *C. B. & Q. R. R. Co.* v. *Lee*, 68 Ill. 576; *Ind.*

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& St. Louis R. R. Co. v. *Galbreth*, 63 Ill. 486; *Railroad Company* v. *Norton*, 12 Harris 465; *Railroad Company* v. *Mulherin*, Supreme Court of Pa. decided May 8, 1876, unreported, and cases there cited.

JAMES McCOY AND JOSEPH McCOY *v.* ELIJAH C. BABCOCK.

ABATEMENT—*Plea in — suit prematurely brought.*—Where a suit was prematurely brought, advantage should not be taken of that by plea in abatement. A plaintiff is required to show that the defendant was indebted to him at the time of the commencement of the suit, or he fails in his action.

CONSOLIDATION OF DEMANDS.—Where two notes when consolidated exceeded the jurisdiction of the justice, it was *held*, that they should have been sued separately before the same justice on the same day, and that each note constituted a separate cause of action, and not one entire demand. The rule that a party cannot split up an entire cause of action and maintain several suits thereon, does not apply. Also *held*, that if these two notes had, when consolidated, not exceeded the jurisdiction of the justice, then under the statute the plaintiff would be obliged to bring them both forward in one suit.

PROMISSORY NOTE.—Where a note was by virtue of the statute entitled to days of grace, it was not due until the last day of grace, which in this case was two days after the suit was instituted, and there can be no recovery.

APPEAL FROM WARREN COUNTY. Filed January 16, 1878.

I. M. KIRKPATRICK, *Attorney for Appellants*, cited: It further appears that on the same day the summons was issued in this case, another suit was instituted by the same plaintiff against the same defendants on another note due January 1, 1877. Both these notes were given, as shown upon their face, for different installments of rent for the lease of a tract of land. Now, I contend, that if it be admitted that the first point is not well taken, appellee is barred from a recovery upon this note. There is no doubt but that the cases of *Buckner* v. *Thompson*, 11 Ill. 564, and *Mallock* v. *Krome*, 78 Ill. 110, are against me, yet I cannot see how those decisions can be reconciled with other decisions of the same court, or with the statute. It certainly cannot be the law that a party having a claim, for instance, of $2,000 against another for goods sold and delivered at different times, could split up the demand and bring ten suits for the recovery of the amount, and yet the case of *Mallock* v. *Krome* goes to that extent. According to that decision the only question is: Do the demands, when consolidated, exceed the jurisdiction of the justice? If they do not, they must be consolidated; if they do, they need not be. I think the object of the law is correctly stated in the case of *Waterman* v. *Bristol*, 1 Gilm. 598, viz, to prevent the multiplicity of suits — which would certainly not be the case if the view taken by the court in *Mallock* v. *Krome* be the correct one. The case of *Casselbery* v. *Forquer*, 27 Ill. 170, appears to me to be directly in point. There two suits were brought for different installments due on a lease; *the installments when consolidated exceeded the jurisdiction of the justice*, and the court held that plaintiff could not bring separate suits, but must consolidate, and in support referred to *Camp* v. *Morgan*, 21 Ill. 258. To the same effect is *Lucas* v. *LeCompte*, 42 Ill. 303, and the court there very clearly intimates that decision in *Buckner* v. *Thompson*, *supra*, was not correct; that they can see no difference, in fact, between a claim upon notes and a claim upon account. The only evidence introduced on the part of plaintiff on the hearing in the Circuit Court was the promissory note payable "on or before the first day of March, 1877." Upon that note appellants

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insist the plaintiff could not recover, because it was not due at the time the suit was brought; the summons showing suit brought March 1, '77, and the transcript showing suit brought March 2. If, then, the right of recovery depended wholly upon the note, the suit was prematurely brought, and should have been dismissed. In the case of *Hamlin* v. *Race*, 78 Ill. 422, the court say: "We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit." To the same effect is *Daniels* v. *Osborn*, 71 Ill. 169. This was a suit in *assumpsit* for goods sold and delivered to which *non assumpsit* was plead, and the court hold that because the suit was brought for the price before the credit upon which the goods were sold had expired, the plaintiff could not recover. A case on appeal in the Circuit Court where there are no pleadings in writing, is like an action of general *indebitatus assumpsit* with the plea of *non assumpsit* filed. This being the general issue, anything may be given in evidence under it which goes to show that the plaintiff has no subsisting cause of action. *Minard* v. *Lawler*, 26 Ill. 302. Upon this point I will also refer to the following additional authorities: *Church* v. *Clark*, 21 Pick. 310; *Leftly* v. *Mills*, 4 T. R. 170; *Boston Bank* v. *Hodges*, 9 Pick. 420; *Staples* v. *Franklin Bank*, 1 Met. 43; *New England Bank* v. *Lewis*, 2 Pick. 125; *Henry* v. *Jones*, 8 Mass. 453; *Osborn* v. *Moncure*, 3 Wend. 170; 1 Parsons' Notes, etc., 410–413; *Walter* v. *Kirk*, 14 Ill. 55. In this last case suit was brought on a note payable "on or before the first day of November," and the court say that a suit brought on the first day of November "*would have been dismissed because prematurely brought.*" This decision was made before the statute providing for days of grace was in force. Conceding the jurisdiction of the justice, on appeals to the Circuit Court the proofs alone determine the right of recovery. *Allen* v. *Nichols*, 68 Ill. 250; *Swingley* v. *Haynes*, 22 Ill. 216; *O. & M. R. R. Co.* v. *McCutchen*, 27 Ill. 9; *Coulterville* v. *Gillen*, 72 Ill. 702; *Waterman* v. *Bristol*, 1 Gilm. 593; *Minard* v. *Lawler*, 26 Ill. 302; *Zuel* v. *Bowen*, 78 Ill. 234; *Jacksonville* v. *Block*, 36 Ill. 507.

J. B. Clark and Almon Kidder, *Attorneys for Appellee*, cited: The defense was as a matter in abatement only, and not in bar of the action, and must be taken advantage of in apt time. 1 Chitty's Pleadings, 453; *Archibald* v. *Argill*, 53 Ill. 307; Moore's Civil Practice, 470, sec. 505–506. The plea in abatement not having been made in apt time, as it should have been in the Justice Court, the right to make it for the first time in the Circuit Court, on trial of the appeal, was waived by the defendants below. This was the position taken by the Circuit Court, and is sustained by *Tisdale* v. *Town of Mononk*, 45 Ill. 10; *Archibald* v. *Argill*, 53 Ill. 307; Moore's Civil Practice, 470; *Gilmore* v. *McCullock*, 26 Ill. 200. The two notes on which the two suits were brought, or the respective demands, could not be consolidated and become one demand, because if so consolidated the same would exceed $200, the amount of the justice's jurisdiction. Then each note constitutes a separate demand, and could be so sued on. *Buckner* v. *Thompson*, 11 Ill. 563; *Mollock* v. *Krome*, 78 Ill. 110.

Pillsbury, J., delivered the opinion of the court:

This suit was commenced before a justice of the peace of Warren county upon the following promissory note:

$200. Denny, Ill., Feb. 19, 1876.

On or before the first day of March, A.D. 1877, for value received, we or either of us promise to pay Almon Beecher the sum of two hundred dollars.

This note given to secure the rent on 80 acres of land belonging to above-named party.

James McCoy.

Indorsed, A. Beecher. Joseph McCoy.

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Judgment was rendered by the justice against defendants, and they appealed to Circuit Court, whereupon a trial before the court, a jury being waived, a like result followed.

On the trial below the defendants objected to the introduction of the note in evidence, on the ground that it was not due at time of the commencement of the suit, and in support of their objection read in evidence the summons issued by the justice, from which it appeared that the suit was commenced March 1, 1877.

Also the transcript of the justice, reciting issuing of summons March 2, 1877. The court overruled the objection and the defendants excepted, and assign the ruling of the court for error in this court.

This note was by virtue of the statute entitled to days of grace, and whether the summons or the transcript should control as to time of commencement of suit, is immaterial, as in either case the note was not due until the last day of grace, which was two days after suit was instituted.

In fact, it is admitted by the appellee that the suit was prematurely commenced, but claims that advantage should be taken of that by plea in abatement.

We do not so understand the law. A plaintiff is required to show that the defendant was indebted to him at the time of the commencement of the suit, or he fails in his action.

Our Supreme Court, in *Hamlin, Hale & Co.* v. *Race*, 78 Ill. 422, say: "We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit," and after citing various authorities, continue: "If this rule could be seriously questioned, other cases could be referred to as establishing the rule; but to our minds it requires no authority, as it is based upon principles obviously just." *Daniels* v. *Osborn*, 71 Ill. 169, is conclusive upon this point. It was *assumpsit* for goods sold and delivered, and *non assumpsit* pleaded. The proof was that the goods were sold on credit, and the credit had not expired at the time of bringing suit. The court held that the suit was prematurely brought, and reversed the judgment.

There is no merit in the second point made by appellant. The two notes when consolidated exceeded the jurisdiction of the justice, therefore he could sue them separately before the same justice on the same day. Each note constituted a separate cause of action, and not one entire demand. The rule, therefore, that a party cannot split up an entire cause of action and maintain several suits thereon, does not apply. *Buckner* v. *Thompson*, 11 Ill. 564; *Mallock* v. *Krome*, 78 Ill. 110.

If these two notes had, when consolidated, not exceeded the jurisdiction of the justice, then under the statute the plaintiff would be obliged to bring them both forward in the one suit.

As the note was not due at the time of the institution of this suit, the plaintiff cannot recover. The judgment will be reversed and cause remanded. *Judgment reversed.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION, SEPTEMBER TERM, 1877.

SAMUEL BAILEY, JR., *v.* JOHN R. BENSLEY.

WAREHOUSE RECEIPTS.—A warehouse receipt cannot be regarded as the property, or as representing the property, of the consignor on account of the receipt of whose grain it issued; so that the parting with such particular receipt is a disposal of the consignor's property.

SAME.—By a provision of the warehouse law, he may, with the consent of the warehouseman, have his grain kept in a separate bin by itself, when the warehouse receipt must state on its face that it is in a separate bin, stating its number. He may instruct the commission man upon the subject, and require him to keep the identical receipts received upon his shipment of grain, and not part with them except when he sells on his own account.

SAME—*Custom—usage.*—A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market, and he who employs another to act for him at a particular place or market must be taken as intending that the business to be done will be done according to the usage or custom of that place or market, whether the principal, in fact, knew of the usage or custom or not.

SAME—*Presumption in regard to custom.*—The presumption should be in favor of honesty of dealing and of rightful action, and it was for appellant to show the contrary, and a violation of duty, if any, in the respect named.

APPEAL from the Circuit Court of Lee County. Opinion filed January 21, 1878.

BARGE, DENSLOW & DIXON, *Attorneys for Appellants*, cited: Nature of warehouse receipts as choses in action. Story on Agency (7th ed.) sec. 179 and note 2; ibid. secs. 204, 205. Property must be held separately. *Seymour* v. *Wyckoff*, 10 N. Y. 213. Agent must not assume a position adverse to the interest of his principal — as where a commission merchant mixes property of his own with that of consignor. *Cotton* v. *Halliday*, 59 Ill. 176; 1 Parsons on Contracts, 74; *Marfield* v. *Goodhue*, 3 N. Y. 62. Nor where he will be tempted to abuse the confidence reposed in him. *Cotton* v. *Halliday, supra;* Story on Agency, sec. 192, and secs. 207 to 214. It defeats the contract of bailment existing under the law between consignor and factor, and destroys the rights of the parties arising under the law as applicable to that relation. *Wood* v. *Fales*, 24 Penn. St. 246. And is therefore void. *Seymour* v. *Wyckoff, supra, et seq.* Appellant not knowing of existing custom is not bound by it. *Wells* v. *Bailey*, 49 N. Y. 464; *Johnson* v. *DePeyster*, 50 N. Y. 666; *Bradley* v. *Wheeler*, 44 N. Y. 495. Appellant is entitled to price at which his warehouse receipts actually sold. *Anstill* v. *Crawford*, 7 Ala. 335; *Seymour* v. *Wyckoff*, 10 N. Y. 213.

E. B. SHERMAN AND F. SACKETT, *Attorneys for Appellees*, cited: Factor has lien on property, while broker has not. Story on Agency, sec. 34; 1 Pars. on Cont., p. 98. When factor may sell property for advances. *Brown* v. *McGraw*, 14 Pet. 479. Statement of account presented and retained without objection, considered as assented to. 1 Greenleaf Ev. sec. 197. *Willis* v. *Jernegan*, 2 Atk. 232; *Freeland* v. *Heron*, 7 Cranch, 147; *Hayes* v. *Kelly*, 116 Mass. 300. Business presumed to be done according to usage of place where done. Smith on Cont., p. 410; *Sutton* v. *Tatham*, 10 A. & E. 27; *Bayliffe* v. *Butterworth*, 1 Exch. 428; 1 Story on Cont., sec. 236;

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Story on Agency, sec. 96. Presumption of law is that agent performed his duty in conformity to known usages. Fraud or improper conduct is not presumed, but must be shown by proof. 1 Greenleaf Ev. secs. 34, 35, 80; Cowen & Hill's Notes to ch. 10 Phillips' Ev.; *Jackson* v. *Miller*, 6 Wend. 228, 231; *Bank U. S.* v. *Dundridge*, 12 Wheat. 64, 69.

SHELDON, J., delivered the opinion of the court:

This was an action of *assumpsit*, brought by appellees against appellant, wherein a verdict and judgment were rendered against the latter for $1,119.68. The appellees, Bensley and Wagner, were commission merchants doing business in Chicago, and appellant, Samuel Bailey, jr., a grain buyer at Baileyville, Illinois. On the trial it appeared that appellant commenced consigning grain and produce to the appellees for sale on commission in the year 1868, and continued so to do until the fall of 1873. Appellant was in the habit of making drafts upon appellees at the time of each consignment for about 10 per cent less than its market value, which drafts appellees paid; portions of the grain appellant ordered to be held until he directed it to be sold. Accounts of sales when made were rendered by appellees to appellant, as also monthly accounts current, giving items of debt and credit down to December 1, 1873, for the last balance debt at that time. This suit was brought April 6, 1874. The grain was sent by rail, and upon reaching Chicago was stored in public warehouses, and appellees received from the warehousemen as it arrived receipts entitling the holder to the same quantity of grain of similar kind and grade upon return of the receipts.

The main controversy in the case is in respect of these warehouse receipts, appellant insisting that the receipts issued upon the storing of his grain were his property, and that when appellees were directed by him to hold certain grain until he ordered its sale, it was their duty to retain the identical warehouse receipts issued for that grain; whereas appellees maintain that, according to the usage and custom of the transaction of business on the Board of Trade in Chicago, in holding the grain, or in making sales of it on account of any particular shipper, no attention is paid by the commission man to the matter of holding or transferring the identical receipts which were received by him when that person's grain was received into the warehouse; that the receipts are used indiscriminately, except that in general the commission merchant endeavors, when sales are made, to get rid of the oldest receipts first, and to hold his fresh receipts. And appellees, therefore, insist that their duty was performed if they at all times kept on hand receipts for grain of the several kinds and grades in sufficient quantities to represent the aggregate amount of grain received by them from their several consignors, and remaining unsold by order of such consignors.

Appellant claims that he is entitled to the price the particular receipts on account of his grain sold for, and only liable for storage to the time of such sales. Thus, he sent appellees 15,000 bushels of corn in June, July, August and September, 1872, with orders to

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hold it. The warehouse receipts issued for this corn appellees sold almost immediately upon its arrival, and only $36.19 extra storage had there accrued upon it. Yet, though appellant did not order the grain to be sold until May 16, 1873, and it was then sold, and $1,394.43 extra storage had accrued upon it, his claim is that he is entitled to the price which the identical warehouse receipts originally received for the corn sold for, and is only liable for the $36.19 extra storage. Appellees insist that he is only entitled to the price of the sale, May 16, 1873, and is liable for storage up to that time.

The proof as to the mode of doing business is, that on arrival in Chicago the grain is placed in one of the elevators or public warehouses by the railroad company, and mixed with other grain of the same kind and grade, so that its identity is wholly lost. After the grain has been received, it is passed to the credit of the consignee or commission man, and a warehouse receipt issued to him in his own name. Each receipt usually includes all the grain of the same grade going into the same elevator on account of the consignee for the same day, and not infrequently it covers the grain received from several consignors. The number of the car from which the grain is received is written on the back of the receipt. All the testimony is that there is no regard had to the identity of receipts; that the date of the sale of a receipt would be no indication of the date of sale on account of the consignor of grain received in the cars mentioned on the receipt.

There is no dispute as to the usage and custom of the business, and it must be conceded that the dealing of appellees was in conformity thereto, and their claim sanctioned thereby, while that of appellant is entirely unwarranted thereunder.

A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market, and he who employs another to act for him at a particular place or market must be taken as intending that the business to be done will be done according to the usage or custom of that place or market, whether the principal, in fact, knew of the usage or custom or not. Story on Agency, pp. 60, 96, 199; 1 Chit. Cont. 11th Am. ed., 83; *Sutton* v. *Latham*, 10 A. and E. 27; *Bayliffe* v. *Butterworth*, 1 Webst. Hurls. & Gord. Exch. 428; *Lyon* v. *Culbertson*, 83 Ill. 33.

We do not see how, as appellant claims, the warehouse receipt can be regarded as the property, or as representing the property, of the consignor on account of the receipt of whose grain it issued; so that the parting with such particular receipt is a disposal of the consignor's property. The grain on being received at the warehouse is stored in common bins, mixed with other grain, and loses its identity, and becomes incapable of specific designation; that amount of grain is credited to the consignee. The warehouse receipt is given to the consignee as his voucher that he has in that warehouse, not the grain of the consignor, nor any particular grain, but a certain

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number of bushels of grain of the kind and grade mentioned in the receipt, subject to his order and disposal. The consignor is not named in the receipt. It does not represent his particular property; it is not issued to be used by him. For his protection and voucher he may be supposed to have the railroad receipt on shipment, and the acknowledgment of the consignee of the receipt of the grain.

True, the receipts do bear a consecutive number, and on the back is specified the number of the car in which the grain arrived, whereby the receipt is capable of identification as issued upon any particular consignor's shipment of grain, and this is all. Of any two receipts issued in respect of different consignors for the like amount, kind, and grade of grain, neither has any especial value above the other, but they are the exact equivalents of each other for all commercial purposes; and the practice of indiscriminately disposing of receipts, regardless of the particular consignors on whose account they are issued, would seem to be a matter of utter indifference to their interests, so long as there be kept on hand receipts for the several kinds and grades in sufficient quantities to represent the aggregate amount received from the several consignors remaining unsold. This latter the custom requires to be done; and if it be done, the correctness of the charge for storage up to the time sale is ordered must be acknowledged, as such an amount of grain would have been kept in store to that time on account of appellant.

It is contended that the present is like the case of pork packed in barrels, and, marked with the owner's name, consigned for sale, where, by being stored in a warehouse with a large quantity of pork of the same quality and brand, it does not lose its identity as the particular property of the consignor. The case of *Seymour* v. *Wyckoff*, 10 N. Y. 213, which is cited by appellant's counsel as so holding, takes the very distinction which here exists. The defendant there claimed that the pork of the consignor, by being stored in the inspector's warehouse with a large quantity of other pork of a similar inspection brand, and all consigned to the defendant for sale, lost its identity, like wheat mixed in a bin, etc. The court say: "The rule referred to by the defendant's counsel applies only to cases where the property, by the mixture, does in fact lose its identity, and becomes incapable of specific designation, etc. In such a case the owner parts with the property as he parts with the means of identifying or controlling it; and the person to whom it is delivered, instead of becoming a bailee becomes a debtor"; and see *Chase* v. *Washburne*, 1 Ohio St. 244. It was remarked in the case first cited, that the property was packed in barrels, which were marked so as to identify it as the complainant's property; that there was no reason for pretending that there was a confusion or mixture of the property. It is supposed that the present case resembles that, because the warehouse receipts are so marked that the consignor is always capable of identification. But this does not respect the identity of property that was past identification from the time of the storage and mixture; and we have

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endeavored to show that the receipts are not the consignor's property, and do not represent his property, but are merely evidences of a debt to the consignee. It is next urged by appellant that this usage and custom of the indiscriminate use of warehouse receipts, not preserving their identity, is against public policy, and on that ground should not be sustained, but should be declared void. It is claimed that the practice furnishes the opportunity for speculation by an agent with his principal's property; that it leads the agent to assume a position adverse to the interest of his principal; that it is a constant temptation to the abuse of confidence reposed, and to unfaithful and dishonest dealing; and that it destroys the means of detecting unlawful speculations and frauds by agents.

Without remarking upon the relative advantage and disadvantage of the system now in vogue, we acknowledge that there is force in the objections which are urged against it, and that a contrary practice would in tendency operate as a check upon violation of duty toward consignors in the way of diminishing temptation thereto, and to hazardous speculation with a view to individual profit. Still, we are not prepared to hold that the natural, necessary, or legitimate result of the usage is to such a degree in the injurious direction suggested that a court is called upon to pronounce it void as against public policy, and annul dealings honestly had under it. The long experience had in its favor would seem to denote it as of general convenience.

The supposed evil, although of long duration, has never been deemed of sufficient magnitude to attract legislative attention. Although with such usage before the view, as we may suppose from its notoriety, there has been legislation upon warehouses and warehouse receipts, regulating the subject of such receipts to quite an extent, no provision has been enacted looking toward repression of the practice of parting with the identical receipts received upon any particular shipment of grain, and not keeping them on hand until the time of making sale on account of the particular consignor of such shipment. The laws upon the subject appear to have been passed for protection against the fraudulent issue of warehouse receipts, without any reference to any supposed risks to the consignor in his dealing with the commission man. The owner of grain has sufficient means of protection.

By a provision of the warehouse law, he may, with the consent of the warehouseman, have his grain kept in a separate bin by itself, when the warehouse receipt must state on its face that it is in a separate bin, stating its number. He may instruct the commission man upon the subject, and require him to keep the identical receipts received upon his shipment of grain, and not part with them except when he sells on his own account. We have thus, we believe, determined the whole case substantially made in defense, and which sufficiently disposes of the points made up instructions.

The point is taken further, that appellees did not show a compliance with the terms of the custom, in that they did not make proof

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that they coustantly kept in their possession warehouse receipts of the requisite kind and grades of grain, in quantities sufficient to represent all the grain of all their principals which they had received, and which the principals had not ordered sold. We think the presumption should be in favor of honesty of dealing and of rightful action, and that it was for appellant to show the contrary, and a violation of duty, if any, in the respect named.

Objection is made that certain of the sales were made without being ordered; but the evidence, we think, warranted the finding that the sales were rightfully made in pursuance of the usage of the trade for the reimbursement of advances which had been made.

The judgment must be affirmed. *Judgment affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

JOHN M. DUMPHY *v.* FRANCIS A. RIDDLE ET AL.

MECHANIC'S LIEN—*Sec. 28 of the Mechanic's Lien Act, p. 668, Rev. Stat. 1874, construed.*—The statute does not say in terms *against whom* the suit shall be commenced within the six months, its language being, "unless suit be instituted to enforce such lien within six months"; but the true construction is that the person against *whom* the suit must be instituted within the time limited is the one against whom the right of lien may be asserted; that the suit must be instituted against the *creditor* or *incumbrancer* within the six months; that such interpretation accords with the rule of strict construction which has ever been applied to this and like statutes; and where suit is commenced to enforce the lien against the owner, and afterward, upon amendment of the petition, a creditor or incumbrancer is made a party defendant to the suit, that the suit cannot be considered as having been commenced against such creditor or incumbrancer until he was so made a party defendant.

SAME—*Sec. 12 of same act construed.*—This section contains no implication that, in case of one interested in the subject-matter of the suit, and made a party before final judgment, the suit is to be considered as having been commenced against him from the beginning or at any time prior to his being made a party. This proceeding, under the statute, is made a chancery proceeding, and this provision in section 12, as to making or becoming parties, really adds nothing to what, without it, would have been within the exercise of the ordinary power in chancery practice to grant.

SAME—*Proceeding in rem.*—It is not a proceeding *in rem* in any such case as that it is one binding on all the world, and that the decree therein binds or affects the right of those not made parties to the suit. We do not see that it is any more a suit *in rem* than one to foreclose a mortgage or to enforce a vendor's lien, or that it to any greater extent should affect persons not made, or until made, parties to the suit.

MERGER.—The question of merger is one of intention, express or implied. The intention is the controlling element: *Held*, that in this case there was nothing evincive of any intention to merge the estate or extinguish the mortgage more

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than the transaction itself. The mortgage or note was not canceled or given up, but were kept and produced in evidence on the hearing. There was clearly no merger or extinguishment of the mortgage.

MORTGAGOR—*Purchaser.*—The 28th section in question does not mention purchaser or purchase, but "creditor or any incumbrance" only; and although we can perceive no reason why a mortgagor should be thus protected and a purchaser not be protected, still we do not feel warranted to go beyond the words of the statute, and by an equitable construction embrace a class not named. A purchase cannot properly be included in the term incumbrance.

APPEAL from Cook county. Opinion filed January 21, 1878.

HERBERT B. JOHNSON, *Solicitor for Appellant.*
WIRT DEXTER and STEPHEN SIBLEY, *Solicitors for Appellee.*

SHELDON, J., delivered the opinion of the court:

This was a petition filed in the Circuit Court of Cook county on the 28th day of April, 1875, by the petitioner, John M. Dumphy, to enforce a mechanic's lien on certain described real estate.

The defendants in the suit were Francis A. Riddle, for whom, as owner, in pursuance of a written contract made on the 28th day of November, 1873, it was alleged that the petitioner erected a dwelling house on the premises; and two mortgages of the premises, the United States Mortgage Company and William G. Gallaher.

The court found and declared the lien as against Riddle, the owner, and ordered a sale of the premises for its satisfaction subject to the two mortgages.

The petitioner, Dumphy, appeals.

The only controversy between Dumphy and the United States Mortgage Company is one of fact, whether he waived or released his lien.

Riddle and wife executed the mortgage on the lot to the United States Mortgage Company on the 28th of November, 1873, the same day of the making of the contract for erecting the building, to secure the payment of $11,160; the mortgage being recorded December 11, 1873.

It appeared by oral testimony that the money was borrowed for the purpose of constructing the dwelling house, and that it was agreed between Riddle and the Mortgage Company that the latter should advance about forty per cent of the value of the land and pay the rest as the house was built, reserving enough to finish the building; with the understanding that the building was to be clear of all mechanics' liens; and it would seem to have been advanced accordingly, to wit, $5,500 December 17, 1873; $2,250 July 21, 1874, and $3,411 November 4, 1874, which, with interest, made up the sum of $11,160.

It was testified to by Mr. Sansom, the agent of the company who negotiated the loan for it, that in September or October, 1874, Riddle called on him in regard to the balance of the loan, and that witness told Riddle he must be satisfied there were no liens before the

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balance of the money could be paid. Riddle testifies to the same, and that he told Dumphy what Sansom had said, and drew up a release purporting to release all liens, which was signed by Dumphy and by McDougal and McKinley. The two latter appear to have been sub-contractors for the carpenter work, but Burnham, the architect, refused his signature because the Terra Cotta Company had a lien, on which account Riddle says he tore up the release in presence of Dumphy and Burnham.

Dumphy admits the signing of this release by him, and McDougal and McKinley, and that he knew the object of it was to give it to Sansom, so that Riddle could get the balance of the money, but says they afterward recalled it.

Riddle testifies that he drew another release, which was signed by Dumphy, and by McDougal and McKinley, which he took to the office of the Mortgage Company on the occasion the last payment was made, November 4, 1874, at which time witness, with Dumphy and McKinley, met at Sansom's office, by previous appointment, for the purpose of getting the balance of the money.

Mr. Sansom testifies that he then told Dumphy that he could pay none of the balance of the money to Riddle until assured that there were no liens or chances of liens on the property, that Dumphy then verbally assured him there were no liens; no release was asked for; that thereupon he gave Riddle a draft for $3,411; that without such assurance given by Dumphy he would not have paid the money.

Riddle corroborates Sansom as to the making of such assurances; says that he did not then exhibit the second release, and afterward handed it to Dumphy. Dumphy and McKinley both deny the signing of a second release, and deny the making of the statements by Dumphy as testified by Sansom and Riddle.

There was here a conflict of testimony, and it was for the court below to pass upon the credibility of the witnesses.

We cannot say that the court was not warranted in finding from the testimony, as it did, that as to the United States Mortgage Company, appellant waived or released his lien.

The court below gave precedence to the mortgage of Gallaher over the lien of the petitioner, for the reason that the suit against Gallaher was not commenced within six months after the last payment became due to the petitioner.

The provision of the statute fixing the terms of limitation in this respect is sec. 28 of the Mechanics' Lien Act, p. 668, Rev. Stat. 1874, which is as follows: "No creditor shall be allowed to enforce the lien created under the foregoing provisions, as against or to the prejudice of any other creditor or any incumbrance, unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due and payable."

The mortgage of the premises subject to the mortgage of the United States Mortgage Company was made by Riddle to Gallaher April 13, 1874, and recorded June 1, 1874, and was to secure the

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payment of Riddle's promissory note of the same date for $7,000, payable to Gallaher one day after date.

The last payment for labor and materials became due and payable to the petitioner under the contract on the 18th day of November, 1874. The petitioner filed his petition April 28, 1875. F. A. Riddle, the United States Mortgage Company and Charles R. Steele were at the time of the filing of the petition made parties defendant, and a summons was issued against them alone and served upon them April 28, 1875.

On the 22d day of May, 1875, on motion of the petitioner, leave was given him to amend his petition by making Gallaher a party defendant, and order made that a summons issue against him which issued accordingly on the same day.

Thus it will be seen the suit was commenced against Riddle, the owner, the Mortgage Company and Steele, within six months after the last payment for labor and materials became due; but that Gallaher was not made a party defendant to the suit until after the expiration of said six months, to wit, four days afterward.

The statute does not say in terms *against whom* the suit shall be commenced within the six months, its language being, "unless suit be instituted to enforce such lien within six months;" and it is contended by appellant that it is only needful to commence suit to enforce the lien against the owner and property within the six months, and that at any time afterward, and after the expiration of the six months, upon amendment of the petition, any creditor or incumbrancer may be made a party defendant, and the lien be enforced against him.

We cannot adopt this as the true construction of this 28th sec. of the statute, but think it to be otherwise, that the person against *whom* the suit must be instituted within the time limited is the one against whom the right of lien may be asserted; that the suit must be instituted against the *creditor* or *incumbrancer* within the six months; that such interpretation accords with the rule of strict construction which has ever been applied to this and like statutes; and where suit is commenced to enforce the lien against the owner, and afterward, upon amendment of the petition, a creditor or incumbrancer is made a party defendant to the suit, that the suit cannot be considered as having been commenced against such creditor or incumbrancer until he was so made a party defendant.

In *Miller* v. *McIntyre*, 6 Pet. 61, a suit in equity to enforce a trust in land, after the original bill was filed it was amended and new parties defendant were brought in who set up the statute of limitations, the period of which had elapsed between the time of filing the original bill and the making of the new defendants parties.

The court sustained the defense, and in delivering judgment said:

"It is insisted that the amended bill filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808, and consequently that the statute cannot bar, as its limitation had not then run.

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"Until the defendants were made parties to the bill the suit cannot be considered as having been commenced against them.

"It would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice and where a final decree in the case could not have prejudiced their rights."

All the authorities are this way. *Brown* v. *Goolsby*, 34 Miss. 437; *Gormem* v. *Judge*, etc., 27 Mich. 140; Angell on Lien, 6th ed., sec. 330; Story's Eq. Pl., sec. 904.

This court has repeatedly held that in suits of this character the rights of a person who was not made a party to the suit are not affected by the decree or any proceedings under it. *Kelly* v. *Chapman*, 13 Ill. 534; *Williams* v. *Chapman*, 17 id. 423; *Lomax* v. *Dore*, 45 id. 379.

Stress is laid upon sec. 12 of the act, as supporting appellants' construction, which provides that all persons interested in the subject-matter of the suit may, on application to the court, be made or become parties at any time before final judgment.

We fail to perceive that this contains any implication that in case of one so made or becoming a party to a pending suit, the suit is to be considered as having been commenced against him from the beginning or at any time prior to his being made a party.

This proceeding, under the statute, is made a chancery proceeding, and this provision in section 12, as to making or becoming parties, really adds nothing to what, without it, would have been within the exercise of the ordinary power in chancery practice to grant.

The case of *Work* v. *Hall*, 79 Ill. 196, cited as being in support of appellants' construction, we do not so regard.

We fail to perceive any aid to appellants from the suggestion that the proceeding is one *in rem*. It is not a proceeding *in rem* in any such sense as that it is one binding on all the world and that the decree therein binds or affects the right of those not made parties to the suit. We do not see that it is any more a suit *in rem* than one to foreclose a mortgage or to enforce a vendor's lien, or that it to any greater extent should affect persons not made, or until made, parties to the suit.

It appears in the case that after the mortgage from Riddle to Gallaher, on April 30, 1874, *namely*, on the 1st day of July, 1874, in consideration of an independent indebtedness of $5,000, Riddle and his wife, by their quit-claim deed, conveyed the same premises to Gallaher in fee simple. It is contended that by this Gallaher's interest as mortgagee was merged in his estate as grantee and the mortgage was extinguished.

"If a party acquires an estate upon which he has an incumbrance, the incumbrance is, in equity, considered as subsisting or extinguished according to his intention, expressed or implied. The intention is the controlling element. If no intention has been manifested equity will consider the incumbrance as subsisting or extinguished, as may be most conducive to the interest of the

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party." *Campbell* v. *Carter*, 14 Ill. 286, and see *Edgerton* v. *Young*, 43 id. 468; *Fouler* v. *Fay*, 62 id. 375.

There was nothing evincive of any intention to merge the estate or extinguish the mortgage more than the transaction itself.

The mortgage or note was not canceled or given up, but were kept and produced in evidence by Gallaher on the hearing. There was clearly no merger or extinguishment of the mortgage.

Appellee, Gallaher, assigns a *a* cross-error, the ordering of the sale of his interest as *purchaser* under his quit-claim deed of July 1, 1874. He contends that under the 28th section in question he is entitled to protection as *purchaser*, as well as mortgagor.

The section does not mention purchaser or purchase, but "creditor or any incumbrance" only, and although we can perceive no reason why a mortgagor should be thus protected and a purchaser not be protected, still we do not feel warranted to go beyond the words of the statute, and by an equitable construction embrace a class not named. A purchase cannot properly be included in the term incumbrance. We regard the decree as right, and it is affirmed.

Decree affirmed.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

BARRET B. CLARK *v.* A. T. EWING, Assignee, etc.

(No. 843, 844, 845.)

PLEADING—*Judgment by default—"to" that day construed.*—Where the time to plead was by order of the court extended to the third Monday of July, 1875, and on that day default for want of plea was entered, the damages assessed and final judgment rendered, and where appellant insists that he had by the terms of the rule the whole of the third Monday of July in which to plead, it was *held*, that it was not irregular to take default at any time on that day for want of the plea, and that the terms "to" that day must be construed to mean until the meeting of the court upon that day.

APPEAL from Will County. Opinion filed January 21, 1878.

BARBER & LOGAN, *Attorneys for Appellant.*
PALMER & COLT, *Attorneys for Appellee.*

Per Curiam: These cases are alike, the same questions being presented in each record.

Appellant in each case insists that the judgment by default was entered before the time to plead fixed by order of the court had expired, and was therefore irregular. He also claims that if the default was regular, the court ought to have set the same aside upon the affidavits filed. The time to plead was by order of the court extended to the third Monday of July, 1875. On that day default for want of plea was entered, the damages assessed and final judgment rendered. Appellant insists that he had by the terms of the

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rule the whole of the third Monday of July in which to plead. This court cannot sanction that position, but hold that it was not irregular to take default at any time on that day for want of the plea. The terms "to" that day must be construed to mean until the meeting of the court upon that day. As to the second point, we hold that due diligence to obviate the default is not shown by defendant in either of these cases. The judgment in each of the cases must be affirmed. *Each judgment affirmed.*

SCOTT and DICKEY, JJ., dissent.

DICKEY, J., delivered the dissenting opinion of the court:

I think these judgments ought to be reversed without discussing the merits of the cases. It is apparent that the defendant could not lawfully be defaulted for want of a plea, at the time when these defaults were entered. The statute provides that on the appearance of the defendant the court may allow such time to plead as may be deemed reasonable and necessary. In this case "time to plead was allowed to defendant (as it is expressed in one record) *till* the third Monday of July, 1875, or (as it is expressed in the other records) *to* the third Monday of July, 1875." The words "till" and "to" in this connection mean the same thing, and the order means that defendant may plead on or before that day. Under that order the defendant was entitled to plead at any time during that day. He had by the terms of that order all of the third Monday of July within which to plead, and it was error to enter a default against him for want of a plea until after that day had passed.

In *Dunn* v. *Hudson*, 1 D. & L. 204, where a rule was entered on the 6th of June for "plea in four days," it was held that defendant had the whole of the 10th of June to plead, and that judgment entered on that day for want of a plea was irregular. In *Pepperell* v. *Burrell*, 2 D. P. C. 674, it was held that "seven days' time for pleading" gives the whole of the seventh day to plead in, after excluding the day on which the order is made. In *Oxley* v. *Bridges*, 1 Dougl. 67, it was held that on a rule to plead "by" a particular day, that *day* is construed to continue till the office opens next morning. In *Thomas* v. *Douglass*, 2 Johns. Cases, 226, an order was made enlarging the time to plead until the second day of the term. Judgment by default for want of a plea was entered on the second day of the term. This was held irregular by the Supreme Court of New York (Kent being at that time one of the judges), and the judgment was set aside.

The court said: "The defendant had time to plead until the second day of the term, and the order must be construed as including that day." So it has been held that where the time for the making of an award by an arbitrator is enlarged until a given day, the time given includes the day named.

In *Bruce* v. *Reed*, 16 Barbour, 352, the court say: "It has been decided that '*till*' includes the day to which it is prefixed," and in

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support thereof refers to *Dakins* v. *Wagner*, 3 Dowl. P. C. 535. It is true that the words "until," "till" and "to," when applied to time, do not *always* include the day to which they are prefixed. In *Webster* v. *French*, 12 Ill. 302, under a statute providing that bids from all persons should be received "until the first day of July, 1849, at which time all the bids received shall be opened and compared," etc., it was held that the time for receiving bids terminated when that day began. The statute required the bids to be opened and compared on the first day of July. That could not be done until after all bids had been received. In view of the language in other parts of the sentence, and in view of the objects of the statute and the nature of the transaction contemplated, the court very properly gave a construction to the word "until" other than the ordinary import of the word. This court then said: "The word 'until' may . . . have an exclusive or an inclusive meaning according to the subject to which it is applied, the nature of the transaction to which it relates, and the connection in which it is used.

The case at bar is not analogous to the case of *Webster* v. *French*. It is one thing to say that certain things may continue to be done until a given day, and quite another to say that the time at which a given thing must be done is extended or postponed until a given day. Suppose the time of a public sale be extended or postponed until the first day of July, does that mean that it must take place before the first of July? In the case of that statute as to the time of receiving bids, the word "before" might readily be substituted without marring the sense. To say "bids shall be received at any time before the first of July, at which time all bids shall be opened," gives the same idea as if you say, "bids may be received until the first day of July, at which time all bids shall be opened." But to say, "The rule to plead herein is extended till (or to) any time before the third Monday of July," does not convey the idea expressed by the words, "The rule to plead herein is extended till (or to) the third Monday of July." If the words were, the rule, etc., "is extended till the third Monday of July, on which day judgment will be entered in absence of a plea," the case would be analogous to the case of *Webster* v. *French*.

EDITOR'S NOTES.

CONTRACT—*Waiver of forfeiture.*—Where a workman fails to complete a building within the time stipulated in his contract, if the other party, after such default, makes partial payments, and urges him to go on with the work, and he does, and expends considerable money, work and materials afterward, this will be a waiver by the owner of his right to insist on a forfeiture, for the failure to do the work in time. *Eyster* v. *Parrott*, 83 Ill. 517.

MECHANIC'S LIEN—*Of sub-contractor.*—If a party, furnishing labor or materials to a contractor for the erection of a building, desires to enforce a lien under the act of 1869, he must give notice to the owner in twenty days from the completion of his contract, or in twenty days after payment should have been made, and then he can recover no greater sum than is due from the owner to the original contractor. *Metz* v. *Lowell*, 83 Ill. 565.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

Bridget McCarty *v.* Philip Kearnan.

Deed—Where all of the evidence shows that a deed was executed by a party, and that the party at the time was of sound mind and memory, to the extent the law requires to render a party's acts valid and binding, the deed was held valid, and the party competent to execute it.

Same—*Gift, donatio mortis causa.*—Where such a deed was given as a compensation for labor done, it was not a *donatio mortis causa*, but was a sale on a sufficient consideration to support the conveyance.

Same—*Fraud.*—And where there was no evidence of any device, trick, or misrepresentation or false pretenses used to induce the conveyance, it was *held* that fraud was not established.

Same—*Presumptions.*—Sanity and intellectual capacity being the rule with comparatively few exceptions, the presumption must prevail until rebutted that all acts performed by adult persons are binding. And to overcome this presumption the evidence must be clear and satisfactory. But in this case it fails to preponderate against its validity, but on the contrary, independent of the presumption of legal capacity it sustains the validity of the deed.

Appeal from Jo Daviess County. Opinion filed January 21, 1878.

M. Y. Johnson, *Attorney for Appellant.*
Louis Shissler, *Attorney for Appellee.*

Walker, J., delivered the opinion of the court:

It appears that appellant was the owner of two hundred and forty acres of land in Jo Daviess county. That about the 22d of February, 1873, being sick and apprehensive of her approaching dissolution, appellee was sent for, a justice of the peace, to direct the authentication of a will, which appears to have been drawn but not executed two or three years previously, and for a priest to administer the spiritual consolations of the church. On the arrival of the justice, McCarty, who was there, went to see about the justice's horse, and whilst he was absent, appellee had an interview with appellant, in which he says he said to her, "you told me you did not want my labor for nothing, you always said you would recompense me for it, here is Black now going to have the will fixed." She said: "If you had never spoken of it I would have that fixed. I wil give twenty acres of land and make you a deed for it. Whether I live or die no one can take it from you."

The justce of the peace testified that on entering the room with the priest, McCarty and she were the only persons there. That he said to her, that the man who had gone for him said she wanted him to witness or acknowledge a will. She replied saying she wanted the will altered or asked him as to the best way to give Kearnan twenty acres of the land. That he advised the making of a deed before the execution of the will, to which she assented. That Mc-

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Carty objected, but she said he had been a good boy to her and she would give him the twenty-acres. That after considerable quarreling it was decided to make the deed. That a difficulty then arose as to the shape of the twenty acres, whether it should be square or taken from one side of an eighty-acre tract. That appellee and she wanted it square, and McCarty taken from the side of the eighty-acre tract, and that she yielded, and the deed was so made. She signed and acknowledged it, and appellee paid her a dollar as the consideration, and gave it to witness to have it recorded. The will was then signed by appellee and McCarty, it being a joint will. That she was sitting or standing by the stove. He says she certainly understood what she was doing in making the deed and will.

The priest, with less detail, gives, in substance, the same account of the transactions. That she confessed to him, and he administered to her the sacrament of the church. After which, she asked him to perform the marriage ceremony between her and McCarty, and on producing a license he did so, and he is clearly of the opinion that she conversed with him and the justice intelligently. That if she had not he would not have performed the marriage ceremony. This witness further testified that McCarty did not want her to give Kearnan the land, but she said she wanted to give it to him on account of the services he had rendered her, and insisted he should have the land.

Having recovered from her sickness she subsequently filed this bill to set aside the deed, but the court below, on a hearing, dismissed the bill for want of equity, and complainant brings the record to this court, and asks a reversal.

In favor of reversal it is insisted that the deed was obtained by fraud. That it was without consideration, and made *donatio mortis causa*, and that she did not knowingly and intentionally execute it. Was she then *compos mentis?* Appellee, Black, the justice, and the priest, all testify to facts strongly tending to show that she was. On the other hand, she testifies that she knew nothing of the transaction or her marriage or the execution of the will. Dr. Caldwell, the physician, gives it as his opinion, that she was feeble, physically and mentally. That she was not mentally capable of transacting business, and Mrs. O'Neil says she was mentally feeble. O'Neil gives no opinion as to her mental condition, nor does her husband. The justice of the peace and the priest, on the other hand, seem to have no doubt as to her mental capacity to understand, and that she did comprehend all she did.

On reading all of the evidence we are decidedly of the opinion that she was of sound mind and memory, certainly, to the extent the law requires to render her acts valid and binding.

If the circumstances detailed by Black and the priest occurred as they detail them, and we can see no reason to doubt their evidence, it would seem almost impossible to believe that she was not capable of legally performing each and all of these acts. What she did and

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said was rational, and was entirely pertinent to the business then being transacted. They were actors taking an active part in the transactions, and from their position in discharging their various duties, they would undoubtedly, as they say, have refused to proceed if they had believed she was incompetent to act.

It would have been a gross violation of Black's official duty to take an acknowledgment of a deed from her had he believed she was mentally incapacitated to act. It would have been aiding in the perpetration of a gross fraud that no officer can be permitted to aid in consummating. But taking into consideration all the circumstances we must hold she was competent to act.

The physician gives no facts upon which he bases his opinion, except she had lung fever, which affected her mind, and that she was "so befogged in her intellect," that he "was unable to get from her anything like an intelligent history of the beginning and progress of her disease." That was no doubt strong evidence of confused ideas, or at least a want of clear perceptions in reference to that matter, but it by no means follows that her mind was not clear on other and business subjects.

Sanity and intellectual capacity being the rule with comparatively few exceptions, the presumption must prevail until rebutted, that all acts performed by adult persons are binding. And to overcome this presumption the evidence must be clear and satisfactory. But in this case it fails to preponderate against its validity, but on the *contrary*, independent of the presumption of legal capacity it sustains the validity of the deed.

Nor does the evidence sustain the charge of fraud. At most it only appears that appellee claimed compensation for services he had rendered, and she recognized the claim and proposed to cancel it by the conveyance of this land, and he accepted it in satisfaction. He had for several winters previously cut wood, fed stock and did house and other work for her. It is true that there seems never to have been any definite understanding as to what he was to be paid. Yet his labor was of value to her, and had she obtained it from others she would doubtless have been compelled to pay a considerable amount for it. And we may reasonably conclude that both parties expected it to be paid, as he claimed it and she recognized the claim as being just. And not only so, but when her present husband, with whom she was then engaged, and to whom she was in an hour afterward married, remonstrated against conveying the land to appellee, she said she would do so on account of his services. And although he had influence enough to prevent her from conveying it in a square piece, and to induce her to convey it in a strip across an eighty-acre tract, her sense of justice resisted his opposition to her making any conveyance. And Black says that she did so after considerable quarreling. The record is barren of evidence of any device, trick, misrepresentation or false pretenses used by appellee to induce the conveyance; and we must hold that fraud is not established. From what has been said it follows that this was not a *donatio*

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mortis causa, but was a sale on a sufficient consideration to support the conveyance. And if we are correct in the conclusion that there was a sufficient consideration to support it, then there cannot be the slightest claim that it was a mere gift in apprehension of death, to operate only as a devise, and subject like a devise to revocation at the pleasure of the donor. A sufficient consideration having been paid, the title vested absolutely, and from the delivery of the deed as in any other sufficient conveyance, it became irrevocable. The entire record considered, we are of the opinion that the errors are not well assigned and the decree is affirmed. *Decree affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

JOHN A. ELLISON IMP'D, *v.* SAMUEL KERR.

AUCTION —*Real estate sold at.*—When real estate is sold at auction, until the sale is completed the auctioneer is regarded as a stakeholder of the deposit, where any is required to be made, and should not pay it to either party without the consent of the other. In relation to it, he is treated as agent for both seller and buyer.

SAME —*Exception to this rule.*— But where both the plaintiff and the owner of the property treated the money advanced on the purchase as being in the hands of the latter, he is alone responsible for it to the plaintiff.

APPEAL from Superior Court of Cook County. Opinion filed January 21, 1878.

ELDRIDGE & TOURTELLOTTE, *Attorneys for Appellants.*
KERR & MATTHEWS, *Counsel for Appellee.*

In July, 1873, John A. Ellison, of the firm of Ellison & Foster, as auctioneers sold a lot to Samuel Kerr for the sum of $550, of which sum $50 was paid in cash to the auctioneer acting, to secure the good faith of the bid. It was published by the auctioneer the title to the property was good, and that Picket, the owner, then present, would furnish an abstract showing a perfect title, and on compliance with the terms of the sale he would make the purchaser a warranty deed. The purchaser himself frequently applied to the owner for an abstract and deed, but without success. In December thereafter he accepted from the owner a contract in writing in which it was recited the owner had received from the purchaser $50 on the price to be paid for the lot, and conditioned as to terms on which a deed would be made as published at the sale, and also provided the deed and abstract should be delivered on or before the 1st of February, 1874. It was signed by both parties, and was placed on record in the proper office. On the day named in the agreement, the purchaser again went to the owner and asked him for the deed and abstract, but he was unable to furnish them. After that he made

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frequent applications to the owner for the abstract and deed, but with no better success.

Some time in the spring of 1875 the owner disclosed to the purchaser, that the premises embracing the lot bought by him had been sold under a trust deed given by him before the auction sale, and that he himself could not give a deed for the lots bought by him, but that the purchaser at the trustee's sale, then residing in Cincinnati, would. No deed or abstract was ever tendered to the purchaser at the auction sale. Shortly after the interview between the owner and plaintiff, the latter went to defendant and showed him the check for the $50, and asked him to refund the money so advanced at the auction sale, which he refused to do, and thereupon this suit was brought to recover it. It is proven defendant had long before this suit was brought, settled with the owner of the property sold, and in that settlement had accounted for the $50 advanced at the auction sale. The cause was tried before the court without the intervention of a jury, and judgment rendered for plaintiff for the amount claimed. Defendant brings the case to this court on appeal.

SCOTT, J., delivered the opinion of the court:

There being no controversy as to the facts of this case, but one question can arise, viz, whether after the elapse of so great a period defendant's firm is liable to refund the sum of money deposited with them, the owner of the lot sold having failed to furnish an abstract of title so that the sale could be completed. The general doctrine on this subject seems to be that when real estate is sold at auction, until the sale is completed the auctioneer is regarded as a stakeholder of the deposit, where any is required to be made, and should not pay it to either party without the consent of the other. In relation to it, he is treated as agent for both seller and buyer. Paley on Agency, 392; Wharton on Agency, sec. 252; Dart on Fen and Pur., pp. 81, 82. Reference to a few cases illustrative of the application of the principle may aid in a clearer understanding of the rule adopted.

An early case is *Burrough* v. *Skinner*, 5 Burr. 2639. In that case it did not appear the money had been paid over by the auctioneer to his principal, but whether that is so, objection seems to have been made before it either was or ought to have been so paid over.

A recovery was permitted in *Edwards* v. *Hadding*, 5 Taunt. 815, for two reasons: 1st, because defendant or attorney had notice the title to the property had not been completed before he paid over the money deposited with him; and, 2d, he misled plaintiff to sue him by not saying that he had paid it over to his principal when demand was made upon him.

In *Gray* v. *Gullenjdgi*, 1 Man. & Ryl. 614, defendant, who was an auctioneer, by contract signed, acknowledged that he had sold the real estate, and agreed to complete the sale according to the terms published, and having chosen in that way to bind himself as principal,

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he was held liable. But independently of that view, the court go on to say on the authority of *Burrough* v. *Skinner*, *supra*, it was the duty of defendant to keep the money until the sale was completed, without notice from plaintiff to that effect. Exceptional cases, however, may arise, which make it imperative, to prevent injustice, that there should be a modification of the general rules adopted, and the case in hand, it is apprehended, is one of that character. Should the principle declared be applied with that strictness with which it is expressed in the text-books and in some of the reported cases, it would in many instances work great hardships. In this case, near two years elapsed before any demand was made by plaintiff on defendant for the money deposited with his firm. No notice was given to retain the money for his benefit, and in the mean time defendant accounted for the money deposited with him, in a settlement made with the owner of the estate sold. During all that time plaintiff had been negotiating with the owner for the title to the property. Five months after the auction sale he accepted a written contract from the owner, in which it was acknowledged that the money deposited with defendant was in his hands, and in which it was also agreed that the owner should furnish an abstract and deed for the property by the 1st day of February, 1874. That the owner failed to do, and yet plaintiff continued to negotiate with him in regard to the consummation of the sale until the spring of 1875, without any notice to defendant to hold the deposit for his benefit. The conduct of plaintiff would warrant the belief in the mind of any reasonable person that payment could be properly made to the owner for whose use the deposit had been made with the auctioneer. Taking the contract, in which it was recited that the money was in the hands of the owner, is evidence of plaintiff's understanding that payment could rightfully be made by defendant to his principal, and defendant, under a belief induced by the conduct of plaintiff, might well proceed to settle with the owner of the property on that hypothesis; and having done so, it would be inequitable to permit plaintiff, under the circumstances, to recover it of defendant. Both plaintiff and the owner of the property treated the money advanced on the purchase as being in the hands of the latter, and he is alone responsible for it to plaintiff.

The judgment will be reversed, and cause remanded.

Judgment reversed.

EDITOR'S NOTES.

STATUTE—*Requiring writing, etc.*—Whenever a statute or usage requires a writing it must be made on paper or parchment, but it is not essentially necessary that it be in ink. It may be in pencil. Chit. Cont. 72; 2 Pars. Cont. 290; *McDowell* v. *Chambers*, 1 Stroub, Eq. 347; *Geary* v. *Physic*, 5 B. & C. 234; *Merritt* v. *Clason*, 12 Johnson, 102; *Joeffry* v. *Walton*, 2 Eng. C. L. 385; *Draper* v. *Pattina*, 2 Speers, 292. Promissory note: *Closson* v. *Stearns*, 4 Vt. 11; *Brown* v. *Butchers*, 6 Hill, 443; *Partridge* v. *Davis*, 20 Vt. 499. Bank account in pencil: *Hill* v. *Scott*, 2 Jones, 169. Wills: 1 Redf. Wills, sec. 17, pl. 2.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

FELIX K. MISCH ET AL. *v.* MINOR N. KNOWLTON.

AFFIDAVIT OF MERITS — *Stipulation to vacate judgment.*—Where it was stipulated and agreed "by counsel and by the court" that judgment might be entered against the defendants for $408.15, and that if the defendants should by affidavit show a good defense to the suit, upon the merits, the judgment should be set aside; and subsequently the affidavit of one of the defendants was filed, showing a meritorious defense to all of the note upon which the judgment had been rendered, except $81.27, and a motion was made to vacate the judgment, but the court refused to grant the motion unless the defendants would actually pay plaintiff the amount conceded to be due by the affidavit; it was *held* to be error.

SAME.—It was also *held*, that where appellants filed an affidavit which complied with the stipulation under which the judgment was rendered, they were entitled to have the judgment vacated, and had a right to plead the court had no power to impose a condition not embraced in the stipulation. It was no part of the stipulation that defendants should pay any part or parcel of the plaintiff's demand, and all that they could be required to do was to file an affidavit which declared a meritorious defense. This they did, and the judgment should have have been set aside, and defendants allowed to plead.

APPEAL from Superior Court Cook County. Opinion filed January 21, 1878.

Per Curiam: This was an action of *assumpsit*, brought by appellee to recover a balance claimed to be due upon a promissory note; to the declaration appellant interposed a demurrer, and at the same time entered a motion to strike from the files the affidavit of claim, on account of certain supposed defects it contained; the court overruled the demurrer, and denied the motion to strike from the files the affidavit, but, as appears from the bill of exceptions contained in the record, it was then stipulated and agreed in open court "by counsel and by the court" that judgment might be entered against the defendants for $408.15, and that if the defendants should by affidavit show a good defense to the suit, upon the merits, the judgment should be set aside. Subsequently the affidavit of one of the defendants was filed, showing a meritorious defense to all of the note upon which the judgment had been rendered, except $81.27, and a motion was made to vacate the judgment, but the court refused to grant the motion unless the defendants would actually pay plaintiff the amount conceded to be due by the affidavit. In this we are of opinion the court erred. When appellants filed an affidavit which complied with the stipulation under which the judgment was rendered, they were entitled to have the judgment vacated, and had a right to plead the court had no power to impose a condition not embraced in the stipulation. It was no part of the stipulation that defendants should pay any part or parcel of the plaintiff's demand, and all that they could be required to do was to file an affidavit

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which declared a meritorious defense. This they did, and the judgment should have been set aside, and defendants allowed to plead.

For the error indicated, the judgment will be reversed and the cause remanded. *Judgment reversed and remanded.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION, SEPTEMBER TERM, 1877.

JAMES MIX *v.* THE PEOPLE, ON THE APPLICATION OF C. P. SINGEST, COUNTY TREASURER, FOR JUDGMENT FOR TAXES FOR 1876.

CHANGE OF VENUE.—In an application for judgment for taxes the contestant is not entitled to a change of venue, neither has he any right to have a jury.

APPEAL from the County Court of Kankakee County: Hon. C. R. Storr, Judge, presiding. Opinion filed January, 21, 1878.

STEPHEN R. MOORE, *Attorney for Appellant.*

BREESE, J., delivered the opinion of the court:

This is an appeal by James Mix from the County Court of Kankakee county on the application of the county treasurer and collector of that county, for judgment against the lands of appellant alleged to be delinquent in the payment of the taxes assessed against the same.

The points made on this appeal are: First, that a motion for a change of venue was denied.

Second, that a trial by jury was refused.

Third, There was no proof that the property had been assessed.

Fourth, It was error to admit in evidence the delinquent list.

No one of these objections is tenable. An application for judgments for delinquent taxes is a summary proceeding, and governed by the Revenue Act. The act in relation to change of venue and to trial by jury have no application to such a case. It is not a suit in legal parlance.

It has been often held by this court that the party whose lands are charged as being delinquent must make the proof. It is not incumbent on the collector to prove it, for it is an act, with which he is not in privity. He is not required to make any proof of the acts of the assessor. *Durham* v. *The People*, 67 Ill. 414. The presumption is, the assessor and all other officers performed their duty.

The Revenue Act makes the collector's return of the lists of delinquent lands evidence. Parties can make objections at the proper time, if there be any. It is for the land-owner to point them out. So far as we can discover, the writ in this case complied with the statute.

The other points are settled by *Buck* v. *The People*, 78 Ill. 560, and *Mix* v. *The People*, ib. 118.

The judgment must be affirmed. *Judgment affirmed.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

THE SINGER MANUFACTURING COMPANY *v.* FREDERICK O. HOLTFORDT.

AGENT—*Knowledge—Gross negligence of principal.*—A was appellant's agent, with ample authority to sell the machine and receive and receipt for the payment of its price, and B bought the machine from him, paid him in full to the day for it, and received his receipt. It was *held* that his act and his knowledge, in this transaction, were the act and knowledge of the appellant, and that appellant's subsequently taking the machine by force from appellee's residence resulted from its gross negligence.

EXEMPLARY DAMAGES.—Such a case is eminently proper for the imposition of exemplary damages.

SAME—*Excessive damages.*—Any act of unwarranted force or any vulgar or ruffianly conduct by one in the home of another, the well-being of society demands shall be followed by such exemplary punishment as shall discourage it repetition, and we cannot say the judgment is more than adequate to that end.

APPEAL from Superior Court of Cook County. Opinion filed January 21, 1878.

ELDRIDGE & TOURTELLOTTE, *Attorneys for Appellant.*
MAGEE, OLESON & ATKINSON, *Attorneys for Appellee.*

SCHOLFIELD, C. J., delivered the opinion of the court:

This was trespass by appellee against appellant for breaking and entering his dwelling house and taking and carrying away a sewing machine.

The verdict of the jury was in favor of appellee, assessing his damages at $800. Motion for new trial was made by appellant, whereupon appellee remitted $300 of his judgment, and the court overruled the motion for new trial and gave judgment for appellee for $500.

It appears from the evidence that appellant is a corporation created by a law of the State of New York, doing business, through agents, in the city of Chicago. It had, when transactions involved in this controversy were enacted, an office, called its "head office," on State street, and an office under the control of one Wilkin, on Dearborn street. Wilkin says his arrangement with the "head office" was to dispose of its sewing machines, take contracts therefor, deliver them to the "head office," do the collecting and pay the money to the "head office."

On the 27th of July, 1872, Wilkin, in his capacity as agent for appellant, sold to appellee a sewing machine for $75, of which $10 was paid at the time and the balance was to be paid in monthly installments of $5, on the 27th of each month. At the same time an instrument was signed by appellant, by Wilkin and by appellee, reciting that appellant had leased the machine to appellee for thirteen months, at the price and terms of payment above stated as

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agreed upon for its purchase, and providing that if default should be made in any payment or any of the covenants therein of appellee, appellant should have the right to declare the lease forfeited and, either with or without process, enter the premises of appellee and search for and take and remove the machine.

Appellee made all the payments required by his contract, as they matured or before, and received the following receipt:

CHICAGO, October 28, 1873.

MR. F. HOLDFORDT,

To 1 Singer Sewing Machine, No. 663,272..... $75 00

Received payment, J. N. WILKIN, N. E. K.

The machine was delivered to appellee when he made the purchase and remained in his possession until the 18th of August, 1874, when appellant's agents, in the absence of appellee and against the remonstrance and exertions of his wife to prevent it, entered his dwelling house and forcibly removed the machine and conveyed it to the "head office."

Appellee testifies that in the preceding March, being informed that some one professing to be appellant's agent had, in his absence, been at his residence threatening to take the machine, he went to Wilkin's office and notified him of the threat and showed his receipt, upon which Wilkin replied: "That is all right; they will not bother you any more." That again, in May, of the same year, hearing that appellant's agents had repeated their call at his house, he went to Wilkin's office and showed his receipt, and was then replied to: "We have nothing to do with this any more. You have to go to 111 State street." When he got there he informed a lady, who was acting as cashier, of the object of his visit, showed his receipt, and asked if it was all right. She called a man that was superintendent, as he supposed, and he stated his desire to him. The man replied: "There is something wrong. Your receipt is all right, and if that man comes around again I wish you would have him arrested."

There is no controversy whether the men who took the machine on the 18th of August were the agents of appellant. They testify they so acted, and under directions received from those in charge of the "head office," at 111 State street.

Appellant returned the machine to appellee on the day following that upon which it was taken, after appellee, however, had twice applied at the "head office" and once at the office of Wilkin, as appellee testifies. He also says they first wanted to make the return of the machine only upon condition that he return his receipt, which he refused to do. The other members of appellee's family when appellant's agents removed the machine, and who were at his residence at the time, were his wife and three children, the eldest of which was about four years old and the youngest a babe.

Two witnesses, apparently disinterested, testify that they witnessed the taking of the machine from appellee's residence. One of them, Annie Oleson, says, being attracted by the screams of appel-

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lee's wife, she went to the house; that appellee entreated the man not to take the machine until appellee's return, informing him that appellee had a receipt for it, but he said he would not; that there were two men, one of whom went into the house and took the machine and the two put it into a wagon and drove off with it; that appellee's wife was in delicate health, and was crying. She also says appellee made an effort to prevent the removal of the machine. The other witness, Mrs. Minnie Weise, in substance *corrobates* as to the health of appellee's wife; that she was excited and crying, and that the occurrence created some attention in the neighborhood.

It is claimed by appellant that the machine was taken in good faith, though under a mistake in respect to the fact of payment having been made for the machine by appellee. Wilkin says in some way he omitted to report to the "head office" the payment of $10, and the books at that office showing nothing of this payment, it is claimed, those in charge of it honestly supposed they had a right to declare the lease forfeited, and acted accordingly; but as soon as convinced of the error they returned the machine in good condition.

It is contested that appellant, being a corporation, cannot be made to respond in vindictive damages unless the wrongful act was authorized or approved by the corporation. This is not in accordance with the ruling of this court. Ever since the decision in *C. A. & St. L. R. R. Co.* v. *Dalby*, 19 Ill. 353, it has been regarded as settled law that if the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes the corporation may be liable to vindictive damages, and that a person openly and notoriously exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority from the corporation to so act. But it is insisted, even if a corporation may be liable, in some cases, to vindictive damages, appellant cannot be in this, because vindictive damages cannot be assessed against a party for an act done in good faith and with prudence and proper caution. The only objection to this position is in the assumption that appellant, in taking the machine, acted in good faith and with prudence and proper caution. It does not appear from anything before us that the jury were clearly not warranted in believing that appellee testified to the truth; and, if he did testify to the truth, then even the "head office" was expressly notified, after it had on two occasions sent a man to appellee's residence to threaten the taking of the machine, that it had been paid for. When thus notified, common prudence and common honesty alike required the correction of their books in accordance with the truth, so as to avoid any future misapprehension.

But whether the "head office" was notified or not was not of the slightest concern to appellee's rights. He had nothing to do with the "head office." Wilkin was appellant's agent, with ample authority to sell the machine and receive and receipt for the payment of its price. Appellee bought the machine from him, paid him in

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full to the day for it, and received his receipt. His act and his knowledge, in this transaction, were the act and knowledge of the appellant, and the least that can be said of appellant's subsequently taking the machine by force from appellee's residence is that it resulted from its gross negligence.

We think, under the law and the evidence, the case is one eminently proper for the imposition of exemplary damages, and it remains, therefore, only to determine whether the damages for which judgment was given are excessive.

When appellee made the last payment for his machine all pretense of a license to enter appellant's residence and take it was ended. Thenceforth it was as secure against appellant's seizure as any other property appellee owned.

Any unauthorized entry into a dwelling house or violent or grossly offensive conduct therein by a stranger is deserving of prompt and adequate punishment. Such an act tends to violence, and, it may be, bloodshed, for so long as there is a feeling of manhood there will be a disposition to defend, at all hazards, domestic privacy and the rights with which the law invests the head of a family in his own domicile, and to fail to assert which is, by almost universal public sentiment, deemed degrading in the extreme.

Any violence thus resulting is not only dangerous to those between whom there may be conflict, but must also, many times, seriously imperil the helpless.

Any act of unwarranted force or any vulgar or ruffianly conduct by one in the home of another, the well-being of society demands shall be followed by such exemplary punishment as shall discourage its repetition, and we cannot say the judgment is more than adequate to that end.

The judgment is affirmed. *Judgment affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

THE CITY OF JOLIET *v.* WILLIAM HARWOOD.

RESPONDEAT SUPERIOR.—Where public work is done by an independent contractor with the city, the doctrine of *respondeat superior* does not apply. But it is important to bear in mind that it does not apply where the contract directly requires the performance of work intrinsically dangerous, however skillfully performed. In such case a party authorizing the work is regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.

SAME.—Where the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done, the right of recovery does not rest upon a charge of negligence on the part of the contractor, but rests upon the fact that the city caused work to be done which was intrinsically dan-

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gerous, the natural consequence of which was the injury to plaintiff's property, and in such case the city is responsible.

APPEAL from Will County. Opinion filed January 21, 1878.

DICKEY, J., delivered the opinion of the court:

It is insisted that O'Reiley, the contractor, is responsible for this injury, and not the city, and this upon the position that where public work is done by an independent contractor with the city, the doctrine of *respondeat superior* does not apply. Dillon, in his excellent work on Municipal Corporations, sec. 792, says such is the general rule, but it is important to bear in mind that it does not apply where the contract directly requires the performance of work intrinsically dangerous, however skillfully performed. In such case a party authorizing the work is regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.

In this case the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done. The right of recovery in this case does not rest upon a charge of negligence on the part of the contractor. It rests upon the fact that the city caused work to be done which was intrinsically dangerous, the natural (though not necessary) consequence of which was the injury to plaintiff's property. In such case the city is responsible.

The judgment must be affirmed. *Judgment affirmed.*

SCOTT, J., dissenting.

EDITOR'S NOTES.

AFFIDAVIT OF DEFENSE—An affidavit of defense setting up fraudulent and deceitful representation of quality of goods sold, must aver the *scienter* on the part of the vendor. The misrepresentation must be *willful*. *Boothe* v. *Alexander*, 34 Legal Intel. 456.

WILL—A will written and signed in lead pencil is valid. *Myers* v. *Vanderbilt*, 34 Legal Intel. 455.

PARTNERS—A committee of creditors carrying on a business for the benefit of the whole body of creditors, cannot be held liable as partners, for supplies furnished them, upon a promise made by one of their number alone to be individually liable. *Beeson* v. *Lang*, 34 Legal Intel. 454.

EVIDENCE—At one time it was the admitted doctrine, that if there was the least evidence, a mere scintilla, the question *must* be submitted to the jury, but that is not the law now. A court may now take the matter from a jury where there is slight evidence, a *mere scintilla*, and order a verdict for defendant. *Raley* v. *Cell*, 34 Legal Intel. 454.

ACCOMMODATION INDORSER—The cashier of a bank is not presumed to have power, by reason of his official position, to bind the bank as an accommodation indorser of his own promissory note, and actual authority to make such indorsement must be shown before a recovery can be had thereon. *Bank* v. *Parmelee*, 16 Alb. L. J. 473.

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SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION. PRACTICE DECISIONS.

FRANCIS M. RICHARDSON *v.* HENRY DEMING, ETC.

JANUARY TERM, 1878.

JURISDICTION—Appeal dismissed for want of jurisdiction.

CRAIG, J: In number 173.

There is a motion to dismiss the appeal. It appears from the record that this was an action in *assumpsit*, and the amount recovered was $75; the judgment being recovered on the 7th of August, when an appeal was taken to this court. An appeal in this case does not lie to this court, but since the establishment of the Appellate Courts should have gone to that tribunal. The appeal will be dismissed, and leave will be given to withdraw the record, if desired, in order to take an appeal to the proper court.

THE HOWE MACHINE CO. *v.* SAM. LAYMAN, ETC.

JANUARY TERM, 1878.

BRIEFS—Motion for extension of time to file.

WALKER, J: In number 155.

There is a motion by appellant for further time to file brief. In this case the court thinks there are grounds for an extension of the time. The time will be extended six days. That, however, will carry it past the call. The case will be taken when it is reached on the call, unless appellee shall object, and if the party applying fails to comply with the rule for extension of time by filing his brief, the submission will be set aside and the judgment affirmed.

THE PEOPLE ON THE RELATION GLENN *v.* THOS. S. NEEDLES.

JANUARY TERM, 1878.

MANDAMUS—Leave to file petition for.

SCOTT, J: Number 246.

In this case the motion is for leave to file a petition for a *mandamus*. We see no reason why leave should not be granted to file the petition. As the attorney-general has entered a demurrer to the petition there is no necessity for awarding process. Only private interests are involved in the litigation and the case will be placed upon the docket and called in its regular order.

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MARTHA E. EMMONS ET AL., ETC., v. CATHERINE MOORE.

JANUARY TERM, 1878.

REHEARING—Correction of expressions in opinion.

CRAIG, J: In number 1, on the rehearing docket.

There is a petition for a rehearing, which has been examined, but the court do not see sufficient ground to disturb the judgment that was entered when the cause was considered. The petition will be denied. We will, however, take occasion to correct some expressions in the opinion, not, indeed, to change the judgment in any respect.

PETERS v. BANTA.

JANUARY TERM, 1878.

APPEAL—Without bill of exceptions.

WALKER, J: In number 209.

There is a motion entered to dismiss the appeal because the bill of exceptions has been stricken out. We can see no reason for dismissing the appeal because there is no bill of exceptions. A party can appeal without a bill of exceptions if he wants to raise questions independent of the proceedings had upon the trial before the jury. The motion will be denied.

CLARK v. ROBINSON.

JANUARY TERM, 1878.

BRIEFS—Extension of time to file.

SCOTT, J: Number 138.

An application for an extension of time on the part of the appellee to file his brief. Time will be extended six days, in addition to that allowed by rule. The cause, however, will be taken as though the time had not been extended.

HARRISON MOSS v. THE VILLAGE OF OAKLAND.

JANUARY TERM, 1878.

APPEAL—Motion to dismiss for want of a sufficient bond.

WALKER, J: In number 179.

There is a motion entered to dismiss the appeal for want of a sufficient bond, and there is a cross motion for leave to amend and file a sufficient bond. Leave will be given to file a sufficient bond within five days.

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LUCINDA G. BENT v. MARY COLEMAN ET AL.

JANUARY TERM, 1878.

AMENDMENT—Cross motion to amend insufficient bond.

SHELDON, J: In number 137.

There is a motion to dismiss the appeal for want of a sufficient appeal bond and a cross motion for leave to file an amendment. The cross motion is allowed and five days given within which to file the amendment.

CHAPIN v. BILLINGS.

JANUARY TERM, 1878.

APPEAL BOND—Motion to file a new one sufficient to cover accruing rents and profits.

SHELDON, J: In number 217.

There is a motion to file a further appeal bond in the case. Objections are taken to the bond filed. It is a case of forcible detainer, and the objection is that the bond filed does not cover accruing rents and profits, but is conditioned merely for payment of the judgment and costs, the judgment being merely for the restitution of the land, the condition really covers costs. We think the bond should also cover the accruing rents and profits, although the order of the court below does not require that; still we think it should require it. We think the penalty is sufficient, $2,500, and we therefore rule to file a sufficient appeal bond within twenty days, conditioned to cover rents and profits, and if not done within that time the appeal will be dismissed.

SCHOLFIELD, J: The order is entered requiring the bond to be entered within thirty days of this date—to be approved by the clerk of this court, and in default of such bond being filed the appeal will be dismissed.

The Attorney General, Friday, January 18, 1878, offered a series of resolutions by the bar of Lee county, expressive of regret, etc., at the death of Judge Heaton, presiding judge of the Appellate Court in the First District, which, accompanying the request with a few remarks of his own, he asked to have spread upon the records of the court.

DICKEY, J: It was my privilege for more than a quarter of a century to know Judge Heaton very well indeed, personally and professionally. He was a man esteemed for fine ability, but more especially for the peculiar and rather remarkable fairness and justice of his character, not only as a lawyer and as a judge, but as a citizen and as a social companion. He had very many warm friends tenderly attached to him. So far as I know, he had no ambition. He was

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laborious, assiduous in the performance of his duties. I fully concur with all that has been said in relation to his work, and feel, as the members of the bar who adopted those resolutions, that his death is a loss to all his surroundings.

SCHOLFIELD, J: The resolutions will be spread upon record as asked. The members of the court will reserve the right, if they choose, to embody in writing their expressions upon the subject and put them upon record. These resolutions will be put upon record following the resolutions presented some days ago by Mr. Sherman, from the Chicago Bar Association.

SCHOLFIELD, C. J: Thursday, January 24, 1878. The court having been informed of the death of W. W. Heaton, one of the judges assigned to hold Appellate Court for the First District, have appointed as his successor, to hold court in his place, Joseph H. Bailey, of Freeport. The order is drawn up and will be entered upon record.

It being the duty of the chief justice of this court to assign one judge of this court and two judges of the Circuit Courts as a commission of claims, that duty has been performed, and Judge A. N. Craig, of this court, and Judges Vandever and Goodspeed, of the Circuit Court, have been assigned to perform the duties of the commission.

The court likewise adopt certain amendments to their rules, which you will find among the papers before me.

The following rule is adopted, and substituted for the former rule of this court at its last September term:

Pursuant to section 19 of an act in regard to practice in courts of record, approved June 2, 1877, Laws of 1877, p. 154: It is ordered by the court that in all cases removed from the Appellate Courts to this court, by appeal or writ of error, only so much of the record embracing a copy of the final judgment or decretal order of the Circuit Court, with a short statement of the facts found by the Appellate Court, and a copy of their final judgment, as shall be necessary to clearly and fully present the question upon which the decision of this court shall be sought, shall be made up, and the same shall be directed by at least two of the judges of the court from which the record is brought, and their order to that effect shall be certified as a part of the record.

Adopted January 18, 1878.

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APPELLATE COURT OF ILLINOIS.

THIRD DISTRICT. NOV. TERM, 1877.

CHICAGO & ALTON R. R. Co. *v.* RICHARD LANGLEY.

COMPARATIVE NEGLIGENCE—*Obstruction of street crossing by train.*—Where a party attempted to pass over to the other side of the track by climbing over the bumpers of the two cars standing across the street crossing, and while he was in the act of springing up the locomotive backed down some cars to fasten them to the train, and he was caught between the two cars and seriously injured; it was *held* that there could be no recovery.

APPEAL FROM MASON COUNTY. Opinion filed January 14, 1878.

DEARBORN & CAMPBELL, *Attorneys for Appellant.*
FULLERTON & WALLACE, *Attorneys for Appellee.*

DAVIS, J., delivered the opinion of the court:

This action was brought by appellee to recover damages for personal injuries sustained by him in attempting to cross the track of the railroad, by climbing over the bumpers of two freight cars, chained together, in a train then being made up, on the railroad of appellant.

The accident happened on the 25th of August, 1875, between five and six o'clock in the afternoon, in the town of Matrona, a small village on the prairie, consisting of ten or twelve houses.

The train ran into the village and stopped on the main track of the road, not far from the platform directly over the principal street crossing of the village, where the freight cars, after the engine was detached, remained some thirty minutes, while the locomotive was engaged in switching cars from the side to the main track, and attaching them to the train.

Shortly after the train arrived, appellee approached the crossing afoot, with the intention of passing over the track to the other side of the railroad. Finding the crossing obstructed by the train, he remained there some fifteen or twenty minutes, observing what was transpiring and conversing with others who were there with teams and on foot, waiting to pass over. The train not moving out, appellee attempted to pass over to the other side of the track, by climbing over the bumpers of the two cars standing across the street crossing, and while he was in the act of springing up, the locomotive backed down some cars to fasten them to the train, and he was caught between the two cars and seriously injured.

The ground where the accident happened was nearly level with the surrounding country, and was open on both sides of the railroad. The road bed was about a foot higher than the surrounding surface, and was made by the dirt thrown up from the ditches on each side. The locomotive and train were in plain view of those who were present while appellee was waiting at the crossing. The locomotive

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was on the north end of the train and was backing down on the main track when appellee started to cross over, but its location was not then noticed by him. The crossing where appellee was injured was at the distance of the length of five cars from the south or rear end, and of twelve cars from the front end of the train, there were two other street crossings where teams crossed, one north and the other south, about one hundred yards from the place of the accident. There was also a street on each side of the railroad track, outside of the right of way, and the ground on both sides was open and unoccupied, and used by the public in passing and repassing.

On these facts, as shown by the evidence, given principally by the appellee's witnesses, a verdict and judgment was rendered against the appellant, to reverse which this appeal was taken.

Appellant was guilty of some degree of negligence in permitting the train to remain an obstruction to the street crossing over ten minutes, and for that violation of law a remedy is given by the statute.

But that did not absolve appellee from the exercise of that reasonable care and prudence which should govern every person similarly situated. There was no urgent necessity shown for apppellee to cross the track at risk of life or limb, and if his business or pleasure required his presence on the other side, a very little exertion on his part would have enabled him to accomplish his purpose without risk. The locomotive was detached from the train leaving the cars standing motionless, with the rear end of the train at a distance of not exceeding one hundred and fifty feet from where appellee desired to cross, and nothing whatever in the way to prevent him from walking that distance and crossing the track in safety at the end of the train. It seems almost incomprehensible that a human being, endowed with reason, would run the risk of the loss of life which might result from an attempt to pass between two cars of a freight train, under the circumstances attending this case, when all possible danger could be avoided by the exercise of so slight a degree of prudence and care. The act of appellee was one of great danger and recklessness, of which he was probably unconscious at the time.

The rule is well established that a plaintiff cannot recover for injuries received through the defendant's negligence where his own negligence has contributed to such injuries, unless his negligence was slight and that of the defendant gross when compared with each other.

Conceding that appellant was guilty of negligence in obstructing the street crossing, the negligence of the appellee was not slight when compared with that of appellant, and therefore he cannot recover.

The judgment below must be reversed. *Judgment reversed.*

LACEY, J., having presided on the trial of this case below, took no part on the hearing.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1878.

OLIVER F. FULLER *v.* MARY LEDDEN.

STOCKHOLDER—*Liability for stock.*—In the charter of the Bank of Chicago, incorporated by special act of the legislature of Illinois, it is provided that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer as hereinafter mentioned."

Held, the liability to be a primary liability of stockholders to creditors; that stockholders became bound from the time a debt was contracted by the corporation, their liability being limited to double the amount of stock held or owned by each.

Also held, appellant being a stockholder in the bank when appellee deposited the money sought to be recovered in this action, appellant became the debtor of the appellee, and could not relieve himself from his liability without appellee's consent.

Also held, that the words of the charter did not limit appellee's right of action to three months after transfer of appellant's stock, but that such right could be exercised at any time within the time prescribed by the general statutes of limitation.

APPEAL from the Superior Court of Cook County. Opinion filed January 21, 1878.

FULLER & SMITH, *Attorneys for Appellant*, argued: The law sees in corporations only the creature of the charter, the body corporate, and knows not the individuals. *Gray* v. *Coffin*, 9 Cush. 199. The extent of liability depends upon the terms of the statute creating it. The time of its continuance is part of the contract. *Baker* v. *Backus*, 32 Ill. 99; *Tarbell* v. *Page*, 24 Ill. 46. The stockholder is liable *until* three months from publication of notice of transfer of his stock, and then his liability ceases. The liability here is liability to suit. It is expressly limited to continuance of ownership of stock and for three months thereafter. A transfer of stock in good faith releases a stockholder from future liability to corporation or its creditors. *Allen* v. *Mont. R. R. Co.*, 11 Ala. 451. A dormant partner may retire from his firm without notice of his retirement. *Warren* v. *Ball*, 37 Ill. 76. Did the legislature intend to put greater burdens on stockholders? The stockholder is liable for debts existing when he becomes a stockholder, and for those incurred during his membership (*Child* v. *Coffin*, 17 Mass. 64; *Bond* v. *Appleton*, 8 Mass. 472; *Middletown Bank* v. *Majill*, 5 Conn. 28); but upon transferring his stock, the transferree takes the shares *cum onere*, and the transferror ceases to be liable. Angel & Ames on Corp., sec. 534; Redfield on Railways, 53. The liability is not to the creditors of the bank, but it is a liability upon insolvency of the bank to contribute to the assets of the bank in a proceeding in the name of the bank, or its receiver, or in some suit to which the bank is a party. The demurrer should have been carried back and sustained to the declaration.

SHUFELDT & WESTOVER, *Attorneys for Appellee*, argued: The personal liability of a stockholder to creditors having become once fixed, the time within which it may be enforced, unless specially provided in the act of incorporation, is governed by the general statutes of limitation. The liability of the stockholder is a primary one to pay the corporation's debts. It becomes fixed the moment the debt is con-

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tracted by the corporation. *Corning* v. *McCullough*, 1 Com. 47; *Allen* v. *Sewall*, 2 Wend. 327; *Harger* v. *McCullough*, 2 Denio, 123; *Culver* v. *Third Nat. Bank*, 64 Ill. 535; *Aspinwall* v. *Sacchi*, 57 N. Y. 335; *Lindsay* v. *Hyatt*, 4 Ed. Ch. 104. The words in the charter, "and for three months after giving notice of transfer, as hereinafter mentioned," are not words of limitation in any sense, but continue the time in which each stockholder may become liable. The liability cannot be extinguished by a transfer of stock, and a transferree does not assume the liability of the transferror, because under the charter of the corporation in the case at bar, a stockholder is personally liable for none but debts contracted while he be a member of the corporation, or in three months thereafter. Being an original and primary liability it can attach to none but those who are stockholders at the time a debt is contracted. *Corning* v. *McCullough*, 1 Com. 47; *Moss* v. *Oakley*, 2 Hill, 268; *Harger* v. *McCullough*, 2 Denio, 122; *Adderly* v. *Storm*, 6 Hill, 636; *Tracy* v. *Yates*, 18 Barb. 152; *Southmayd* v. *Russ*, 5 Conn. 28; *Culver* v. *Third Nat. Bank*, 64 Ill. 537; *Holyoke Bank* v. *Burnham et al.*, 11 Cush. 183; *Mill Dam Foundry* v. *Hevey*, 2 Pick. 419.

CRAIG, J., delivered the opinion of the court:

This was an action of debt, brought by Mary Ledden in the Superior Court of Cook county against Oliver F. Fuller, to recover the amount of certain moneys deposited in the Bank of Chicago, a corporation organized under a special charter of the State of Illinois, in which Fuller was a stockholder at the time the money was deposited. The action was brought to enforce the individual liability of Fuller as a stockholder, under the third section of the charter of the bank, which provided that "each stockholder shall be liable to double the amount of stock held, or owned by him, and for three months after giving notice of transfer, as hereinafter mentioned."

The action was commenced on the 25th day of July, 1874, and in the declaration it was averred, that on the 1st day of January, 1873, previous thereto and thereafter, the said Oliver F. Fuller was a stockholder in said bank, and owned twenty shares, to the amount of $2,000, and on the last-mentioned date the Bank of Chicago was indebted to the plaintiff in the sum of $488.62 for money previously deposited by the plaintiff. To the declaration the defendant filed a special plea in which he averred that, prior to January 24, 1874, he was a stockholder; that on January 24, 1874, he sold and transferred his shares of stock to the bank, to wit: twenty shares to one Ellis for a valuable consideration, and then and there ceased to be an owner of any stock in the bank. That defendant's shares were, when sold, transferred in the manner required by the by-laws of the company, and the notice of such transfer required by the act was given on the 19th day of March, 1874. To this plea a demurrer was interposed, which the court sustained; and, the defendant electing to stand by the plea, judgment was rendered in favor of the plaintiff, and defendant appealed.

The plea presents but a single question, and that is, whether, under the charter of the bank, a right of action of a creditor against

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a stockholder is limited to three months after the stockholder sells and transfers his stocks.

In *Culver* v. *Third Nat. Bank of Chicago*, 64 Ill. 530, which was an action by a creditor to collect a demand against the corporation from a stockholder where the act of incorporation provided that all the stockholders of the company shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company prior to the time when the whole amount of its capital stock shall have been paid in, and a certificate thereof made and filed,— it was *held*, that the stockholders were personally liable to the extent, provided in the act, to the creditors of the company. In *Corning* v. *McCulloch*, 1 Comstock, 47—which was, as here, an action by a creditor against a stockholder— it was held, where the charter of an incorporated company provides that the stockholders shall be liable for its debts, and that a creditor may, after judgment obtained against the corporation and execution returned unsatisfied, sue any stockholder and recover his demand, such stockholders are liable in an original and primary sense, like partners, or members of an incorporated association.

In *Allen* v. *Sewell*, 2 Wend. 327, where the language of the act was, that "the members of the company shall be individually liable for its debts," the court said: "It was the intention of the legislature to put the stockholders upon the same footing, as to liability, as if they had not been incorporated."

In *Aspinwall* v. *Saechi*, 57 N. Y., where it was provided in the charter that the stockholders should be severally individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them respectively, until all the stock should be paid in,— it was *held:* "Here, by the statute, all the stockholders are made individually liable for the debts of the company, and the liability is the same, in effect, as if every stockholder had executed a separate bond binding himself to pay the debt, upon the conditions specified in the act." See also *Harger* v. *McCullough*, 2 Denio, 123; *Coleman* v. *White*, 14 Wis. 701, where the same doctrine is announced.

From these authorities it is apparent that the stockholder assumed the primary liability to creditors of the corporation to pay the indebtedness of the company, to an amount equal to double the amount of stock held by each stockholder. When a debt was contracted by the corporation, the liability of the then stockholders attached, and from that moment they became bound in the same manner, and with like effect, as if they had been doing business as partners, unincorporated, except, under the act, the liability of each stockholder is limited to double the amount of stock held or owned by him. The bank, no doubt, obtained deposits upon the credit of the stockholders, as the act which created the bank expressly declared and fixed the liability of the stockholders. The charter was accepted by the stockholders, the company organized and business commenced, with

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full knowledge on the part of the stockholders of their liability under the act which gave them a corporate existence. Under such circumstances the stockholders should be held to a strict accountability. When the money, to recover which this action is brought, was deposited in the bank, appellant was a stockholder; under the charter he became the debtor of appellee; his liability was fixed, and we are aware of no principle under which he could relieve himself without the consent of appellee. He had the right, it is true, to sell his stock, and cease to be a member of the corporation, but his withdrawal from the corporation would not relieve him from liabilities incurred while a member. A contract or liability of this character cannot be rescinded by one party without the consent of the other contracting party. But it is urged by appellant that the action cannot be maintained, as it was not instituted within three months after notice was given of the transfer of appellant's stock. The words of the act, "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer, as hereinafter mentioned," have reference to the continuance of the liability, and not to the time within which action shall be instituted. The fair and reasonable construction to be given to the language used is: Appellant, as a stockholder, was liable for debts incurred while a member, and for such debts as should be contracted by the corporation for and during the ensuing three months after he had given notice of the transfer of his stock. The general statute of limitations of the state, providing the time in which actions should be brought, was not changed by the provisions of the charter, but it was left in full force and effect. Suppose the act had been framed in this language: "Each stockholder, while a member of the corporation, and for three months after notice of transfer of stock, shall be liable to double the amount of stock held or owned by him"; we apprehend it could not reasonably be contended the stockholder would be relieved unless action was brought within three months after notice of transfer of stock; and yet the substance of the act and the supposed language is the same. We are of opinion, the facts set up in plea presented no defense to the action, and the demurrer was properly sustained. As to the declaration, it was good in substance, and the judgment will be affirmed.

Judgment affirmed.

EDITOR'S NOTES.

STOCKHOLDER—*Individual liability.*—Much of the confusion that seems to exist in the minds of many lawyers concerning the individual liability of stockholders of corporations for the debts of the company is attributable to two causes: (1) a want of a proper distinction between the nature of the liability of stockholders, and their successors, to the corporation of which they are members, and that of their liability as specially provided by charter or statute to creditors of their corporation; (2) a want of sufficient consideration of the fact that there scarcely exist any two charters or statutes providing individual liability of corporators to creditors of a corporation in the same, or even in synonymous terms.

1. The contract of a subscriber for stock in a corporation is with the corporation

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itself. The stock being once paid for in full, the contract of the stockholder is fulfilled. The money thus paid to the corporation becomes an asset of the company. The assets may be wasted, but the stockholder cannot be assessed for further payment. Until the stock be fully paid, the contract of subscription is an asset of the company. Upon insolvency of the corporation, this contract may be enforced for the benefit of the creditors of the company, but solely for the reason that it is an asset of the corporation. The creditors, independent of the company or its receiver, cannot enforce it. It is not their property. This contract of subscription being one between the stockholder and the company, it may be released by the company, if done without injury to creditors. So the corporation may, at common law, discharge, in good faith, a corporator, assigning his stock, from his liability upon unpaid stock subscription, and may receive therefor that of the incoming assignee.

On the other hand, the additional and further liability of corporators for the debts of the corporation, as generally modified and provided by statute or charter, is no manner whatever an obligation to the company, but is a liability direct to creditors of the corporation. This principle is distinctly asserted in *Ingalls* v. *Cole*, 47 Me. 530; *Stanley* v. *Stanley*, 26 Me. 191; *Paine* v. *Stewart*, 33 Conn. 516; *Southmayd* v. *Russ*, 5 Conn. 52; *Adkins* v. *Thornton*, 19 Ga. 325; *Middletown Bank* v. *Magill*, 5 Conn. 28; *Sherman* v. *Smith*, 1 Black, 587; *Atwood* v. *R. I. Agricult. Bank*, 1 R. I. 376; *Patterson* v. *Arnold*, 45 Pa. St. 410; *Coleman* v. *White*, 14 Wis. 700; *Wright* v. *Field*, 7 Porter, 376; *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473; *Spear* v. *Crawford*, 14 Wend. 20; *Simondson* v. *Spencer*, 15 Wend. 548; *Garrison* v. *Howe*, 17 N. Y. 458; *Harger* v. *McCullough*, 2 Denio, 119; *Burr* v. *Wilcox*, 22 N. Y. 551; *Culver* v. *Third Nat. Bank*, 64 Ill. 529, and in a large number of other cases.

It must then logically follow that, where such a liability to creditors exists, it forms no part of the assets or property of the corporation, and, unless specially controlled by statute, will not pass to a receiver of the assets of a corporation, *Judson* v. *Rossie Galena Co.*, 9 Paige, 597, or to an assignee in bankruptcy, *Dutcher* v. *Central Nat. Bank*, 11 Nat. Bankruptcy Rec. 457.

2. The remedy by which the various liabilities of stockholders may be enforced seems to have been a matter of some dispute. The law fixing the character of the liability upon stock subscription universally defines it to be a contract with the corporation, and gives but one remedy in the courts to the corporation,—an action at law against a delinquent stockholder for so much of his unpaid subscription as may be due by its terms. What should be the remedy, however, to enforce the stockholder's liability upon his subscription, the corporation having become insolvent and passed into the hands of a receiver, is a question concerning which courts have not been entirely harmonious. Some courts of great respectability have held that the receiver of an insolvent corporation may sue any stockholder of the corporation to recover whatever may be unpaid upon such stockholder's subscription, leaving the equities between the stockholders to be adjusted by themselves, by proper action or otherwise. See *Dayton* v. *Borst*, 31 N. Y. 435; *Winans* v. *The McKean R. R. and Navigation Co.*, 1 American Corporation Cases p. 3; But the Supreme Court of Illinois has held, in an unpublished case, *Lamar Ins. Co.* v. *Moore*, Centr. Div. Jan. T. 1877, that a stockholder of an insolvent insurance company, in the hands of a receiver, is liable upon his unpaid stock subscription, which is not due by its terms, *pro rata* only with other stockholders, to an amount not exceeding the unpaid subscription, sufficient to pay all liabilities of the company.

The individual liability of stockholders to creditors, however, has been enforced by a variety of remedies. This diversity in remedy is due to the difference between

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charters and statutes modifying or prescribing the liability, and to the various statutes of different states regulating the remedy.

The nature of the liability is defined by the terms of the statute or charter providing it, and, as those terms greatly vary in different cases, the nature of the liability varies also, and such variance will often affect the remedy.

In the principal case, the liability is provided in general terms, is not dependent upon the happening of any particular event or contingency, is made individual and separate by the words "each stockholder," and, not being limited in its nature, is a general one to every creditor. Such a liability is uniformly held, as in the principal case, to attach to every stockholder, to the amount prescribed, the moment the corporation contracts a debt (see authorities cited by the court); and it attaches to none but such as are stockholders when the debt be contracted. *Corning* v. *McCullough*, ante; *Moss* v. *Oakley*, 2 Hill, 268; *Harger* v. *McCullough*, ante; *Adderly* v. *Storm*, 6 Hill, 626; *Tracy* v. *Yates*, 18 Barb. 152; *Southmayd* v. *Russ*, ante; *Culver* v. *Third Nat. Bank*, ante; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Mill Dam Founrdy* v. *Horey*, 21 Pick. 419; *Judson* v. *Rossie Galena Co.*, ante. It would then follow that where the liability be in its nature like that discussed in the principal case, it could not be considered as one upon all the stockholders *en masse*, because each stockholder is liable for none but those certain debts contracted during his membership. In the absence of any controlling statute, therefore, the remedy sanctioned in the principal case seems to be the proper one. And even where a general statute provided that "the liability of stockholders" might be enforced by a creditor's bill, and the nature of the liability before the court was similar to that discussed in the principal case, the learned Chancellor Walworth (*Judson* v. *Rossie Galena Company*) said: "In the recent case of *Moss* v. *Oakley*, 2 Hill, 265, which arose under the act incorporating the Rossie Lead Mining Company, and which is similar in its provisions, the Supreme Court has decided that those who were stockholders at the time the debt was contracted were alone liable for the payment thereof, and not those who became stockholders afterward. So far, therefore, as the individual liability of the stockholders is concerned, the creditors of the corporation, whose debts were contracted at different times, have no common interest; and their claims will not necessarily be against the same persons as stockholders. It would, for that reason, be wholly impracticable for them to litigate their claims in one suit. For no creditor would have the right to file a bill and make all who were or ever had been stockholders of the company defendants therein, when some of such defendants might not have been stockholders at the time the debt was contracted."

In *Paine* v. *Stewart*, *Burr* v. *Wilcox*, *Eaton* v. *Aspinwall*, 19 N. Y. 119, *Abbott* v. *Aspinwall*, 26 Barb. 202—all actions at law by creditors of corporations against stockholders—the liability in question, in such case, was provided for in general terms, and was, in its nature, the same as that in the principal case, as interpreted by the court. These actions were sustained.

In many charters and statutes there is a liability of corporators to creditors provided for, which is not an obligation upon such alone as are members when the particular debt be contracted, but which is made to attach upon the happening of some event or contingency, and which will then attach upon all who are corporators at the time of the event. For example, the statute: "That for all debts which shall be due and owing by the company *at the time of its dissolution*, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company." Upon dissolution of the corporation, all the stockholders at that time are made liable for all the debts.

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Here, the stockholders *en masse* are liable for the debts *en masse* to the limit prescribed, and, it would seem, an action in chancery by a creditor in behalf of all creditors, to enforce the liability, would be practicable, provided it were possible to bring within the jurisdiction of the court all the defendants. The *Bank of Poughkeepsie* v. *Ibbotson* arose upon that statute. It was an action at law by a creditor of the corporation against a stockholder thereof. The defense contended that the remedy should be in equity. The court *held*, that, under the statute, the creditor could elect a remedy at law or in chancery; and it gave the plaintiff judgment. In reply to the defendant's argument that he might be compelled at law to respond to many actions in excess of his liability, the court said: "Any difficulty that may may exist on the part of the stockholder in protecting himself beyond the statute liability, has never been suggested as a ground for proceedings in equity. Indeed, it is clear, that, as to him, the defense is as perfect, if not as simple, in the one court as the other." *Garrison* v. *Howe* and *Woodruff & Beach Iron Works* v. *Chittenden*, 4 Bosw. 406, were actions at law, and *Slee* v. *Bloom*, 20 Johns. 668, was a proceeding in equity, under the same statute. *Briggs* v. *Penniman*, 8 Cowen, 387, and *Van Hook* v. *Whitlock*, 1 Paige, 409, were actions in chancery under similar statutes, where the remedies were concurrent.

There is, however, a class of statutes, or charters, providing individual liability of stockholders for debts of a corporation, that of their terms leaves something to be ascertained by a court of equity before the liability can be enforced.

Let us illustrate: In Massachusetts was a statute as follows: "The holders of stock in any bank *at the time when its charter shall expire*, shall be liable in their individual capacities for the payment and redemption of all bills which may have been issued by said bank, and which shall remain unpaid, *in proportion* to the stock they may respectively hold at the dissolution of the charter." Had the statute terminated at the word "unpaid," it would have been within the class last discussed, and creditors could elect under it a remedy either at law or in chancery. But the addition of the words "in proportion, etc.," makes it necessary for a court of equity to ascertain the assets and liabilities of a bank, and then determine "the proportion" necessary for each corporator to pay. *Crease* v. *Babcock*, 10 Metc. 525, arose under that statute.

The same remedy is imposed by the same words in the statute discussed in *Pollard* v. *Bailey*, 20 Wall. 520, and by the words "equally and ratably," modifying the manner of the liability of corporators in the statute discussed. *In re Reciprocity Bank*, 22 N. Y. 9, in the National Banking Act, and in various other statutes.

Under like reasoning it has been well held, that, where the liability by the terms of the statute is for a deficiency of assets to meet liabilities, a court of equity must take an accounting of the affairs of the corporation, in order to fix the amount of each stockholder's liability. It was so held upon such a statute in *Horner* v. *Henning*, 93 U. S. 228, and in *Harris* v. *Dorchester*, 23 Pick. 112. The principle in these cases, as well as in those where the liability is a proportionate or a ratable one, is, that there is something in the terms of the statute providing the liability, which leaves it necessary for a court of equity to act before the amount of a stockholder's liability can be ascertained and fixed. Upon this principle it is held in Ohio, where a general statute makes "all stockholders" of a private corporation liable within a certain amount *for securing creditors*, that, the stockholders being liable as sureties merely, it is necessary for a court of equity to adjust the affairs of the corporation and ascertain the amount of its liabilities, which it, as principal creditor, cannot pay, in order to fix the amount for which the stockholders, as such sureties, are liable.

In all cases where it is necessary for a court of equity to ascertain and fix the

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liability of the corporator, the question may arise whether the court will, in the same proceeding, proceed to enforce the liability by decree, or, having ascertained and fixed the amount, leave it to be enforced against the respective stockholders by courts of law. This question must be determined by the particular circumstances in each case, especially by the possibility of acquiring complete jurisdiction of all parties in the chancery proceeding. *Wheelock* v. *Kost*, 77 Ill. 296, was a proceeding in chancery to ascertain and fix the amount of the liability of the stockholders of a national bank (stockholders being, by the statute, liable "equally and ratably," and to enforce the same by decree. The action was fully sustained. The United States Circuit Court in Minnesota, however, held, in *Bailey* v. *Sawyer*, 9 Legal News, 191, that the Comptroller of the Currency was empowered by the Banking Act to fix the amount of each stockholder's individual liability, and, it having been by him determined, there was no necessity for the action of a court of equity, and stockholders could then be proceeded against in actions at law.

It remains to be said that, irrespective of all the principles and philosophy of the law, it is competent for the legislature to arbitrarily prescribe remedies; and, wherever this has been done in acts providing for individual liabilities of corporators to creditors, or by general statutes made directly applicable thereto, the prescribed remedy must be followed, though it be so uncertain and unsatisfactory in its results as to defeat the very purpose of the law. Such has often been the result of legislative wisdom in dictating remedies. The courts of a state will enforce obligations arising under the laws of another state, but a remedy prescribed by a legislature has no extra-territorial force. Therefore, when a particular remedy be provided by statute to enforce a particular obligation, it often practically releases the non-resident party from the obligation itself, because the prescribed remedy cannot be insisted upon in the courts of another state, and the obligees are not subject to any remedy but the one prescribed. Therefore, when the statute of New Hampshire provided an individual liability of stockholders to creditors, and at the same time provided a particular remedy in chancery, a stockholder residing in Massachusetts escaped all liability, because none but the prescribed remedy could be used at all, *Erickson* v. *Nesmith*, 15 Gray, 221, and the prescribed remedy could not be demanded in another state, *Erickson* v. *Nesmith*, 4 Allen, 233.

The following are a few of the cases where a particular remedy was prescribed by statute: *Martin* v. *Rossie Lead Mining Co.*, 2 Sanf. Ch. 333; *Bogardus* v. *Rosendale Manufg. Co.*, 4 Sanf. 92; *Walker* v. *Crane*, 17 Barb. 119; *in re Empire City Bank*, 18 N. Y. 199; *Story* v. *Furman*, 25 N. Y. 214; *Pruym* v. *Van Allen*, 39 Barb. 354; *in re Reciprocity Bank*, ante; *in re Oliver Lee's Bank*, 21 N. Y. 9; *Calkins* v. *Atkinson*, 2 Lansing, 13; also, 101 Mass. 385; 106 Mass. 131; 109 Mass. 473, and others.

From all the foregoing cases and considerations, the rule applicable to the remedy against the corporators of a company for their individual liability to creditors, may perhaps be stated thus:

Where the liability is provided in general terms, is separate, original and primary, and no remedy be arbitrarily provided by statute or charter, the remedy is, to the separate creditors, law alone.

Where the liability attaches, upon the happening of a particular event or contingency, to all who are then stockholders, and no remedy be arbitrarily provided by statute or charter, the creditor may elect his remedy at law or in chancery.

Where the terms of the charter or statute, providing the liability, leave something necessary for a court of equity to ascertain, in order to fix the amount of a stockholder's liability, and also where the charter or statute so direct, then resort must first be had to a court of equity.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

BERNARD A. STAMPOFSKI *v.* MARGARET H. T. HOOPER.

EVIDENCE—*Rehearing.*—Where the evidence in support of appellee's claim is in the last trial fuller and stronger than before, whilst that for appellant is weaker and less satisfactory, and there was evidence strongly tending to impeach the testimony given by appellant in his own behalf, and it was such as to authorize the jury in believing that his character for truth and veracity was so bad as to warrant them in disregarding his testimony in all matters not corroborated by other evidence, it was *held*, that the additional evidence heard on the last trial was material, and clearly distinguishes it from that on the former.

CONTRACT—*Agreement to convey land found in hands of assignee.*—Where there was a contract apparently fairly entered into agreeing to convey the undivided half of a lot, the consideration of the sale acknowledged to have been paid in full, and an obligation to convey on demand and reasonable notice, found in the hands of an assignee, it was *held*, that the existence of such an instrument, although not conclusive, is strong evidence that it was fairly and legally executed, and must be held binding on the person executing it until it is shown by clear and satisfactory evidence to be invalid. Loose and unsatisfactory evidence is not sufficient. If the binding force of such instruments may be destroyed by such unsatisfactory evidence, then the effects of written agreements solemnly entered into would, as evidence, be well nigh destroyed. Such instruments must have controlling effect as evidence until convincing evidence establishes their invalidity.

SAME—*Possession fraudulently obtained.*—Where A admits that he made and executed this instrument, but claims that B fraudulently obtained possession of it, and was to take it for a few minutes to procure the money with which to pay the sum named in the agreement, but failed to return it to A, and so testifies, and he is to some extent corroborated by C, who was present when the agreement was executed, but does not speak as to the consideration paid or to be paid for the lot, it was *held*, that A had not shown with sufficient clearness that B obtained the possession of the instrument by fraud, as he claims he did.

SAME—Also *held*, that where the evidence is conflicting it is for the jury to reconcile it, and that it is beyond the province of this court to reverse where the jury had found against the clear preponderance of the testimony.

APPEAL from Cook County. Opinion filed January 21, 1878.

LAWRENCE, CAMPBELL & LAWRENCE, *Attorneys for Appellant.*
BRANDT & HOFFMAN, *Attorneys for Appellee.*

WALKER, J., delivered the opinion of the court:

This case was before this court at a former term, and is reported in vol. 75 Illinois Reports, 241. It was then reversed and the cause was remanded for further proceedings in that court.

It has been again tried, resulting as before in favor of plaintiff, and defendant brings it again to this court by appeal.

It is insisted that as it was held by this court that the evidence failed to sustain the former verdict, that we should so hold now, as

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the evidence is substantially the same as before. In this supposition there is a manifest misapprehension.

The evidence in support of appellee's claim is fuller and stronger than before, whilst that for appellant is weaker and less satisfactory, and there was evidence strongly tending to impeach the testimony given by appellant in his own behalf. It was such as to authorize the jury in believing his character for truth and veracity was so bad as to warrant them in disregarding his testimony in all matters not corroborated by other evidence. Again, Lloyd and Walch were examined as witnesses on the last trial, and although not full it in some respects corroborates Hooper's evidence, and as his and appellant's testimony is that upon which the case mainly depends, the evidence of Lloyd and Walch may have been regarded as important in sustaining Hooper. We are clearly of the opinion that the additional evidence heard on the last trial was material, and clearly distinguishes it from that on the former.

Here was a contract apparently fairly entered into agreeing to convey the undivided half of a lot, the consideration of the sale acknowledged to have been paid in full, and an obligation to convey on demand and reasonable notice, found in the hands of an assignee. The existence of such an instrument, although not conclusive, is strong evidence that it was fairly and legally executed, and must be held binding on the person executing it until it is shown by clear and satisfactory evidence to be invalid. Loose and unsatisfactory evidence is not sufficient. If the binding force of such instruments may be destroyed by such unsatisfactory evidence, then the effects of written agreements solemnly entered into would, as evidence, be well nigh destroyed. Such instruments must have controlling effect as evidence until convincing evidence establishes their invalidity.

Here appellant admits that he made and executed this instrument, but claims that Hooper fraudulently obtained possession of it, and was to take it for a few minutes to procure the money with which to pay the sum named in the agreement, but failed to return it to appellant. And he testifies that such was the manner in which Hooper obtained possession. He is to some extent corroborated by Monroe, who was present when the agreement was executed. But he is only positive as to what transpired in reference to taking the agreement and returning it, but does not speak as to the consideration paid or to be paid for the lot.

In the first place, appellant's version of the matter does not appear to us to be reasonable or probable. It is apparent that Hooper was very poor, having much difficulty to support his family, and it is wholly improbable that a man thus situated would be desirous of purchasing real estate, especially property thus situated, or from appellant. He was enjoined from conveying not only it, but all he owned in the city, by a creditor's bill claiming the property in fact belonged to another person. Thus the title was in dispute. It was but an undivided half, and the other half in the name of a man with whom he was not even on speaking terms, and had not been

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for a considerable time previously. Is it reasonable to suppose that he would purchase and pay for this property thus situated, and of appellant, and pay the full value of the property in hand? We think not.

On the other hand, it is not disputed that Hooper had been appellant's attorney, and was claiming that he owed him $750 or $850 for fees, and Hooper swears it was due to him, and the balance of the purchase money he was to pay in services in the injunction suit. This is denied by appellant, who claims it was a sale, and the money was to be paid. As to such claim for fees claimed to be due, and services in the injunction suit being the consideration for the bond, Hooper is strongly corroborated by Walch, who appears to have been an unwilling witness and to have testified reluctantly in favor of appellee.

All of the evidence considered as it now stands, we are of the opinion that it sustains the verdict. But appellant has not, we think, shown with sufficient clearness that Hooper obtained the possession of the instrument by fraud, as he claims he did. In this conflict in the evidence, which was for the jury to reconcile, we should go beyond our province if we were to reverse, because the jury had found against the clear preponderance of the testimony.

It is objected that the instruction given by the court misled the jury, and that there was error in refusing instructions asked by appellant. After reading them carefully, we fail to see that the court committed any error in giving or refusing them. As given, the instructions presented the law of the case fairly to the jury, and we fail to see any grounds for reversing the judgment, and it must be affirmed. *Judgment affirmed.*

EDITOR'S NOTES.

MUNICIPAL CORPORATION—*Injury from change of grade of streets.*—Under the constitutional provision that "private property shall not be taken or *damaged* for public use without just compensation," if injury to private property is sustained by changing the grade of a street, the municipal corporation causing the same to be made will be liable to the owner in damages. *The City of Elgin* v. *Eaton*, 83 Ill. 535.

EMINENT DOMAIN—*Act relating to, not retrospective.*—The laws in force at the time a city enters upon a public improvement of a street by changing its grade, will fix and determine the right of a property holder to damages, and it cannot be altered by subsequent legislation. Ib.

SAME—*Measure of damages.*—If private property is damaged by a change in the grade of a street, the recovery must be measured by the extent of the pecuniary loss. If it is benefited as much as damaged, there can be no recovery, and it is error to refuse testimony to show that fact. Ib.

SAME—*Evidence—Profile of grade.*—In a suit by the owner of a house and lot to recover damages growing out of a change in the grade of a street, after the work is commenced and before its completion, the profile of the proposed improvement is proper evidence against the city. Ib.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION, SEPTEMBER TERM, 1877.

AMARILLA B. MULVEY *v.* JOSEPH G. GIBBONS ET AL.

EQUITY OF REDEMPTION—*Permission to assert, against an equity still stronger.* Where there were repeated attempts, and as was supposed, sufficient foreclosures of the equity of redemption; the moneys secured by the mortgage were largely in default, the property worth but a small part of the mortgage debt; for a long time theretofore, as well as thereafter, neither the mortgagor, nor any of the parties claiming under him, offered to make any payments on the mortgage, or pay any taxes, or gave the property any attention, and apparently abandoned the same; and where the condition of the title was such that repeated and numerous sales and conveyances were all the while being made for the full value of the land, on the basis of a good title, it being believed to be such, and so pronounced upon legal advice taken in some cases; and where this neglect, inaction or omission to intimate any adverse claim, and apparent content with and acquiescence in the several foreclosures, encouraged purchasers to deal with and buy the land as they did; and where this silence continued, and there was no stir of this asserted equity of redemption until after an extraordinary increase in the value of the property had occurred, it was *held*, that, viewing the equities between the parties, the petitioner appears to have the better right. The equity of redemption set up by the defendants should be regarded, as not enforceable against the petitioner at the time the petition was filed, and consequently as barred, and, if so, it confirms the title in the mortgagee and those claiming under him, making the title conveyed by the mortgage deed, which was conditional so long as the equity of redemption might be asserted, now absolute.

Also *held*, that under the proceeding here adopted the court below should have determined and decreed that the title in the land in question was vested in the petitioner.

APPEAL from Cook County. Opinion filed January 21, 1878.

JOHN BORDEN, *Solicitor for Appellant.*
C. C. BONNEY and F. H. KALES, *Solicitors for Appellees.*

SHELDON, J., delivered the opinion of the court:

The records of Cook county having been destroyed by the great fire in Chicago in 1871, and the title papers to a more or less extent of the petitioner, she filed her petition in this case under what is called the "burnt record" act, praying for a decree establishing and confirming the title she claimed to the land in question. The act provides that in case of such destruction of records any court in the county having chancery jurisdiction shall have power to inquire into the condition of any title to or interest in any land in the county, and to make all such orders, judgments and decrees as may be necessary to determine and establish such title or interest, legal or equitable, against all persons, known or unknown, and that it shall be competent to determine and decree in whom the title is vested, whether in the petitioner or in any other of the parties before the

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court. Various persons were made defendants, but the contest in the case is only between the petitioner on the one side and the defendants, Gibbons and the South Park Commissioners, on the other, and the case will be considered only as regards them.

The whole question arises under the Embree mortgage, the defendants claiming under conveyance by the mortgagor made subsequent to the giving of the mortgage, and the petitioner under conveyance from the mortgagee, after the mortgage was made.

Petitioner insists the equity of redemption has been barred by foreclosure, or, if not so barred, it was not enforceable against her as a purchaser, and claiming under purchasers for value, and *bona fide* by reason of laches, neglect or abandonment on the part of the grantees and assigns of Embree, the mortgagor, and that the true question in the case is whether the equity of redemption was enforceable against the petitioner at the time the petition was filed.

Defendants insist there has been no valid foreclosure, and in that event deny that the question is as petitioner claims, but that whether the equity of redemption is enforceable against the petitioner is a question only to be determined upon a bill for foreclosure subsequently to be filed; that under the statute the question of *title* only is to be determined in this proceeding; that the mortgagor holds the title until the equity of redemption is regularly foreclosed, and hence that the court rightly decreed that the title was vested in the lawful grantees and assigns of Jesse Embree, and not in the petitioner, leaving the question whether the equity of redemption was enforceable, open, to be determined upon, bill to be filed to foreclose the mortgage, the decree expressly saving that right.

We concur in the view of the petitioner, that the proper question is whether the equity of redemption was enforceable against the petitioner at the time the petition was filed, for, if not, then the title was in the petitioner.

Defendant's position, as also the decree, would treat the case as one only to establish a lien by mortgage, and not as one to establish title. The statute in terms provides for two sorts of petitions, one to establish title, and the other to establish any lien by mortgage, etc. The position here is to establish title. The respective parties claim title under conveyances purporting to convey title; the power of the court under such petition is to inquire into the condition of any title to or interest in the land, and to make such decree as may be necessary to determine such title or interest, legal or equitable, against all persons known or unknown. We think the court here might properly determine in which party was the title or interest in the land, whether legal or equitable.

Petitioner claims there have been here three valid foreclosures. One by decree, in the second foreclosure suit against Daniel and others, on bill for foreclosure field April 25, 1868. But that decree does not affect the defendants, because Tompkins, who then owned the equity of redemption, if it had not been previously foreclosed, was not made a party to the suit. It is claimed that he was a party

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under the designation of "unknown persons," as the complainant in that suit did not know that he had right in the land. This claim is entirely inadmissible. Tompkins was a party to the original foreclosure suit, a well-known resident of the county, and because the party bringing the second foreclosure suit did not know that his rights were not cut off by the decree of foreclosure in that former case, he cannot be treated as an unknown person in the second foreclosure suit. He does not fill the description of such person within the contemplation of the statute for making unknown persons parties.

Another foreclosure claimed is under the power of sale in the mortgage. The objections taken to this foreclosure are that the property was bid in at the sale indirectly for the mortgagee, and that the deed executed pursuant to the sale was made in the name of the mortgagee, and not in the name of Embree, the mortgagor, the mortgage providing that upon sale the mortgagee might, as the attorney of the mortgagor for that purpose, by the mortgage duly authorized and appointed, execute and deliver to the purchaser a good and sufficient deed, etc. The first objection would render the sale voidable only at the option of the mortgagor, to be determined in apt time. But neither he nor his grantees have ever taken any steps to set aside the sale. It is claimed that Wiltburger himself sufficiently impeached the sale by his first bill of foreclosure, wherein he set forth these two matters as affecting the validity of the foreclosure under the power of sale. Such averment in that bill was but the statement of a legal conclusion as supposed to result from the facts, and made for the purpose of that suit as an excuse and reason for applying for a chancery foreclosure. The subsequent voluntary dismissal of the suit, it is contended, amounted to a withdrawal of this allegation in the bill, and that it should be counted for naught. We do not regard this statement in the bill of itself, exclusive of influence it might have on subsequent conduct, as having any greater effect than the admission of the fact that the property was bid in for the mortgagee. It is said the same statement is repeated in the present petition. We do not so understand.

The petition makes reference to that bill to foreclose, stating that therein, among other things, the complainant averred the invalidity in the respects named, of the foreclosure under the power of sale, the petition only stating, by way of recital, the allegations of the bill to foreclose.

The mortgage gives the power, in default of payment, to sell the land, and all right of redemption at public auction, and declares that the sale shall be a perpetual bar to the right and equity of redemption. The sale itself, duly made, would seem to be the principal thing, and the substantial foreclosure of the right to redeem, and, however, in case of such a form of mortgage, the deed made in the name of the mortgagee, and not in the name and as the attorney of the mortgagor, may be regarded as not conveying a good title in fee simple to the purchaser, as seems to have been held in *Speer* v. *Hadduck*, 31 Ill. 439, in an action of ejectment, we must regard

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such a proceeding for foreclosure as not to be disregarded in its bearing upon the equities in this case.

The decree of strict foreclosure in the case of *Wiltberger* v. *Embree et al.* is mainly relied upon as protecting the petitioner up to and at the time of the institution of that suit Wiltberger seems to have claimed and relied upon the foreclosure under the power of sale as a valid one. Mrs. Cleaver seems to have bought and paid for the land upon such reliance, though at the time it was thought advisable that a decree of strict foreclosure should be obtained, and probably the money was paid for the land under the expectation that such a decree would be obtained.

Although Mrs. Cleaver, with reference to that foreclosure suit, bought *pendente lite*, and is therefore affected by the reversal of that decree, and she herself enjoys no protection from the decree, it is otherwise with her grantees, Mulvey and Bass. The decree of strict foreclosure was entered June 18, 1866.

The deed from Mrs. Cleaver and her husband was made to Mulvey and Bass June 20, 1867. No step was taken toward reversing the decree until August 23, 1869, when the writ of *scire facias* to Wiltberger, defendant in error, was issued.

Although then the decree of foreclosure was reversed by judgment of this court on May 22, 1871, such reversal would in no wise affect the rights of Mulvey and Bass, as decided by this court in the cases of *Wadhams et al.* v. *Gay*, 73 Ill. 415; *Eldridge* v. *Walker*, 81 Ill. 270, they having purchased while the decree of strict foreclosure was in full force, before any steps had been taken to reverse it, was entitled to put faith in and rely upon the decree as determining and binding the rights of the parties to the suit in the land. The case of the petitioner then claiming under Mulvey and Bass, or Mulvey alone, is to be considered as unaffected by the reversal, and as if the decree were now in full force.

Errors, if there be any, in the decree cannot affect it collaterally if there was jurisdiction.

There was full jurisdiction over Tompkins, under whom defendants claim, and even as to his co-defendant, Ashton, upon whom service was held bad, and made a ground of reversal, the decree would be good collaterally, as the writ on which the service was held bad was returnable to the December term, 1865. His default was not entered until June 11, 1866, before which time several terms of court had elapsed, there being a new term of the Superior Court begun on the first Monday of each month.

By the order of the court of June 11, 1866, it was found that due personal service of process of summons had been had on Ashton, there having been then time for another summons, and a valid service of the same, the same will be presumed in the case of such a finding. *Miller* v. *Handy*, 40 Ill. 449; *Turner et al.* v. *Jenkins*, 79 Ill. 228.

The objection to the decree for uncertainty as to the amount found due and to be paid we would regard as no more than error in the

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decree, were the objection founded in fact, but we consider the decree as reasonably certain in this respect, that the sum was $45,000, the decree in this regard being:

"And it also appearing to the court that the said Embree has only paid a part of one of the notes due January 1, 1859, to wit, $1,103 40/100 thereon, and that said complainant has received no other money on account of said notes, and that there is now due and owing on said notes over and above the sum of $45,000, besides the sum of $52,800 yet to mature, but which, as provided by said mortgage, has also to become due and payable, making a total of some $97,800."

Then afterward follows the order to pay the amount now due and owing on the notes and mortgage.

The more serious objection taken to the decree is, that it was but a decree *nisi*, and that in order to complete the decree as one of foreclosure a further order of court was necessary finding that the money had not been paid and making the foreclosure absolute.

The concluding portion of the decree was as follows:

"And it is also ordered, adjudged and decreed that upon the defendants, or either of them, paying to complainant the amount now due and owing on said notes and mortgage, together with the costs of this suit, within thirty days from the entry of this decree, that then the complainant cancel and satisfy of record said mortgage, if thereto required by said defendants, or either of them, but in default of such payment by defendants, or either of them, within the time aforesaid, then it is ordered, adjudged and decreed that the defendants, and each of them, do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said premises included in said mortgage, and set forth and described in said bill of complaint," particularly describing them. No further order or decree appears. The rule in English practice in this regard is thus laid down in Daniells' Chancery Practice, vol. 24, Am. ed., p. 996, *et seq.* "There are some cases of decrees which, although they are final in their nature, require the confirmation of a further order of the court before they can be acted upon. . . . The most ordinary case, in which a further order is necessary to complete the decree, is that of a decree for a foreclosure. . . . If, upon that occasion (the time appointed for payment), the defendant does not attend to pay the money, the plaintiff's right to the estate will become absolute. He must, however, in order to complete his title, procure a final order for confirming it, otherwise the decree of foreclosure will not be pleadable.

It is contended by petitioner's counsel that this rule of practice does not prevail in this state, and in the absence of any express decision of this court upon the point he cites the case of *Chickering* v. *Failes*, 26 Ill. 507, as being in support of such view.

The decree there was one of strict foreclosure. The form of the decree does not appear in the report of the case, but counsel set it forth at length, as shown by the transcript of the record in that case,

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and it is a decree *nisi* in form as in this case, with no subsequent order of confirmation appearing. This is not contradicted.

The decree of strict foreclosure there was held void for want of jurisdiction in the court to render it. It was then set up as color of title in bar of the right to redeem, the statute upon the question involved being, that on proof of the statutory requirements, the party relying upon the same "shall be held and adjudged to be the legal owner of the lands and tenements to the extent and according to the purport of his or her paper title."

The decree was held to be good color of title, and, accompanied with the other statutory requisites, to be sufficient to bar the equity of redemption, because it purported to be a foreclosure of the mortgage. The answer made to this is, that the point now in question was not in any way raised or considered in that case. Without pronouncing as to the rules of practice in this state in the regard named, and admitting it to be as claimed by defendants, we deem the decree as it is, in its bearing upon the equities in this case, as of sufficient avail to the petitioner.

At the date of the decree, and for a considerable time afterward, the property was worth very much less than the amount due of the mortgage debt; the decree determined the rights of the parties, and decreed that unless the amount due was paid within thirty days the defendants should be debarred from all equity of redemption of the premises; there is no pretense of the payment of any part of the money, or of excuse for non-payment, or of any readiness or disposition to pay anything. Why, in reason and justice, should not the right of redemption be barred as the decree declared?

The absence of a further order of confirmation was a lack of but the merest technical form. According to the rule as laid down by Daniell, if the defendants did not pay the money the plaintiff's right to the property became absolute, though in order to complete his *title* there must have been a final order confirming it.

If the plaintiff's right to the property had become absolute, how, before a court of equity, could that consist with any remaining right of redemption in the defendants? Why, in that court, where the real right, regardless of form, is regarded and given effect to, should not such an absolute right as thus declared be recognized and asserted?

In *Kenyon* v. *Shreck*, 52 Ill. 383, this court recognize and declare the principle that the right of a mortgagor or his grantees to redeem after condition broken is a purely equitable right, which can be asserted only in a court of equity, and where its assertion would be plainly inequitable that court will withhold its aid; and that where a defective foreclosure has been had such equity of redemption will not be permitted to be asserted against an equity still stronger, and see *Hamilton* v. *Lubukee*, 51 Ill. 420; *Burgess* v. *Munn*, 70 id. 604; *Bush* v. *Sherman*, 80 id. 160.

The application of that doctrine to the facts of the present case must determine it in favor of the petitioner. There were here

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repeated attempts, and as was supposed, sufficient foreclosures of the equity of redemption; the moneys secured by the mortgage were largely in default, the property worth but a small part of the mortgage debt; for a long time theretofore, as well as thereafter, neither Embree, the mortgagor, nor any of the parties claiming under him, offered to make any payments on the mortgage, or pay any taxes, or gave the property any attention, and apparently abandoned the same, as Egbert Wiltberger testifies they did abandon it.

It appears that Embree had made contracts of sale with several different persons, for small portions of the premises, and Wiltberger had arranged to release their parts from the mortgage on making their payments; that in or before 1859 some small payments were made by these under purchasers, which were applied on the mortgage, and some taxes on their portions were paid in that year, but that subsequent to that year they never paid anything, or any taxes, although applied to and urged to do so by Wiltberger, he offering to release from the mortgage on payment of a very much less amount than a proportionate part of the mortgage debt, in one instance on paying at the rate of $100 per acre. The abandonment was apparently entire on the part of them all. Wiltberger and his grantees were allowed to deal with the property as their own, without objection. They paid the taxes, made a vacation of Yerber's previous subdivision, made a new and different subdivision themselves, with streets which were improved and traveled as highways.

The condition of the title was such that repeated and numerous sales and conveyances were all the while being made for the full value of the land, on the basis of a good title, it being believed to be such, and so pronounced upon legal advice taken in some cases. All this occurred before the eyes of Tompkins, who resided in Chicago, under whom defendants claim, and to whom Embree conveyed the equity of redemption in 1859.

This neglect, inaction or omission to intimate any adverse claim, and apparent content with and acquiescence in the several foreclosures, encouraged purchasers to deal with and buy the land as they did.

This silence continued, and there was no stir of this asserted equity of redemption until after an extraordinary increase in the value of the property had occurred from the passage of the park act, when in May, 1869, Tompkins quit-claimed his interest in the premises in question to one Daniel H. Carpenter, for no consideration, so far as the proof shows, after which the decree of foreclosure was taken to this court on error and reversed. Gibbons, to whom Carpenter subsequently conveyed, does not appear to have paid any consideration. The South Park Commissioners, who purchased from Gibbons, appear to have paid a valuable consideration, but they must be held to have had notice of the prior equity of the petitioner.

Viewing the equities between the parties, the petitioner appears to have the better right. The equity of redemption set up by the defendants should be regarded, we think, as not enforceable against

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the petitioner at the time the petition was filed, and consequently as barred, and, if so, it confirms the title in the mortgagee and those claiming under him, making the title conveyed by the mortgage deed, which was conditional so long as the equity of redemption might be asserted, now absolute.

We are of opinion that under the proceeding here adopted the court below should have determined and decreed that the title in the land in question was vested in the petitioner.

The decree will be reversed and the cause remanded for further proceedings in conformity to this opinion. *Decree reversed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

GEORGE N. SPRINGER ET AL. *v.* JOSEPH G. GIBBONS ET AL.

APPEAL from Cook County. Opinion filed January 21, 1878.

JOHN BORDEN, *Attorney for Appellant.*
C. C. BONNEY AND F. H. KALES, *Attorneys for Appellees.*

Opinion per Curiam: The essential points in this case are identical with those in the case of *Mulvey* v. *Gibbons et al.*, decided at the present term, and for the reasons given in the opinion filed in that case the decree herein is reversed and the cause remanded for further proceedings conformable to such opinion. *Decree reversed.*

EDITOR'S NOTES.

CHATTEL MORTGAGE—*As to acknowledgment.*—A chattel mortgage, as between the parties, is valid, without any acknowledgment; but, without the acknowledgment, it has no effect upon the rights of third parties acting in good faith, and notice of such a mortgage does not prevent a creditor from subjecting the property to the payment of his debt. *McDowell* v. *Stewart*, 83 Ill. 538.

SAME—*Effect of a false certificate of acknowledgment.*—Where a mortgagor requested a justice of the peace to go to the office of the mortgagee, which was in a different town from that in which the justice and mortgagor resided, and the justice, in the absence of the mortgagor, at the request of the mortgagee, added his certificate of acknowledgment to a chattel mortgage in due form; *held*, that the certificate was false, and that the mortgaged property was liable to levy and sale on execution against the mortgagor. Ib. *Vide: Porter* v. *Dement*, 35 Ill. 478; *Frank* v. *Miner*, 50 Ill. 44; *Forrest* v. *Tinkham*, 29 Ill. 141; *Van Pelt* v. *Knight*, 19 Ill. 535; *Sage* v. *Browning*, 51 Ill. 217.

CONTRACTS.—One who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. *Dutchess etc.* v. *Davis*, 14 Johns. 238; *Sanger* v. *Upton*, 91 U. S. 56; *Upton* v. *Treblecock*, 91 U. S. 45; *B. & O. R. R. Co.* v. *Cary*, 26 N. Y. 75; *Bissell* v. *M. S. R. R. Co.*, 22 N. Y. 259.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

The Western Union Telegraph Company *v.* The Chicago & Paducah Railroad Company et al.

Contract—*Not formally executed.*—Where all the acts of a railroad company are the acts of acquiescence and adoption and recognition by the railroad company of the terms of contract, they should be *held* binding upon the company, although it did not formally execute the contract.

Same—*Public policy — monopoly.*—*Held*, that on the ground of public policy, so long as any other company is left free to erect another line of telegraph poles, there is no just ground for complaint on the score of monopoly or the repression of competition. Also *held*, that under the terms of the contract, appellant's rights in respect of the line of poles in question is exclusive as regards any other telegraph company, so far as physical interference or injury may result from placing upon the poles an additional wire by another company.

Statute of Frauds—*Acceptance of contract by letter—part performance.*—The acceptance of the contract by letter is a sufficient signing within the statute, and the contract is taken out of the statute by the mutual execution of its terms and provisions on the principle of part performance.

Appeal from La Salle County. Opinion filed January 21, 1878.

Williams & Thompson, *Solicitors for Appellants.*
Henry Crawford, *Solicitor for Appellees.*

Sheldon, J., delivered the opinion of the court:

This was a bill in equity brought by the Western Union Telegraph Company against the Chicago & Paducah Railroad Company and the Atlantic & Pacific Telegraph Company, for an injunction to restrain the last-named telegraph company from the use for the line of its wire of the telegraph poles along the road of the railroad company.

The facts appearing are, that in the winter and spring of 1874 the Chicago & Paducah Railroad Company was constructing, and had about completed, its railroad from Streator to Altamont. It had commenced the construction of a line of telegraph by the erection of a line of poles for a portion of the distance, when negotiations were opened with the Western Union Telegraph Company, looking to the adoption of the telegraph line by that company. These negotiations were carried on mainly by Ralph Plumb, the vice-president and general manager of the railroad company, on one side, and Anson Stager, the general superintendent of the telegraph company, on the other. They resulted in the drawing up of a contract in writing, the formal execution of it by the proper officers of the telegraph company, and the submission of a copy of it to the railroad company. The contract provides as follows: That the railroad company shall furnish and distribute for the telegraph com-

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pany, along the line of the road, cedar poles, and furnish all labor to erect the poles, and to place wires and insulators thereon, and also to furnish the labor to keep the telegraph line in repair. The telegraph company agreeing to furnish wire, insulators, batteries, instruments, and all other material, except poles, necessary to the construction of the line, and to furnish all material, including poles, necessary to keep the line in repair. The telegraph company agrees to give the free use of new telegraph patents, discoveries or inventions which may be acquired during the continuance of the contract.

The railroad company grants, and agrees to assure to the telegraph company, so far as it legally may, an exclusive right of way along the railroad line and lands, for commercial or public telegraph purposes, and to discourage competition by withholding facilities and assistance, performing toward competing lines its legal duty and no more.

The messages of the officers and agents of the railroad company are to be transmitted over the line free of charge, and the telegraph company agrees, in addition, to transmit such messages over its lines throughout the United States, free of charge, to the amount, at regular rates, of $100 per month, and for such messages in excess of that amount at one-half the regular rates.

The telegraph company agrees to furnish machinery and batteries for all offices which the railroad company may deem it necessary to open, and the railroad company agrees to receive at its offices and transmit all commercial messages which may be offered, at the tariff rates of the telegraph company, rendering monthly accounts of receipts and paying the same to the telegraph company, and in all such business conforming to the rules and regulations of the telegraph company.

The telegraph company's operator shall perform telegraph duty for both companies, unless the business of both companies is too large for one operator, in which case each pays its own operator.

It was agreed that the telegraph line or wires covered by the contract should form part of the general telegraph system of the telegraph company, and as such in the department of commercial or public business should be controlled and regulated by it, the telegraph company fixing and determining all tariffs for the transmission of messages and all connections with other lines.

The contract to be in force for twenty-five years from the first day of ———, A.D. 1874.

Immediately upon the submission of the draft or copy of the contract to the railroad company, Stager received the following letter from Plumb, the vice-president and general manager of the railroad company:

CHICAGO & PADUCAH RAILROAD COMPANY,
STREATOR, March 5, 1874.

ANSON STAGER, ESQ., General Superintendent Western Union Telegraph Company:

Dear Sir,—Yours with draft of contract proposed for telegraph on the line of the Chicago & Paducah Railroad is received, and has been examined. It is proper to state that so far as we have already erected poles they are cedar, have insulators

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now on them, and are 200 feet apart. For the remaining distance we will put them up at the rate of thirty to the mile; while you can furnish the balance of the insulators and allow us cost for those put up by us. With this exception, we accept the terms named in the draft of the contract furnished, and ask your company to do the same. If this is done, we shall require about 1,000 additional poles to build as far as the track is now ready, 143 miles. What about four-inch poles referred to being on hand in Chicago? We are very anxious to get the 143 miles up at as early a day as possible, and the remaining 13 miles as soon as the track is laid in May next.

If you require the contract signed and returned now, we are ready to do it.

Yours truly, RALPH PLUMB, V. P. and G. M.

The telegraph company immediately notified the railroad company of its acceptance of the contract as requested, fixing the date left blank as January 1, 1874.

The companies respectively furnished the labor and material required by the contract, the telegraph company equipping the line with wires, insulators, batteries, blanks, etc., so that by June, 1874, the line was in working order, and for that month the railroad company made to the telegraph company its first return and payment of receipts for commercial business, and did the same for each succeeding month to July, 1875, inclusive. In August, 1874, a bill for $560, rendered by the Kenosha Insulator Company to the railroad company for insulators ordered by that company before the contract was made, was sent by the railroad company to the telegraph company and paid by the latter at the request of the railroad company after the completion of the line; franks for the free telegraphing were applied for and furnished as provided in the contract; requisitions for the telegraph supplies were constantly made by the railroad company upon the telegraph company, and from June, 1874, until August, 1875, the telegraph business upon the line was conducted in all respects according to the terms of the contract, so far as appears to have been known to the telegraph company. The free business of the railroad beyond the line was performed as agreed.

The formal signature to, and execution of, the contract by the railroad company does not appear. The reason seems to have been this, that the contract was lost in the New York office of the telegraph company, and remained there for more than a year. When it was at last discovered Plumb was absent, and Shumway, the then manager, requested some slight modification, so that the Chicago railroad office might be connected with the line on the railroad through the telegraph company's wires. Stager did not accede to the request to change the contract, although it was, as he states, a small matter with the telegraph company, and that he probably would have yielded the privilege voluntarily and Stager allowed the matter to remain until the return of Plumb from abroad.

In August, 1875, the railroad company gave permission to the Atlantic & Pacific Telegraph Company to string a wire upon the poles along the line of the railroad. This telegraph company entered upon the work of stringing its wire with great rapidity, but before the work was completed, this bill was filed to enjoin such

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use of the poles. Upon the final hearing the bill was dismissed, and the complainant appealed.

SHELDON, J: The defense set up against the bill is, that the alleged contract was never executed by the railroad company, and is not binding upon it; the statute of frauds is also set up, and that the contract should not be enforced as being against public policy.

The draft of contract in the case was not actually signed by the railroad company, and it is contended that Plumb had no authority to make such a contract for the company. This being admitted, still the fact appears that Plumb, the vice-president and general manager of the railroad company, by his letter to the telegraph company, expressly accepted, with one exception, which was acceded to, the terms named in the draft of contract. In reliance upon this as an acceptance of the contract by the railroad company, the complainant went on and made large expenditure in the completion of the line of telegraph, the railroad company furnishing the labor and materials required by the contract. After the completion of the line, the telegraph business was conducted thereon for a year and more by both parties, and requisitions for telegraph supplies, applications for franks for the free telegraphing were made by the railroad company and furnished by the telegraph company in all respects according to the terms of the contract. All this while there was no dissent or objection whatever by the railroad company to any of the terms of the contract, except at about the end of the time as to the important particular of the connection of the Chicago railroad office with the line.

The expenditures which the telegraph company was induced by the contract of the railroad company to make in the completion of the line, and the subsequent carrying on of operations upon it, were not upon the understanding of a revocable license to place their wire upon the poles; but they were upon the terms and conditions of the contract, as securing to the telegraph company rights in respect of the telegraph poles, and carefully guarding them against interference and injury on the part of any other telegraph company. The property of the complainant is upon the line placed there under those terms and conditions. The contract names that the poles are to be furnished for the telegraph company.

In view of all the acts of acquiescence and adoption and recognition by the railroad company of the terms of the contract, we can have no doubt that they should be held binding upon the company, although it did not formally execute the contract.

And we are of opinion that under the terms of the contract, appellant's rights in respect of the line of poles in question, is exclusive as regards any other telegraph company, so far as physical interference or injury may result from placing upon the poles an additional wire by another company.

As respects the statute of frauds, we regard the acceptance of the contract by the letter of Plumb as a sufficient signing within the statute. *McConnell* v. *Brillhart*, 17 Ill. 354; *Cossitt* v. *Hobbs*,

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56 id. 231; also, that the contract is taken out of the statute by the mutual execution of its terms and provisions on the principle of part performance.

The objection to the contract on the ground of public policy is, that it gives to the appellant the monopoly of the telegraph business along the line of the railroad company.

However it might be as to the provision of the contract in this respect, taking it in its full extent of an exclusive right of way, and the discouragement of competition, in so far as it goes only to the exclusion of competitors from the line of poles occupied by complainant, when direct injury to the actual working of complainant's line of wire might result, it is not, in our view, liable to this objection. So long as any other company is left free to erect another line of poles, we see no just ground of complaint on the score of monopoly or the repression of competition.

As to the liability of interference with, and injury to, complainant's line of wires from the placing on the poles of an additional line by another company, many experts are examined on both sides, and their testimony upon the subject is very conflicting. A large number of them testify that there is great practical difficulty in working two lines of wire upon the same set of poles when the wires are under the management of distinct companies, and give their opinion that there would be liability of serious annoyance, inconvenience and injury to complainant's line of wire from the additional wire on the same poles, and some of them support their opinion by statements of actual results which have followed in instances named. We think a case is presented entitling the complainant to the relief prayed, so far as respects the placing and maintaining a wire upon the poles in question by the defendant telegraph company.

That company is fully chargeable with notice of the rights of the complainant. It virtually admits that it was put upon inquiry in regard to them; stating in its answer that it was informed by the railroad company that the line of wire which had been placed upon the poles by the complainant was under a parole understanding in the nature of a revocable license. It should not have stopped with the railroad company in making inquiry. Resort should have been had to the complainant as the proper source of information in respect to its rights.

The decree will be reversed and the cause remanded for further proceedings conformable to this opinion. *Decree reversed.*

EDITOR'S NOTE.

CONTRACTS—*In restraint of trade.*—At common law contracts in general restraint of trade were limited *in territory*. A limitation in time did not affect the validity of the contract. Ad. Cont. 99; Chit. Cont. (2d Am. ed.) 576; 8 A. & E. 438; 11 M. & W. 652; 2 Exch. 611; 7 Blackf. 344; 33 Eng. Com. L. 254; 6 Porter, 204. But this restraint did not extend everywhere, though limited in time. 5 M. & W. 548, 561. The contract must be founded upon a good and valuable consideration, and confined in space. 10 Ga. 505; 39 Ga. 655; 30 Ga. 414; 45 Ga. 319.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

ISAAC N. BASSETT ET. AL *v.* ALLEN W. BRATTON.

Master in chancery.—Jurisdiction to order writ of *ne exeat.* The master in chancery had general jurisdiction over the subject-matter to order the issuing of the writ upon presentation of the petition and affidavit, if in his judgment a proper case was presented for the writ, and the ordering of the issue of the writ would be in the exercise of jurisdiction which he possessed and was called upon to exercise.

SAME—*Absence or inability of judge.*—The statute invests masters in chancery with authority, in the absence or inability of the judge to act, to order the issuing of the writ of *ne exeat.* It provides that the writ shall not be granted except upon bill or petition filed and affidavit to the truth of the allegations therein contained.

SAME—*Erroneous decision—jurisdiction.*—Whether he decided erroneously or not should not affect the petitioner laying before the master the petition for the issuing of the writ, if in the judgment of the master in chancery the case made by the petition authorized the granting of the writ. Erroneous judgment in such respect, or insufficiency of statement in the petition where there were statements upon the subject, would not go to the point of jurisdiction.

NE EXEAT.—The petition for the writ of *ne exeat* is amendable, and is not void. It can only be attached in a direct proceeding, and will be sufficient to protect those acting under it.

TRESPASS.—Where the conviction and judgment are upon the count alone in trespass for the arrest and false imprisonment, trespass is not sustainable.

FRAUD.—The statute itself is entirely silent in respect to fraud, neither requiring any allegation of it in the petition, nor making it a requisite of title to the writ. It is only non-compliance with the constitutional provision that is to be alleged in this respect.

APPEAL from Stark County. Opinion filed January 21, 1878.

ISAAC N. BASSETT AND JAMES H. CONNELL, *Attorneys for Appellant.*
B. C. TALIAFERRO, *Attorney for Appellee.*

In December, 1872, John S. Davis placed in the hands of the appellants, Bassett and Connell, attorneys-at-law, four promissory notes, for collection, against the appellee, Bratton, and William H. Loman. On the 24th day of February, 1873, the attorneys brought a suit in *assumpsit* in the Mercer Circuit Court, in favor of Davis, against Bratton and Loman, upon the notes, and on the same day sued out a writ of attachment, in aid of the suit in *assumpsit*, against the property of Bratton. Afterward, in the absence of Bassett in California, a petition in the name of Davis for a writ of *ne exeat* against Bratton, and on the 6th day of March, 1873, presented it to the master in chancery of the county, who made an order for the issue of the writ, upon filing the proper bond in the sum of $500 with Bassett and Connell and John F. Connell as sureties. The bond was filed and

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the writ of *ne exeat* issued March 7, 1873; Connell signing the name of Davis to the bond, by Bassett and Connell, his agents, and also the firm name of Bassett & Connell and his individual name. Davis subsequently ratified his signature to the bond.

The petition for the writ appears to be signed by Davis, and the firm name of Bassett & Connell is appended to it as attorneys for complainant. The affidavit of the truth of the allegations in the petition was made by Connell. Bratton was arrested under the writ, and in default of giving the bond prescribed by the statute, was committed to and held in jail. On the 15th of April, 1873, judgment was rendered against Bratton in the *assumpsit* suit for $579.50, after giving credit for an amount realized under the attachment process. Answer was filed in the *ne exeat* proceeding April 4, 1873, and a hearing was had on the 22d day of April, 1873, and a decree entered dismissing the bill. Davis took an appeal, the appeal bond being filed May 1, 1873, Bassett being one of the sureties thereon. Afterward Bratton applied to one of the judges of this court for a writ of *habeas corpus* for a discharge from the imprisonment. The application by argument was considered as if the writ had been issued and a return had, and it was decided that Bratton could not be held under the writ of *ne exeat*, and he was thereupon discharged from imprisonment.

At the August term, 1874, of the Circuit Court of Mercer county, Bratton commenced a suit, in respect of the foregoing matters, against Davis, Bassett and Connell, the declaration containing four counts: the first being for malicious prosecution in the arrest and imprisonment of Bratton in the *ne exeat* proceeding, reciting the same at length; the second and third being for malicious prosecution in the making of such arrest and imprisonment; and the fourth being for an unlawful arrest and imprisonment.

Davis was not served with process, and the case proceeded against Bassett & Connell. Upon trial before a jury they were both found guilty under the fourth count, and not guilty under all the other counts, and the damages against them were assessed at $1,950; upon a remittur of $950, judgment for $1,000 was rendered against them, and they appealed.

SHELDON, J, delivered the opinion of the court:

A question is first made in respect to Bassett alone, that he is not liable, because he did not participate in causing the arrest and imprisonment, being absent at the time in California, and that if he is to be charged it must be upon the mere facts that he was a partner of Connell, assisted on the trial in the *ne exeat* proceeding, and signed the appeal bond on appeal from the decision therein.

This question we shall not consider, as we are of opinion the judgment cannot be upheld against either defendant. We consider that case for the malicious motive and want of probable cause for the proceeding is the only sustainable action against the defendants, and they stand acquitted by the verdict under all the counts con-

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taining the charge of malicious prosecution. The conviction and judgment are upon the count alone in trespass for the arrest and false imprisonment, simply as regards which, we are of opinion that the legal principle that whenever an injury to a person is occasioned by regular process of a court of competent jurisdiction, trespass is not sustainable, should apply here in exoneration of the defendants.

This principle, or that it applies in case of such an officer as here, is not disputed by appellee's counsel, but the fact of jurisdiction is denied, and it is contended that the writ was void. In such event the writ might afford no protection, and, as we conceive, the decision of this case turns upon that point, whether or not the writ of *ne exeat* was void.

The imprisonment was by an officer, in obedience to the command of a writ which the master in chancery directed to be issued. The statute invests masters in chancery with authority, in the absence or inability of the judge to act, to order the issuing of the writ of *ne exeat*. It provides that the writ shall not be granted except upon bill or petition filed and affidavit to the truth of the allegations therein contained.

Such petition and affidavit were here filed, and the only suggestion of the want of jurisdiction in any respect, or of ground upon which the writ is void, is, that there was no allegation of fraud made in the petition for the writ, and that because of the want thereof the master in chancery had no jurisdiction to order the issuing of the writ, and it was void.

The statute itself is entirely silent in respect to fraud, neither requiring any allegation of it in the petition, nor making it a requisite of title to the writ. It is only non-compliance with the constitutional provision that is to be alleged in this respect; such provision being that, "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud."

The petition has an allegation in respect of fraud, as follows: That about the 18th day of February — prior to the 6th of March, when the petition was filed — Bratton, the debtor, sold his farm and other property and at once sold and assigned his notes, amounting to several hundred dollars, for the purpose of defrauding the petitioner and put the money in his pocket, beyond the reach of the petitioner in his attachment suit then pending.

It further alleges that Bratton intends and purposes to take all the money and property he has out of the State of Illinois, and that he has no real estate except a small tract with which he had partly secured the debt to the petitioner, which was not worth over three hundred dollars; that there were five hundred dollars due on the notes unsecured; that Bratton would not leave any personal property in the state; that he was going to Kansas and had sold part of his property and sent part of it out of the state and was intending to take the remainder and the said money out of the state. Here

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were facts and circumstances stated tending to raise a presumption of fraud. Whether sufficient in that respect the master in chancery was the proper person to pass upon and decide; he would seem to have adjudged them sufficient, inasmuch as he ordered the issuing of the writ.

Whether he decided erroneously or not should not affect the petitioner laying before the master the petition for the issuing of the writ, if in the judgment of the master in chancery the case made by the petition authorized the granting of the writ.

Erroneous judgment in such respect, or insufficiency of statement in the petition where there were statements upon the subject, would not go to the point of jurisdiction.

The master in chancery had general jurisdiction over the subject-matter to order the issuing of the writ upon presentation of the petition and affidavit, if in his judgment a proper case was presented for the writ and the ordering of the issue of the writ would be in the exercise of jurisdiction which he possessed and was called upon to exercise. The rule in this class of cases is thus laid down by Bronson, C.J. in *Miller* v. *Brinkerhoff*, 4 Denio, 118: "When certain facts are to be proved to a court of special and limited jurisdiction as a ground for issuing process, if there be a total defect of evidence as to any essential fact the process will be declared void in whatever form the question may arise . . . But when the proof has a legal tendency to make out a proper case in all its parts for issuing the process, then, although the proof may be slight and inconclusive the process will be valid until it is set aside by a direct proceeding for that purpose"; and see *Staples* v. *Fairchild*, 3 Const. 41; *Matter* v. *Faulkner*, 4 Hill, 598. In *Outlaw* v. *Davis*, 27 Ill. 477, a like case involving the liability of a party for suing out a *capias* from a justice of the peace where his statement upon oath did not make a case for the issuing of the writ, this court said: "We think, then, if the magistrate having jurisdiction of the general subject did not require a sufficient statement on oath of the party complaining, such party could not possibly be guilty of a trespass with force and arms. If he had acted maliciously case would lie against him." In support of the decision there was cited the case of *West* v. *Smallwood*, 3 Mason & Wilsby, 417, in which it was said by Lord Albinger, "Where a magistrate has a general jurisdiction over the subject-matter and a party comes before him and prefers a complaint upon which the magistrate makes a mistake in thinking it a case within his authority and grants a warrant which is not justifiable in point of law; the party complaining is not liable as a trespasser, the only remedy against him being by an action on the case if he has acted maliciously. We think the present case comes fully within the principle of those decisions and the rule above, and that they deny the right of recovery here. See further, *Plummer* v. *Dennett*, 6 Greenl. 421; *Ludington* v. *Peck*, 2 Conn. 700; *Johnson* v. *Maxon*, 23 Mich. 129.

In *Booth* v. *Rees*, 26 Ill., trespass for taking personal property,

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there was a plea justifying the taking under a writ of attachment. The question was whether there was a want of jurisdiction and the writ void, because in the affidavit for the writ the statement of nonresidence was on information and belief and not positive, as had been held to be necessary in *Frye* v. *Flint*, 21 Ill. 80. It was held that while the affidavit was defective as it was amendable by statute it was not void, and so supported the writ of attachment, and it was there said: "It appears to be a rule of universal application that a void thing is not amendable." The petition for a writ of *ne exeat* is amendable, as decided in *Fisher* v. *Stone*, 3 Scam. 70, where there was an omission in the bill of what the court regarded as a material allegation, and it was held that the omission amounted at most but to a defective statement of the complaint which, upon demurrer being put in, could be supplied by an amendment of the bill, and the order of dismissal of the bill upon motion by the court below was reversed.

The petition for the writ of *ne exeat* then being amendable, it was not void under the decision in *Booth* v. *Rees*, and could only be attached in a direct proceeding and would be sufficient to protect those acting under it. The writ of *ne exeat* was not quashed or set aside; no exception was taken to the sufficiency of the allegations, the petition was not demurred to but answered by defendant denying the allegations; issue was taken on them, and on the hearing the court found that the evidence did not sustain the allegations, and therefore dismissed the bill.

Our conclusion is that the master in chancery had jurisdiction in the matter of ordering the issue of the writ; that it was not void, and that the defendants are not liable in trespass for the arrest and imprisonment. The judgment will be reversed. *Judgment reversed.*

EDITOR'S NOTES.

TRESPASS—Every one is entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. 7 Johns. Ch. 334; 2 Story's Eq. 925, 928; *Wood* v. *Sutcliffe*, 42 Eng. Ch. 165; *Bassett* v. *Salisbury Manf. Co.*, 47 N. H. 437; *Bigelow* v. *The Hartford Br. Co.*, 14 Conn. 565; *Wason* v. *Sanborn*, 45 N. H. 170; *Blake* v. *City of Brooklyn*, 26 Barb. 301; *Murray* v. *Knapp*, 42 Haw. Pr. 462; ib., 62 Barb. 566; *Nicodemus* v. *Nicodemus*, 41 Md. 537; *Weigel* v. *Walsh*, 45 Mo. 560; *Herbert* v. *Carslake*, 11 N. J. Eq. 241; *Catching* v. *Terrell*, 10 Ga. 578; *Wooding* v. *Malone*, 30 Ga. 980; High on Inj., sec. 459, 483; Eden on Inj. 231.

ASSIGNMENT—A mere *possibility* is not the subject of assignment, unless coupled with an interest. *Vasse* v. *Comegys*, 4 Wash. 570; *Low* v. *Peer*, 108 Mass. 347; *Skipper* v. *Stokes*, 42 Ala. 255; *Purcell* v. *Mosher*, 35 Ala. 570; *Malhall* v. *Quin*, 1 Gray, 105; *Hartley* v. *Tapley*, 2 Gray, 565; *Brocket* v. *Blake*, 7 Nut, 335; *Jonnyn* v. *Mofft*, 75 Penn. Stat. 399; *Garland* v. *Harrington*, 51 N. H. 409; *Hawley* v. *Bristol*, 30 Conn. 26; *Augur* v. *New York etc. Co.*, 39 Conn. 336. Assignments of demands having no actual existence may be valid in equity. *Old* v. *New York*, 6 N. Y. 179; *Mitchell* v. *Winslow*, 2 Story, 630, 638.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

THE SINGER MANUFACTURING CO. *v.* MARY E. MAY.

AFFIDAVIT.—An affidavit made by a party to show an abuse in the discretion of the court requiring a reversal, must show that there has been exercised proper diligence to avoid the result, and it must affirmatively appear that injustice has been done.

APPEARANCE—*Presumption.*—Where an appeal was perfected before a justice of the peace, the appellee was in court and a summons was not required, and where the case appeared on the trial calendar, the presumption is that she must have entered her appearance to have it placed there, and if so that would be a sufficient appearance if more than ten days before the term.

SAME—*Bill of exceptions.*—Where the bill of exceptions fails to show that the appearance was not in time we must presume it was, and that the court acted properly in disallowing that as a ground for setting aside the verdict.

APPEAL from Cook County. Opinion filed January 21, 1878.

ELDRIDGE & TOURTELLOTTE, *Attorneys for Appellants.*
CAULFIELD, HARDIN & PATTEN, *Attorneys for Appellee.*

WALKER, J., delivered the opinion of the court:

In the early part of July, 1874, appellee commenced a suit before a justice of the peace of Cook county, against appellant, and on a trial recovered a judgment for $35 and costs of suit. Defendant perfected an appeal to the Circuit Court of that county, and at the March term, 1876, the cause was regularly called and *and* no one answering for defendant, the case was tried by a jury, when a verdict was rendered for plaintiff for the sum of $175 and costs of suit. During the term defendant entered a motion to set aside the verdict and for a new trial, but the court annulled the motion and defendant appeals. On the hearing of the motion appellant read affidavits in support thereof, from which it appears that the agent understood that a firm of attorneys had charge of the case, but the attorneys claim they were not retained for the purpose. That through this misunderstanding the company had no notice that the case was in the call or even on the calendar, and knew nothing whatever of any action in the case until informed by the attorneys of the company in several other cases, but who were not in this case, that the judgment had been rendered.

That the transaction out of which the suit originated, as is stated in the affidavits, was a contract for the company to furnish to appellee a sewing machine worth $85 for the term of fifteen months, she to pay certain sums monthly as rent. That the machine was furnished to her in April, 1874, and not complying with the agreement, it was agreed in June following that the company should take the machine into possession and that future arrangements were to be made by which the *it* should be restored to appellee, but which were

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never made by her, and she, in the early part of July following, brought this suit.

The question presented by this record is whether appellant has shown diligence in preparing for trial in the court below. We see from the affidavit of the agent that he understood that certain attorneys had charge of the case, but they deny they ever had. He does not explain how he obtained that understanding, nor does he show that he or any other agent of the company ever spoke to them or any other attorney on the subject of retaining them. There is nothing appearing that any the slightest effort was even made to employ counsel or in fact to make any preparation for a trial. It seems after the appeal was taken no further attention was given to the case.

It is true, according to the statements in the affidavits, the judgment appears to be very large, but we cannot know but the evidence adduced before the jury may have required it, and such is the presumption until rebutted. The affidavit does not state that appellee had no other claim against appellant. It states that she had this claim growing out of the agreement, but does not negative other claims and demands. In such a case as this, the party, to show an abuse in the discretion of the court requiring a reversal, must show that there has been exercised proper diligence to avoid the result, and it must affirmatively appear that injustice has been done.

In these particulars these affidavits are entirely wanting.

The appeal in this case was perfected before the justice of the peace, and according to the case *Boyd* v. *Kochn*, 31 Ill. 295, appellee was in court and a summons was not required; and the case appearing on the trial calendar the presumption is that she must have entered her appearance to have it placed there, and if so that would be a sufficient appearance if more than ten days before the term. And as the want of a proper appearance was assigned as one of the reasons for setting aside the verdict, and the bill of exceptions fails to show the appearance was not in time we must presume it was, and the court acted properly in disallowing that as a ground for setting aside the verdict. Perceiving no more in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

EDITOR'S NOTES.

AFFIDAVIT—We wish to express our strong disapproval of the affidavit that has been made by the defendant. Scandalous facts have been inserted in this affidavit. If affidavits of this nature continue to be made, we shall have to consider whether or not it should not be made a ground for refusing costs altogether. *Fitzpatrick* v. *Wilson*, 37 L. T. Rep., N. S. 446.

MARRIED WOMAN.—A married woman's estate, under the statute of 1861, is a legal and not an equitable estate, which must be governed by legal and not equitable rules. *Cookson* v. *Toole*, 59 Ill. 55; *Bresler* v. *Kent*, 61 Ill. 426; *Rogers* v. *Higgins*, 48 Ill. 211; *Carpenter* v. *Mitchel*, 50 Ill. 470; 2 Bish., M. & D., secs. 174–180.

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

JANUARY TERM, 1878.

J. V. FARWELL & CO. *v.* E. MILLER.

JUDGMENT BY CONFESSION.—Oral agreement that judgment note should be held until the happening of a contingent event.

EDWIN F. ABBOTT, *Attorney for Plaintiff.*
W. A. DAY, *Attorney for Defendant.*

The note on which judgment was confessed was given by defendant to plaintiff's agent, and it was orally agreed that it should be held by him until the happening of a contingent event. Before the happening of the contingency Farwell & Co. confessed judgment.

Defendant seeks to vacate judgment, stay execution, and for leave to plead.

It was contended for plaintiff that the evidence of the contemporaneous agreement was not admissible to vary the terms of the contract, it being absolute on its face.

And on the part of the defendant it was alleged that defendant did not seek to vary the terms of the agreement, *but* to show that the agreement had never taken effect; that there was an oral agreement constituting a condition precedent to the note and power of attorney becoming operative, and that the condition had not happened, and that defendant should be allowed to interpose that defense.

Defendant's counsel cited the following cases: *Pym* v. *Campbell*, 6 Ellis & Blackb. 370; *Wallis* v. *Littell*, 11 C. B. & S. 369; *Clark* v. *Gifford*, 10 Wend. 310; 1 Greenl. on Ev., Redfield ed., sec. 284 *a*; Stephens' Dig. of Ev., p. 89, sec. 3; *Bell* v. *Lord Ingestre*, 12 Q. B. 318 (E. C. L., vol. 64.)

MCALLISTER, J: The defense here sought to be interposed is analogous to the delivery of a deed as an escrow. Defendant does not seek to contradict the writing, but to show that the writing never became operative.

The terms of the note cannot be varied by parol evidence; but in the present case the defense begins one step earlier. The defendant delivered the note and warrant of attorney to a third party, with the understanding that they were not to take effect except upon the happening of a contingent event: the contingent event never happened.

This is the *prima-facie* case presented. I think the defendant is entitled to plead his defense, and have it submitted to a jury.

EDITOR'S NOTE.

SPECIFIC BEQUESTS AND DEVISES.—Where there are both general and specific legacies and devises, those which are general must first be used for the payment of debts, even if they are thus entirely abated, before resort can be had to those which are specific. It is the presumed intention of the testator that the legatee shall receive the specific thing bequeathed. *Farnum* v. *Bascom*, 5 The Rep. 47.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

HUGH MAHER AND SARAH MAHER *v.* MARTIN LANFROM ET AL.

USURY—*Privy of the mortgagor.*—A person purchasing the title or receiving a junior mortgage without receiving any deduction from the price because of the usury, is such a privy of the mortgagor as may urge this defense.

SAME—*Implied authority to make defense of usury.*—In some cases the grantee or a subsequent mortgagee cannot interpose the defense of usury without the permission of the mortgagor. Then an implied authority is all that is required. When it is not agreed or understood that the grantee or subsequent mortgagee shall pay the incumbrance, with the usury, the authority to make the defense will be implied.

SAME—*Express authority.*—The cases in this court do not announce a rule in conflict with this conclusion. It is true they do say that there must be express authority, but in that the expression is inaccurate, as implied authority only is required.

SAME—*Concealment of incumbrance—purchase without notice.*—Equity and good conscience demand that when the mortgagor conceals, fraudulently or otherwise, the existence of the incumbrance, and his grantee purchases without actual notice, he should be permitted to set up and rely on the usury.

SAME—*Presumption as to incumbrance—failure to urge defense of usury.*—When the grantee contracts with a view to the incumbrance, or is informed of its existence, and fails to obtain permission to urge the defense, or fails to take covenants against the incumbrance, the presumption is that the incumbrance, as it appears on its face, formed a part of the consideration which he was to pay for the property, and it would be inequitable to permit him to escape its burthen.

SAME—*Usurious agreement—legal right to enforce.*—The party holding an usurious agreement has no legal right to its enforcement. It is only where the defense is not interposed that he may recover his usurious interest. And he will not be permitted to do so when it will operate unjustly against others who are in no fault. He has knowingly violated the statute, whilst a grantee who purchases without examining a record simply omits a precaution usually employed by prudent persons, the omission of which may subject them to loss.

SAME—*Recovery on note.*—The holder of a note must be limited in his recovery to what the law says he may legally collect, that is, principal without interest applying all payments, whether made on account of interest or otherwise to the principal.

SAME—*Intention of parties.*—Whether a party agreed to pay an incumbrance, when there was evidence that it was not so agreed, was *held* a question of intention, to be gathered from all the circumstances attending the transaction. Also *held*, that in this case the party did not agree to pay or become liable for the incumbrance. Also *held*, that the evidence impels the belief that this transaction is usurious. Also *held*, that where a sum was paid and reserved as interest and it was afterward claimed that such payments were for commissions charged for negotiating the paper, such devices cannot be allowed to defeat the provisions of the statute against usury.

APPEAL from Cook County. Petition for rehearing. Opinion filed February 7, 1878.

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COX & MCCARTHY AND SIDNEY SMITH, *Solicitors for Appellants*, cited: 2 Leading Cases in Equity, 143, and cases cited; *Gahn* v. *Niemcewich*, 11 Wend. 312; *Ryan* v. *Trustees*, 14 Ill. 20; Rev. Stat. 1874, p. 615, sec. 7; *Drake* v. *Lutham*, 50 Ill. 270.

JOHN WOODBRIDGE AND GEORGE W. SMITH, *Solicitors for Appellee*, argued: That usury was not aptly pleaded; *Timothy Mosher* v. *David Norton et al.*, decided at the January term, 1877. *Hancock* v. *Hodgson*, 3 Scam. 330; *Durham* v. *Tucker*, 40 Ill. 519; *Frank* v. *Morris*, 57 Ill. 138; *Beach* v. *Fulton Bank*, 3 Wend. 575; *Smith* v. *Brush*, 8 Johns. 83; *Lawrence* v. *Kiries*, 10 Johns. 140; *Cloyes* v. *Thayer*, 3 Hill, 564; *Vroom* v. *Ditmos*, 4 Paige, Ch. 525–532; *Curtis* v. *Masten*, 11 Paige, Ch. 16; *Rowe* v. *Phillips*, 2 Sandf. Ch. 16; *Watson* v. *Baily*, 2 Duer, 509; *Manning* v. *Tyler*, 21 N. Y. 567; *Crenshaw* v. *Clark*, 5 Leigh, 69; *Smith* v. *Nicholas*, 8 Leigh, 330; *New Orleans Gas L. and B. Co.* v. *Dudley*, 8 Paige, Ch. 451, 457; *Clark* v. *Hastings*, 9 Gray, 64; *Hannas* v. *Hawk*, 24 N. J. Eq. 124; *Turrell* v. *Byand*, ib. 137; *Matson* v. *Conklin*, ib. 230; *Beatty* v. *Van Bruner*, ib. 312; *Henderson* v. *Bellew*, 45 Ill. 322, 325; *Valentine* v. *Fish*, 45 Ill. 462; *Pike* v. *Christ*, 62 Ill. 461; *Allen* v. *Lee*, 7 Ind.; *Leland* v. *Stone*, 10 Mass. 459; *Kinzie* v. *Penrose*, 2 Scam. 515; *Siddons* v. *Riley*, 22 Ill. 111; *Booth* v. *Hines*, 54 Ill. 365.

WALKER, J., delivered the opinion of the court:

In March, 1870, appellant, Hugh Maher, executed to appellee, Silverman, a note for $10,000 for money loaned him—and as *collateral* thereto he executed to him another note for $15,000. To secure the payment of the latter note, he conveyed to Leopold Silverman the premises in question, called the Bridgport property. Subsequently, on the 11th day of January, 1871, in substitution of the former, Hugh Maher executed a new note for $15,000, due at one year with ten per cent interest, also a new deed of trust to Leopold Silverman on the same premises. This deed of trust was recorded January 18, 1871, in the proper office. It was executed with the note to secure or to be held as collateral to the $10,000 note, which has not been paid. The $10,000 note fell due in May, 1871, when a new note for the same amount was given in renewal, payable six months after date. Soon after the fire of October of that year, Silverman, by agreement, extended the time for the payment of this last note one year. The consideration for this extension was the execution of an order drawn by Maher on the Board of Public Works of the city for money owing him. Several renewals were had, and in May, 1872, a new note was given, due at ninety days for $10,000, and for its payment the $15,000 note was pledged. It was sold by Silverman to Adsit but was taken up by the former. In March, 1873, it was again sold to Lanfrom Brothers, and Martin Lanfrom is the surviving owner and holder of the note.

In June, 1872, Maher conveyed the premises to one Waltan, Sr., for the use of his wife. The deed expressed a consideration of $27,000 or $27,500, whilst it is admitted by the Mahers that the true consideration was $25,000, loaned by Mrs. Maher in August, 1871, and a further loan of an equal amount made in June, 1872. The money thus loaned was, it seems, a gift in 1869 by Maher to his

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wife. In June, 1872, the premises were conveyed to one Moore in trust to secure J. B. Lyon for advances made by him, but this having been arranged is not important in this case. On August 21, 1872, Waltan surrendered the deed made to him, and Hugh Maher conveyed the premises to James Bohetts. This was a deed of warranty, and the consideration expressed was $25,000. It was dated June 29, 1872, but was acknowledged on the day it was executed. Roberts at the same time, by deed dated 31st of August, 1872, but acknowledged on the 21st, quit-claimed and released the premises to Mrs. Maher, his sister. But it is claimed that the actual consideration was the $50,000 previously loaned by Mrs. Maher to her husband. It is also claimed that the property at that time was of the value of $65,000 or more. The $10,000 note bears numerous indorsements of interest paid in advance. The first is this: "Extended for thirty days from August 15, 1872, and interest paid for said time." The next extended it in like manner for sixty days from September 15, 1872, and interest was paid to that time. The other indorsements are for interest paid to specified dates. The first of these extensions was before Mrs. Maher's deed was made or recorded. The others were afterward.

Mrs. Maher says she paid no interest on the incumbrance, nor did she consent to any extension of time for payment. Mrs. Maher sets up and relies on the defense of usury in her answer, and Maher testified that he paid one-and-a-half per cent or more per month interest. On the other hand, Silverman says he only charged ten per cent interest and the balance was for commissions for handling Maher's papers, etc.

On a hearing on the bill, answers, replications, exhibits and proofs, the court below found the $10,000 note a lien on the premises, and computed interest thereon at ten per cent, and ordered the sale of the property to pay the amount. From that decree this appeal is prosecuted and a reversal is asked.

It is insisted that when Mrs. Maher loaned the money to her husband, and afterward purchased the property in satisfaction of her claim, that she thereby became the surety of her husband for the payment of this debt, and it is claimed that inasmuch as she was a surety, that when Silverman gave an extension of time for payment without her consent that he thereby released the property from the mortgage. On the other hand, it is claimed that there was no binding extension of time for payment, and even if there was, that it did not release the security of the mortgage.

From the decisions of this and other courts, there is no doubt that there was a valid and binding extension of time. The payment of interest in advance has been held to be a sufficient consideration to render an agreement to extend the time binding. *Flynn* v. *Mudd*, 27 Ill. 323; *Warner* v. *Campbell*, 26 Ill. 282. These cases establish the fact that there was a binding agreement to extend the time for the payment of this note. And the evidence shows the time was actually extended. Then, was Mrs. Maher in any sense a surety for

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her husband? There is no evidence that she even agreed to become his surety, or that she even regarded herself legally bound to pay this debt or any portion of it. She purchased the property after the mortgage was recorded, and is therefore chargeable with notice of its existence. But she testifies that she at the time had no knowledge of its existence. Then, how can it be said that she occupies the position of a surety? She may pay it or not as she may choose. The owner of the note cannot sue and recover it against her as she has done no act which has rendered her liable. There cannot be the slightest pretense that she has.

But she purchased the property subject to this mortgage and it is liable, unless the holder has done some act which has rendered it inequitable to foreclose the mortgage and render it liable for the debt. And the only act relied on as sufficient for the purpose is the extension of time as shown in the evidence. We have been referred to no case which holds that the extension of time to the debtor whilst he holds the equity of redemption releases or discharges the lien of the mortgage, or that such extension of time releases the lien in the hands of an assignee of the equity of redemption. Nor is it believed that any such case can be found.

The principle upon which the doctrine of such discharge of the liability of surety proceeds is that the contract of a surety is to be strictly construed and enforced. He undertakes that the money shall be paid or the act performed by a given day. He engages for credit until that time and no longer, and it is not in the power of the principal debtor and the payee to extend the time of performance or change any other of its terms without his consent.

Again, when the time arrives for the payment of the money by the terms of the contract, he has the right to pay it, and look to his principal and enforce payment of the amount thus advanced for him. But when the time is thus extended he is deprived of this right and the law has determined that his liability cannot be protracted, and when the time is extended that he is discharged from further obligation under his agreement. The relations of principal and surety not existing, the rights, duties and liabilities of that relation cannot exist. Mrs. Maher did not agree that she would pay or that her husband should pay the money at a particular day, or at any other time, nor could she pay it and sue her husband for compensation as a surety unless it could be under the covenants in his deed. She, on the contrary, is a purchaser subject to the lien of the mortgage, and occupies that relation to the parties and to the property. Being such a purchaser chargeable with notice, she to prevent its sale, to discharge the debt must pay off the incumbrance.

A party thus purchasing with actual notice is supposed to either deduct the amount of the incumbrance from the price paid or to look to his grantor to reimburse the amount when paid by him. In any view we have been able to take of this question we fail to see that the land was discharged from this lien.

It is also urged that the contract was usurious and that Mrs. Ma-

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her may avail herself of the defense and reduce the amount of the incumbrance to the amount of principal without interest, and have all payments made by Maher applied to a reduction of the principal. Against this it is urged that Mrs. Maher's answer does not set up usury with sufficient certainty and precision, and even if it did she cannot interpose this defense; and it is also claimed that there was no usury in the transaction. The answers may not be sufficiently specific as to each and all of the items of usury set up and relied on. But the charge that $1,000 was retained out of the loan and only $9,000 actually received by Maher when he gave the note for $10,000 is specific and clearly made.

There is a specific charge that this sum was reserved as usury, and it is alleged, "that on or about the 15th of September, 1872, in consideration of the payment of a sum equal to one-and-a-half per cent per month on $10,000 for sixty days, which sum was then and there paid by the said Hugh Maher to said Silverman, and the time of payment extended for said sixty days," and that many similar extensions were made in pursuance of like agreement between Maher and Silverman.

Again, Mrs. Maher charges in her answer that her husband had paid to Silverman unlawfully, interest on the $2,000 note at the rate of over twenty per cent per annum from March 13, 1873, to November 1, 1873, and if such note should be held valid, such amount should be deducted from the amount due thereon, and all right to interest on that note declared to be forfeited. These allegations setting up usury are clear and specific, and are entirely sufficient to raise the questions of usury. These allegations are clear and specific whilst they were not in the case of *Moshier* v. *Norton* (of the present term), and in this the cases are widely different. Can Mrs. Maher then be heard to interpose this defense of usury?

It is urged that such a defense is personal and cannot be interposed by strangers. It is true that the defense is personal, but there are privies who may rely on it. We suppose it will not be contested that an executor or administrator may not interpose the defense, and sureties on a note may avail of such a defense.

In the case of *Safford* v. *Vail*, 22 Ill. 327, it was held that sureties or some one standing in legal privity with the principal debtor, but not a mere stranger to the transaction might interpose the defense. In the cases of *Henderson* v. *Bellew*, 45 Ill. 322, and *Valentine* v. *Fish*, ib. 462, it was said that a mortgagor may sell or remortgage premises and authorize the purchaser or mortgagee to set np the defense of usury against the prior mortgage, but when such sale or mortgage is made in express terms subject to the previous usurious mortgage, the purchaser or mortgagee cannot question the validity of the prior mortgage.

In the first of these cases the deed of conveyance expressly stated that it was subject to the prior deed of trust, and as there was a deduction in the price of the land equal to the incumbrance, it was held that the purchaser could only redeem by paying the incum-

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brance with the legal rate of interest expressed in the note and deed of trust. The latter of these cases was virtually a bill to redeem, and although the conveyances were all in terms subject to the mortgage previously given, the mortgagor and makers joining in the bill, the defense of usury was allowed, and it was said the grantee and holder of the equity of redemption had the right, with the consent of the mortgagor, to become a party to have the amount ascertained, that he might pay and cancel the lien on his land. Thus it will be seen in these cases that the amount of the mortgage as it appeared on the face of the papers was taken into account by the parties when the equity of redemption was sold, and were both bills to recover. The case of *Pike* v. *Cust*, 62 Ill. 461, follows these cases and announces the same rule. In this case, however, Mrs. Maher purchased without any actual notice, as she had no knowledge of the existence of the incumbrance, although charged with notice by the record. Nothing was deducted from the price of the land when she purchased on account of the mortgage. No deduction in price was made, and she took not by agreement, but by operation of law, subject to the incumbrance. And as the law has imposed the obligation, it surely can only impose it as it legally exists. Only the law bound the mortgagor, and in such a case the grantee is so far a privy in law as to be entitled to rely upon the defense of usury.

The property was conveyed to Roberts by deed with full covenants, and as it was to be by him conveyed to Mrs. Maher, it was the same virtually as if made to her by a mortgagor competent to convey. It seems to be the doctrine generally recognized that if a party purchases from a mortgagor without any deduction from the price on account of the incumbrance, the grantee thereby becomes invested with the right to interpose the same defenses as might be made by the mortgagor. In such a case the conveyance amounts to an authority to the purchaser to interpose the defense of usury. See *Dix* v. *Van Wyck*, 2 Hill, 522; *Post* v. *Dart*, 8 Paige, 639; *Shufelt* v. *Shufelt*, 9 ib. 137; *Brolasky* v. *Miller*, 1 Stock. 807; *Daub* v. *Barnes*, 1 Md. ch. 127; *Green* v. *Tyler*, 39 Penn. 361; *Nurman* v. *Kershaw*, 10 Wis. 333; *Budam* v. *Sedgwick*, 40 Barb. 359: opinion by Allen, one of the judges of the present Court of Appeals.

In another class of cases it is held that where the mortgagor only sells the equity of redemption, or the amount of the incumbrance is deducted from the purchase money, the grantee or junior mortgagee will not be permitted to make the defense of usury. In some of the cases referred to, the mortgagor made default as he had filed in his defense of usury, but the grantee or subsequent mortgagee was nev ertheless permitted to set up and rely upon the defense.

The principle announced is, that a person purchasing the title or receiving a junior mortgage without receiving any deduction from the price because of the usury, is such a privy of the mortgagor as may urge this defense. It is true that in some cases it is said that the grantee or a subsequent mortgagee cannot interpose the defense without the permission of the mortgagor. But it is not held that

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such authority must be express, either written or verbal. We apprehend that an implied authority is all that is required, and we hold that when it is not agreed or understood that the grantee or subsequent mortgagee shall pay the incumbrance, with the usury, the authority to make the defense will be implied.

The cases in this court do not announce a rule in conflict with this conclusion. It is true they do say that there must be express authority, but in that the expression is inaccurate, as implied authority only is required.

Equity and good conscience demand that when the mortgagor conceals, fraudulently or otherwise, the existence of the incumbrance, and his grantee purchases without actual notice that he should be permitted to set up and rely on the usury. On the other hand, when the grantee contracts with a view to the incumbrance, or is informed of its existence and fails to obtain permission to urge the defense, or fails to take covenants against the incumbrance, the presumption is that the incumbrance, as it appears on its face, formed a part of the consideration he was to pay for the property, and it would be inequitable to permit him to escape its burthen.

The party holding an usurious agreement has no legal right to its enforcement. It is only where the defense is not interposed that he may recover his usurious interest. And he will not be permitted to do so when it will operate unjustly against others who are in no fault. He has knowingly violated the statute, whilst a grantee who purchases without examining a record simply omits a precaution usually employed by prudent persons, the omission of which may subject them to loss.

It is urged that the property was worth more than the sum paid, and this claim added when the purchase was made. We fail to see that this changes the legal principles that should govern this case. Values of property in all great cities as well as in the country, as all know, are subject to great and ruinous fluctuations.

It may be that the property at this time is not worth even half of the sum which Mrs. Maher gave for it. If so this burthen will fall hard on her. Again, had she known of this incumbrance she might have declined to purchase. At any rate, the holder of the note must be limited in his recovery to what the law says he may legally collect, that is, principal without interest applying all payments, whether made on account of interest or otherwise to the principal.

We regard the evidence as clearly establishing usury.

There seems to have been paid at the rate of eighteen per cent per annum. It is urged that as the property is shown to have been worth more than the price Mrs. Maher paid for it, that we should presume that she took it subject to the deed of trust.

It may be, and no doubt it was, worth the purchase money and the amount of this debt at the time, still that fact is not of itself sufficient to overcome her express denial and that of her husband and Roberts, to say nothing of the fact that she took covenants against incumbrances. This last fact is evidence that it was not agreed that she

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was to pay the incumbrance. If she assumed to pay the same it is strange that such a covenant should have been given. If she was to pay the incumbrance a release would have passed the title, and would not have in the slightest degree rebutted any presumption that she was to pay the amount of the incumbrance as a part of the purchase money. It is all a question of intention, to be gathered from all the circumstances attending the transaction, and we are of the opinion that it does not appear that it was agreed or understood that she so undertook or became liable therefor.

The evidence impels the belief that the transaction was usurious. Maher swears most positively that he received but $9,000 when the $10,000 note was given, and that $1,000 was retained as interest, and the note, it seems, bore ten per cent interest from its date. On the other hand, Silverman's evidence on that point is indefinite and confused.

He does not fix or state the amount then paid. The evidence, we think, is clear and entirely satisfactory that this $1,000 was paid and reserved as interest, and that it was usurious, and proved as charged in the answer.

Again, the charge that on or about the 15th day of September, 1872, in consideration of a sum equal to one and a half per cent per month on the $10,000 note for sixty days, the time of payment was extended for that length of time. This charge in the answer is proved by Maher, and Silverman claims that such payments were for commissions he charged for negotiating this paper. Maher denies that there was any agreement to pay any such commissions. And even if there was, it would not free it of the taint of usury.

Such devices cannot be allowed to defeat the provisions of the statute against usury. The charge of usury on the $2,000 note seems to be abandoned. The other allegations of usury set up in Mrs. Maher's answer being too general and indefinite, the other evidence of usury cannot be considered. But as to the $1,000 and the other amount paid for an extension on $10,000 note, we think the charges in the answer sufficient, and that they are sustained by the evidence.

All of the evidence considered, we have no hesitation in holding that the transaction is tainted with usury. And the decree of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

BREESE, J: I do not concur in all the views expressed in this opinion, especially upon the question of usury. The mortgagee himself did not plead usury, and his grantee, under the circumstances, ought not to be permitted to avail of it, inasmuch as the property was valued at $65,000, for which the grantee paid $50,000, the outstanding mortgage for $15,000 being known to exist, leaving the inference that the grantor was to pay the mortgage as it then existed.

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EDITOR'S NOTES.

INTEREST.—The payment of interest in advance has been *held* to be a sufficient consideration to render an agreement to extend the time binding. *Flynn* v. *Mudd*, 27 Ill. 323; *Warner* v. *Campbell*, 26 Ill. 282.

SURETY.—A surety, or some one standing in legal privity with the principal debtor, but not a mere stranger to the transaction, might interpose the defense. *Safford* v. *Vail*, 22 Ill. 327.

MORTGAGOR.—A mortgagor may sell or remortgage premises, and authorize the purchaser or mortgagee to set up the defense of usury against the prior mortgage, but when such sale or mortgage is made in express terms, subject to the previous usurious mortgage, the purchaser or mortgagee cannot question the validity of the prior mortgage. *Henderson* v. *Bellew*, 45 Ill. 322; *Valentine* v. *Fish*, ib. 462. In the first of these cases the deed of conveyance expressly stated that it was subject to the prior deed of trust, and as there was a deduction in the price of the land equal to the incumbrance, it was *held*, that the purchaser could only redeem by paying the incumbrance with the legal rate of interest expressed in the note and deed of trust. *Henderson* v. *Bellew*, 45 Ill. 322. The latter of these cases was a bill to redeem; and although the conveyances were all in terms, subject to the mortgage previously given, the mortgagor and makers joining in the bill, the defense of usury was allowed, and it was said that the grantee and holder of the equity of redemption had the right, with the consent of the mortgagor, to become a party to have the amount ascertained, that he might pay and cancel the lien on his land. *Valentine* v. *Fish*, ib. 462. In these cases the amount of the mortgage, as it appeared on the face of the papers, was taken into account by the parties when the equity of redemption was sold, and were both bills to redeem. Ib. *Pike* v. *Christ*, 62 Ill. 461. If a party purchases from a mortgagor without any deduction from the price on account of the incumbrance, the grantee thereby becomes invested with the right to interpose the same defense as might be made by the mortgagor. In such a case the conveyance amounts to an authority to the purchaser to interpose the defense of usury. *Dix* v. *Van Wyck*, 2 Hill, 522; *Past* v. *Dart*, 8 Paige, 639; *Shufelt* v. *Shufelt*, 9 ib. 137; *Brolasky* v. *Miller*, 1 Stock. 807; *Daub* v. *Barnes*, 1 Md., Ch. 127; *Greene* v. *Tyler*, 39 Penn. 361; *Newman* v. *Kenshaw*, 10 Wis. 333; *Burdan* v. *Sedgwick*, 40 Barb. 359.

USURIOUS NOTE.—A general charge that a note is usurious amounts to nothing, unless facts are alleged showing wherein the usury consists. *Dunham* v. *Tucker*, 40 Ill. 519; *Frank* v. *Morris*, 57 Ill. 138; *vide Moore* v. *Titman*, 44 Ill. 367; *McConnell* v. *Hollowbush*, 11 Ill. 61.

STATING ACCOUNT.—Stating the account is the appropriate work of the master. *Steere* v. *Hoodante*, 39 Ill. 264; *Bressler* v. *McCuire*, 56 Ill. 475; *Burn* v. *Tousle*, 62 Ill. 266; *Granch* v. *Stenyer*, 65 Ill. 481.

MARRIED WOMAN—*Deed of trust by.*—A deed of trust given by a married woman to secure unpaid purchase money, when her husband does not join in its execution, has no validity as a conveyance, but may be good as a declaration preserving a vendor's lien, or as a declaration of a trust in favor of the vendor. *Morrison* v. *Brown*, 83 Ill. 562.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

The Lake Shore & Michigan Southern Railroad Company *v.* John Hart.

Negligence—*Crossing railroad track.*—It is the duty of every person about to cross a railroad track to approach it cautiously and ascertain if there is present danger in crossing, as all persons are bound to know that such an undertaking is dangerous and that they must take all proper precaution to avoid accidents in so doing, otherwise they cannot recover from an injury thereby received.

Same—*Due care.*—Where as in the present case a party is not lawfully upon the track at a crossing or upon a public highway, but is walking along laterally upon the track as a way of convenience where it is exclusive by the private right of way of the railroad company; it was *held*, that there was such palpable failure in the exercise of due care and caution on the part of the appellee as to preclude him from any right of recovery.

Same—The practice of running trains in one direction or another does not excuse the exercise of caution and vigilance in looking for approaching trains in *both* directions.

Appeal from the Superior Court of Cook County. Opinion Filed January 21, 1878.

C. D. Roys and Thos. F. Withrow, *Attorneys for Appellant.*

Sheldon, J., delivered the opinion of the court:

This was an action against the Lake Shore & Michigan Southern Railroad Company to recover damages for injuries received from being run over by a train of the defendant.

There was a verdict for the plaintiff for $10,000, a *remittitur* by him of $5,000, and judgment for the residue, from which defendant appeals.

The accident occurred near a station known in the record as the "Car Shops," on a parcel of land which is owned and the principal portion of which is used by the Chicago, Rock Island & Pacific Railroad Company for machine shops and similar purposes.

It extends from 47th to 51st street, in the town of Lake, which lies south of and contiguous to the city of Chicago.

Appellant, the Lake Shore & Michigan Southern Railway Company, has a right of way along the east side of this parcel of land, on which it has constructed, and has for several years operated, two tracks; one is a main or through track, the other is a side track intersecting the main track by the side of a long platform in front of the station house.

The nearest street north of the station is 47th street, and the nearest street south of it is 51st street, and no street is opened leading to the station which is located where 48th street would be if opened.

A fence extends from 47th to 51st street along the east line of this parcel of land.

The platform at the station is connected with a stile over this fence

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by which there is access to the paths passing over the open prairie, extending from the station to State street, which is east of and parallel with the fence.

It was the custom of both railway companies in operating their through trains to move them south over the Rock Island main track, and to move the same trains north over the Lake Shore track.

It would seem to have been otherwise as to switching engines and trains being switched in the yard between 42d and 51st streets.

On the 18th day of July, 1874, at about 4.15 o'clock P.M., the Rock Island company started a suburban, or what is known in the record as a "dummy" train from its depot in the city of Chicago, south. On this train appellee was a passenger.

Within a few minutes of the same time appellant, the Lake Shore company, started south from its yard at 43d street a train consisting of from twenty to twenty-six empty cattle cars drawn by the yard or switch engine, for the purpose of switching the same on the track which intersects the main track at the side of the long platform at the car shops station.

While both trains were moving in the direction of the station at the Rock Island car shops the dummy train passed the switching train at or near 47th street, about 800 feet north of the station. The dummy train stopped at the west side of the long platform for the purpose of discharging passengers.

Appellee left the car in which he was riding, walked off the south end of the platform and a further distance of between twenty-five and forty feet, and then stepped into the gangway of the dummy engine, where he commenced a conversation with the fireman or engineer.

When the dummy engine upon which he was standing had moved about one hundred feet he got off from it and walked obliquely toward the Lake Shore track; he entered upon the track directly in front and within a few feet of the approachiug engine from the north, without looking north to see if an engine was coming, and proceeding south upon the track was almost immediately struck by the engine and run over, not having advanced more than four or five steps.

SHELDON, J: The facts set out in the declaration claimed by appellee as constituting negligence on the part of the railroad company are, in the first count, in omitting to cause a bell to be rung or steam whistle to be sounded or other signal to be given; in the second count in running its locomotive and train by the station mentioned at a high rate of speed without sounding the whistle or ringing a bell; and in the third count in running a freight train between a standing passenger train at a station and the passenger house, in violation of a rule of the company in that behalf.

As to ringing a bell or sounding a whistle, although there was some conflict in the evidence, the clear preponderance of it would seem to be in favor of the bell being rung and the whistle sounded.

The train would not seem to have been run at a high rate of speed.

As to the rule relating to the movement of freight trains between

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passenger trains and stations, it is as follows: "When passenger trains are at stations receiving or discharging passengers, freight trains must not pass between the standing train and passenger house, and passenger trains must run carefully when passing the standing train."

This rule we do not consider has application to the case.

The testimony shows satisfactorily that at the time of the accident there was no passenger train at the station "receiving or discharging passengers."

It had discharged and received the passengers for that station and was moving away from it.

The rule was for the protection of passengers between the standing train and the passenger house, and not for the protection of persons who were quite a distance away, carelessly walking on the track.

The rule was for the government and information of employes, and it was the testimony that switch trains operating in the yards of the company were not required to observe the rule.

But we conceive no such negligence as is here alleged would give a right of action under the circumstances of such want of care and caution on the part of the plaintiff as is exhibited in this record. Appellee entered upon the track directly in front and within a few feet of the approaching engine from the north, without looking north to see if an engine was coming, as he admits himself and others assert, and seemingly without listening for bell or whistle, or taking any precaution to ascertain whether or not he was in danger.

He was so absorbed, apparently, in something else, that he could not hear calls coming to him from *two* directions warning him of danger.

The track was straight for two miles north. At the time the engine had passed the switch and the engineer supposing the track clear in front of him was looking back to receive the signal of the switchman, which would indicate when the last car in the train was over the switch. There is no pretense that the engineer saw appellee before the engine struck him.

There is no evidence going to show that the employes of appellant wantonly or willfully caused the injury.

Appellee had no legal right to be upon the track, it not being at that place a crossing or any part of a public highway but private property, and for this reason he was bound to use an extraordinary degree of care to avoid accident.

Appellee alleges in excuse of his going along upon the track as he did that the company had provided no means of exit, that the station was so situated that it was necessary for the public to pass over the track in going from the station to 51st street, and that it was notoriously used for that purpose.

Appellee was going along upon the track in the use of it as a way to reach his home which was on State street, south of 51st street, for which purpose he would go south upon the track to 51st street, thence on that street east to State street, then south, home.

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Between the station house and State street on the east there was a large space of open prairie over which were paths to State street, to which paths access was easy by way of the stile at the fence at the south end of the depot. This way across the prairie to State street was as direct to his home as the one by which appellee was proceeding.

By the side of the track he was traveling on, between it and the Rock Island main track was ample space in which persons could pass from 51st street to the depot without danger from either trains.

By the side of the fence along the east side of this parcel of land there was abundant room to travel safely along. There were thus three other safe ways of exit. All that can be said for not using any one of them is that the walking was not so good as upon the track between the rails.

This of course did not justify appellee in taking the dangerous way, except upon the condition of assuming the risk of the perils he might encounter. In excuse for not using any precaution to ascertain whether there was any train approaching from the *north*, appellee urges the practice of the roads to run all trains south from Chicago on the Rock Island track, and all trains north toward Chicago on the Lake Shore track; and that therefore in going upon the Lake Shore track he was only bound to look *south* to see if any train was coming from that direction.

Appellee was not justified in relying upon any such practice, as the result shows. The companies had the right to change such practices at any time, and to run their trains at all times in either direction, and any dependence upon such former practice was at appellee's risk.

This practice before did not excuse the exercise of caution and vigilance in looking for approaching trains in *both* directions. Besides, the proof shows satisfactorily that this practice did not prevail as to switching engines and trains being switched in the yards between 42d and 51st street.

This court has time and again decided that it was the duty of every person about to cross a railroad track to approach it cautiously and ascertain if there is present danger in crossing, as all persons are bound to know that such an undertaking is dangerous and that they must take all proper precaution to avoid accidents in so doing, otherwise they could not recover from an injury thereby received.

Among the later decisions are *C. & N. W. R. R. Co.* v. *Sweeney*, 52 Ill. 325; *C. B. & Q. R. R. Co.* v. *Van Patten*, 64 id. 510; *I. C. R. R. Co.* v. *Godfrey*, 71 id. 500; *I. C. R. R. Co.* v. *Hall*, 72 id. 222; *C. B. & Q. R. R. Co.* v. *Damerell*, 81 id. 450; *I. C. R. R. Co.* v. *Hetherington*, 83 id. 510; and see *L. S. & M. S. R. Co.* v. *Miller*, 25 Mich. 274; *Harbon* v. *St. L. K. & N. R. Co.*, 64 Mo. 480; *Fletcher* v. *The A. & P. R. R. Co.*, id. 484; *Gorton* v. *The Erie R. W. Co.*, 45 N.Y. 662; Wharton on Negligence, sec. 384.

With increased force does the rule apply, and a higher degree of vigilance is required, where as in the present case a party is not law-

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fully upon the track at a crossing or upon a public highway, but is walking along laterally upon the track as a way of convenience where it is exclusive by the private right of way of the railroad company.

There was in the present case such palpable failure in the exercise of due care and caution on the part of the appellee as to preclude him from any right of recovery.

The judgment will be reversed. *Judgment reversed.*

WALKER AND DICKEY, JJ., dissent from the views expressed and from the conclusion of the court in this case.

EDITOR'S NOTES.

ACTION—*To recover money paid on judgment after reversal.*—If a judgment, after collection, is reversed in this court, the plaintiff in it will become liable to the defendant for the amount collected by him on it, including costs. *Clayes* v. *White*, 83 Ill. 540.

FORMER RECOVERY—*As to costs after reversal.*—Where, after the reversal of a judgment, suit is brought by the defendant to recover back money paid by him in satisfaction of the same and costs, a judgment, on dismissal of the prior suit against the plaintiff therein, for costs, will not present a bar to a recovery of the costs paid. Ib.

ACTION—*Splitting of entire demand.*—A party, who has paid a judgment and costs before its reversal, if he seeks to recover back the same, cannot split his demand and recover the damages paid in one action and the costs in another; and, after suit for the entire demand, the defendant cannot, by any act of his, compel the plaintiff to recover the costs in one suit and the damages in another. Ib.

FORMER ADJUDICATION—*Of the Supreme Court binding.*—A decision of this court, on appeal, holding that, as the plaintiff had sued the defendant as a simple indorser of a note, he was concluded from urging his liability as guarantor, will be conclusive upon the question in any subsequent suit. Ib.

ASSIGNMENT—*When suit against maker is not availing.*—If the maker of a note, at any time after its maturity, has property, real or personal, liable to execution, sufficient to pay the note, it cannot be claimed a suit would have been unavailing. Ib.

SAME—*Excuse of diligence.*—The want of knowledge on the part of the assignee of a note of property of the maker, is not a sufficient excuse for want of proper exertions to collect its amount of the maker. Ib.

The fact that the maker's property is incumbered, does not furnish sufficient reason for a failure to levy upon it, unless the assignee is prepared to show that the incumbrance was valid and a levy would prove wholly unavailing. Ib.

SAME—*Burden of proof.*—In a suit by the assignee against the assignor of a note, where diligence by suit against the maker is not shown, the burden of proof is upon the plaintiff to establish the insolvency of the maker. Ib.

NEW TRIAL—*Newly discovered evidence.*—A new trial will not be granted on account of newly discovered evidence which is merely cumulative. Ib. *Vide: Camp* v. *Morgan*, 21 Ill. 255; *Clayes* v. *White*, 65 Ill. 357; *Roberts* v. *Haskell*, 20 Ill. 59.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

A. GREEN COURSEN, IMPLEADED, ETC., *v.* GEORGE BROWNING ET AL.

STATUTE—*Sec. 14, R. L. 1874, p. 329—orders and judgments under.*—Where a cause was taken at the September term, 1873, and held under advisement, and the judgment was affirmed on January 30, 1874, the steps taken in the case were in harmony with the statute.

PLEADING—*Affidavit of merits—striking plea from files.*—Where the bond upon which an action was brought was a contract for the payment of money, and the plaintiff in the action filed with his declaration an affidavit of claim, as required by the statute, the appellant was bound to file with his pleas an affidavit of merits, and when he failed in this regard the court did not err in striking them from the files.

PRACTICE—*Service of process.*—Where the record shows that only one of the defendants was served with process, and that the other one did not appear, the court had no power to proceed to judgment against him.

APPEAL from the Superior Court of Cook County. Opinion filed January 21, 1878.

A. GARRISON, *Attorney for Appellant.*
HUTCHINSON & LUFF, *Attorneys for Appellee.*

CRAIG, J., delivered the opinion of the court:

We perceive no force in appellant's objection that the declaration is insufficient to support the judgment. The action is upon an appeal bond, executed July 23, 1873, and filed in the Superior Court of Cook county, whereby an appeal was taken from a judgment rendered in that court to the Supreme Court. The cause was submitted at the September term, 1873, for decision, and the averment that the judgment was affirmed on the 30th day of January, 1874, does not show that the action taken in this case is in conflict with the constitution or the statute, as supposed by appellant. Sec. 14, R. L. 1874, p. 329, declares: The judges of the Supreme Court, or any four of them, may enter orders and judgments in vacation in any of the grand divisions of this state in all cases which have been argued or submitted to the court during any term thereof, and which shall have been taken under advisement.

As the cause was taken at the September term, 1873, and held under advisement, the averment that the judgment was affirmed on January 30, 1874, shows the steps taken in the case were in harmony with the statute.

It is next urged that the court erred in striking appellant's pleas from the files. The bond upon which the action was brought was a contract for the payment of money, and as the plaintiff in the action filed with his declaration an affidavit of claim, as required by the statute, the appellant was bound to file with his pleas an affidavit of merits, and as he failed in this regard the court did not err in striking them from the files.

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Nor is there any force in the objection that the judgment should have been against both defendants or none.

The record shows only one of the defendants served with process, and as the other one did not appear, the court had no power to proceed to judgment against him.

We perceive no error in the record, and the judgment will be affirmed. *Judgment affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION, SEPTEMBER TERM, 1877.

AGUST SIEBOLD *v.* THE PEOPLE OF THE STATE OF ILLINOIS.

JURISDICTION—Withdrawing original jurisdiction of the subject from the Circuit Court and remitting it to the police court of the city.

ERROR TO Peoria County. Opinion filed Jan. 21, 1878.

A. GARRISON, *Attorney for Appellant.*

HUTCHINSON & LUFF, *Attorneys for Appellee.*

SCHOLFIELD, C. J., delivered the opinion of the court:

Plaintiff in error was convicted in the court below of three offenses of keeping open a tippling house on the Sabbath day, in violation of the statute, and fined $10 for each offense. The judgment is upon an indictment, properly framed and presented in due form of law in open court by a grand jury of the county regularly impaneled and sworn.

The offenses were committed within the corporate limits of the city of Peoria, and at the time the city was empowered by its charter, and pursuant to the power had passed ordinances to regulate the sale and giving away of distilled and fermented liquors, and the time when saloons for that purpose should be kept open and when they should be closed.

The only point made against the judgment below is, that the effect of the charter and ordinance adopted pursuant thereto, is to withdraw original jurisdiction of the subject from the Circuit Court and remit it to the police courts of the city; and *Bennett* v. *The People* is relied upon as sustaining it.

The point is not well taken. In *Bennett* v. *The People* the charter conferred exclusive jurisdiction upon the municipal authorities over the subject, and was therefore held to operate as a repeal of the general law within the municipality. Here, however, the charter does not profess to confer upon the city authorities *exclusive* jurisdiction—it merely confers concurrent authority in that respect; and the case is therefore, in all respects, analagous to *Berry* v. *The People*, 36 Ill. 423, and *Gardner* v. *The People*, 20 id. 430. Here, as in those cases, there is no pretense that the acts adjudged as offense against the statute were done with the permission and under the authority of the city, or that the plaintiff in error has been punished by the municipal authority for the same acts. The judgment is right and must be *affirmed.* *Judgment affirmed.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPT. TERM, 1877.

DAVID A. GAGE *v.* FRANKLIN PARMALEE.

PARTNERSHIP—*Bill to set aside a settlement upon dissolution.*—Where there is but *conjecture* that the books, if produced, might furnish evidence in support of the allegations of the bill, and the settlement and the agreement in writing under the hands and seals of the parties appear to have been fairly and deliberately made, it is *held*, that such transactions should not be lightly set aside, and that no sufficient ground has been shown for setting them aside in this case.

SAME—*Where party is not a free agent.*—Where it in no respect appears from the circumstances and mental condition of appellant that he was not a full, free agent, equal to protecting himself, or that he stood in the need of the protection of a court, the court will not protect him.

SAME—Where there is mistake, accident or fraud which in truth vitiates a settlement, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened.

SAME—*The maxim, Omnia præsumuntur contra spoliatorem* (All things are presumed against a wrong-doer), construed.

SAME—*Destruction of partnership books.*—Where the real reason and motive for destroying the books were to prevent exposure to the public of the business transactions of the firm, and not to destroy evidence in this suit, the act should be viewed differently and the adverse presumption be not so strong as if the latter had been the purpose. Still the act deserves severe reprehension, and affords just ground of presumption against the perpetrator.

APPEAL from Superior Court of Cook County. Opinion filed January 21, 1878.

GOUDY, CHANDLER & SKINNER, *Solicitors for Appellant.*
JOHN M. JEWETT, *Solicitor for Appellee.*

SHELDON, J., delivered the opinion of the court:

This was a bill in equity filed in the Superior Court of Cook county, by the appellant, David A. Gage, against the appellee, Franklin Parmalee, to set aside a settlement had between them in 1874, upon the dissolution of a copartnership between the parties.

In the year 1854 the said Gage, Parmalee, Liberty, Bigelow and Walter S. Johnson formed a copartnership by the firm name of F. Parmalee & Co., for the purpose of carrying on a stage or omnibus business in the city of Chicago. The articles of copartnership were in writing, and among other things provided that Parmalee should receive the sum of $1,000 per annum for taking the active charge of the business, and that the net profits of the business should be shared equally by the copartners. In the year 1858 Johnson retired from the firm, and Gage, Parmalee & Bigelow continued the business under the same firm name, without any new articles of copartnership being executed until May, 1871, when Bigelow sold out to his copartners all his one-third interest in both the real and personal property of the firm for the sum of $30,000, for which he took

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the unsecured notes of Parmalee & Gage, who continued the business together without change of firm name until January 1, 1874, when their relations were dissolved, and Parmalee purchased the interest of Gage in the business and personal property of the firm, assuming all the debts of the firm except such as were secured upon real estate, and paying to Gage about $18,000; their contract in the matter being embodied in a writing of that date, signed and sealed by the parties. It is this which the bill seeks to have set aside.

It appears that in the year 1873 Gage was treasurer of the city of Chicago, and in the autumn of that year became seriously embarrassed in his financial affairs, and on the 16th day of December of that year retired from the office of treasurer, and on the 7th day of January, 1874, an indictment was found against him in the Criminal Court of Cook county, by reason of a deficit in his accounts as treasurer, in the sum of about $300,000, upon which he was not tried until the month of December of that year.

The general charge of the bill is, that Parmalee took an unjust advantage of the necessitous and distressing circumstances in which complainant was placed, and demanded imperatively a dissolution of the firm, and an immediate settlement between them; that thereupon a hurried and insufficient examination of the books was made by one Parker; that Parmalee presented to Gage a statement of account showing, as Parmalee represented, that complainant's interest in the concern was about $15,000, and on the hypothesis that such was the true showing, and upon the demand of Parmalee that he should immediately do so, complainant did enter into the agreement of dissolution and settlement of January 1, 1874, for the grossly inadequate consideration therein stated, his true interest at the time being of the value of $100,000; that the dissolution and settlement were a fraud upon the complainant, setting forth several particulars of alleged fraud. The court below, upon final hearing, dismissed the bill, and the complainant appealed.

It is urged, as a ground of relief, that the mental condition and distress of mind of appellant, occasioned by his embarrassments and troubles, were such that, with the alleged unjust advantage taken thereof in forcing and hurrying on the dissolution and settlement, they afford sufficient ground for setting the same aside.

The principle within which it is thus sought to bring the case is laid down as follows in 1 Story's Eq. Jur., sec. 239: "And the constant rule in equity is, that while a party is not a free agent, and is not equal to protecting himself, the court will protect him . . . Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some oppression or fraudulent advantage or imposition attendant upon it."

We do not consider that the facts of this case at all come within the application of this principle. It in no respect appears from the circumstances and mental condition of appellant that he was not a

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full, free agent, equal to protecting himself, or that he stood in the need of the protection of a court.

It is true that appellee insisted upon a dissolution and a settlement, and justifiably so, we think, under the circumstances; the proof indicating it to be a matter of financial necessity. Nothing of undue advantage appears in hurrying the settlement without full opportunity of investigation and deliberation. The matter of dissolution was broached in December, the settlement was not actually concluded until on the 16th day of March following, the writing of dissolution and settlement being dated back to January 1.

Three mutual friends were called in to aid in the settlement. Two of them examined and appraised the property. Parker, an expert accountant, selected by appellant himself, examined the books. Much time, amounting to weeks, after the matter of the settlement had been substantially referred to the three mutual friends, Loomis, Hall, and Richmond, was consumed in talks and examinations.

Notwithstanding the other troublous matters which appellant had to think of and attend to, there would seem to have been ample time here for deliberation, and for making all needful inquiries and examinations in order to come to an intelligent conclusion in respect to the business affairs of the firm, and if there was any lack in such respects, it must have been the fault of appellant; the evidence does not show it to be in any manner chargeable to appellee.

If the settlement is to be taken as made upon the basis of a *stated account*, it must be held conclusive, unless the case be brought by the proof within the doctrine as laid down in 1 Story Eq. Jur., sec. 523. "But if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined."

The particulars in which the bill attacks the settlement made by the parties, and which are here insisted upon, are as follows:

1. The complainant claims that he was under a mistake as to the amount of the yearly net profits of the business.

2. That the interest account, if properly made up, would have shown a large balance due to complainant, which was not allowed in the settlement.

3. That there were entries upon the books of large amounts paid to certain third persons as commissions on omnibus tickets, or certain data and so called vouchers in Parmalee's possession, representing such payment, with a large portion of which complainant was charged, that were never paid, wherein the defendant committed a fraud.

4. That instead of $1,000 per year, as agreed, Parmalee had drawn as a salary a sum largely in excess of that amount, to wit, about the sum of $5,000 per annum, which fact he fraudulently suppressed.

5. That the books of account, if properly examined and settled, would show other frauds committed by Parmalee against the complainant.

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The witness, Parker, who examined the books, testifies that from the computation he made from the books, the average yearly profits of the firm, for the 19¼ years of its continuance, according to his impression, were between $34,000 and $35,000, but that these were not net profits; the only thing, though not taken out, being depreciation of stock. Upon this basis, and taking $125,000 as the amount which appellant had received from the firm, according to his testimony, appellee's counsel makes in detail a full calculation of the entire profits of the business, which, without going into the figures, we will say shows quite plausibly that the amount received by appellant on the dissolution was the fair value of his interest. As to the interest account, we understand it to refer to an interest account between the parties.

There is no charge in the bill, and no evidence in the record, that there ever was such an account. Interest is not payable upon balances, excepting by some agreement or understanding, and none such is shown. As to the charge in respect of commissions paid to certain persons on omnibus tickets, the only evidence upon the point is the testimony of appellant that appellee on one occasion stated to him that in order to get the price of the omnibus fare from depot to depot raised from 35 to 50 cents, which was done in 1872, he had to pay two certain railroad ticket agents 7½ cents on each passenger carried by the firm, after the advance, and that afterward appellee told him he was paying them.

The persons named testified that they never received anything in this behalf. This commission upon the number of passengers so carried would amount to $8,835.45, to a credit of one-half of which sum appellant claims he is entitled.

This conversation appellee denied, and also that any such commission was ever paid. One of the persons referred to testifies that upon application to appellant in regard to the matter, the latter stated that he never thought witness had received any money, and thought that appellee lied when he said it. Appellant does not testify that there was any such account for commissions upon the books, nor is any such account shown by any part of the evidence, nor does it appear anywhere that any sum paid as commissions was ever charged to appellant. The proof fails to establish this charge of the bill.

As to the complaint in respect to salary, the provision for $1,000 a year, as a salary, was contained in the original articles between Parmalee, Gage, Johnson and Bigelow. After Johnson was bought out in 1858 there were no articles of agreement in writing ever executed, as satisfactorily appears from the evidence of Bigelow, Parmalee and Parker, although appellant testifies he is quite positive that on the back of the original articles of copartnership there was indorsed a renewal for three or five years. Bigelow lived in Boston for many years prior to the sale of his interest. Appellant, for more or less of the time, was engaged in carrying on the Tremont House and the Sherman House, in Chicago; was superintendent of a horse rail-

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road in the city, and city treasurer in the city of Chicago, while appellee had the immediate and active charge of the business of the firm, devoting his whole time and attention to its business. Although in the infancy of the business, and the earlier period of the city, $1,000 per year might have been a reasonable salary; as the business increased, as the evidence shows it did largely in its proportions, it would seem just and reasonable, and natural and probable that there should have been an increase of salary, and the evidence shows that appellee's salary was increased from time to time until it reached the sum of $4,000 per annum.

This is stated by Bigelow and appellee, to say nothing of the statements of John W. Parmalee, his son, and Parker, of the same thing as appearing upon the books. Appellant denies that he ever had any knowledge of any increase in the salary over $1,000 per annum, or that he ever assented to any such increase. Appellee testifies that appellant both knew of it and assented to it. Bigelow's evidence, in this regard, is to the effect that appellee's salary was increased from time to time after Johnson was bought out, as the business increased, and that the highest salary paid was $4,000, though he does not state that appellant knew anything of it. We cannot but conclude, from the evidence, that the increase of salary was made, and that it was with the knowledge and consent of appellant.

There is another thing testified to by appellant, although the bill makes no such charge, to wit, that while he was a member of the firm, appellee told him that he had paid, from time to time, between $7,000 and $8,000 to Charles H. Moore, a member of the firm of James E. Lyon & Co., and that he had charged it up to himself and appellant.

Moore, after testifying to the existence of the firm of James Lyon & Co., of Central City, Colorado, composed of James E. Lyon, Gage, Parmalee, himself and one Towne, and its dissolution in 1865, states that Gage and Parmalee had not paid any moneys before or since the dissolution of the firm of James Lyon & Co., on his account personally, to his knowledge or request.

Under this testimony it is claimed for appellant that he is entitled to one-half of that amount, to wit, $4,000.

Appellee denies the statement of appellant in this regard, and says that the firm of James E. Lyon & Co. was a mining company, and very unfortunate. That they were sued in New York, in Colorado, and in Chicago. That Moore refused to pay up; Lyon said that he could not, and the firm debts came on the other partners, and they had to pay them. That on the New York lawsuit he had paid from $5,000 to $7,000, and Moore had only paid $400. That the loss fell on Gage and Parmalee, and was paid and charged, half and half, to each. This is doubtless what appellant's testimony on this subject has reference to.

The testimony of Moore is carefully restricted to a mere denial of payment, *on his account personally*, to his knowledge or request, and we do not see but what it consists with the testimony of appellee

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in this respect. Had there really been any mistake or fraud in respect of this payment, it is singular that it should not have been mentioned in the bill among its other charges. We think this matter should be discarded from consideration.

The general charge that the books of account, if properly examined and settled, would show other frauds, we conceive adds nothing to the specific charges, and is an allegation not entitled to be considered in a bill praying for the opening of accounts, and a settlement between the parties. Upon a more general consideration of the case, it appears that in the transaction in question, there was no reliance upon any confidential relations before then existing between the parties that appellant had for his assistance, experts and friends, relying upon nothing which appellee said or did; not trusting the book-keeper, John W. Parmalee, the son of appellee, who had had charge of the books of the firm for eight or nine years; so that the parties were dealing at arms' length. Parker was the book-keeper selected by the appellant himself to make the examination of the books.

Two of the three mutual friends called in to aid made an examination and appraisement of the personal property. Parker was the old book-keeper of the firm, who had kept the books from 1855 to 1865; the book-keeper who succeeded him, John W. Parmalee, had been instructed by Parker, and had kept the books down to the dissolution upon the same plan introduced by Parker. Parker was engaged about a week, and seven or eight hours of each day, in the examination of the books. He produced a regular balance sheet, also a statement as the result of that examination. There is nothing in the record to show that that balance sheet or statement was wrong in any respect.

According to that balance sheet, taking into account the personal property of the firm on the one side, and its debts on the other, appellant's interest was only about $8,000, as stated by Mr. Richmond, one of the three mutual friends who assisted in making the settlement. But appellant's counsel impugn this statement as being an erroneous deduction made by the witness, as shown by his further following testimony; he said "the two lines, D. A. Gage's account, $33,437; Parmalee's account, $25,392.31, show that Mr. Gage's account is $8,000 more than Mr. Parmalee's. Those accounts were taken from their individual accounts. It shows them. That is the only way I know. I judge that those entries were taken from the individual accounts in the book; I have no other knowledge. Parker never told me what those items showed. Parker did not explain the statement at all. We put our own interpretation upon it." But Parker testifies as a witness, and he does not state that this amount is a wrong showing of appellant's interest by the witness' balance sheet and statement; he is not inquired of upon the subject, nor asked to make any explanation, whatever, of his balance sheet and statement. If there had been the error in this respect now

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claimed, we should think it would have been attempted to be shown by this witness, who knows all about the matter.

All that he says is: The statement does not show the balance due David A. Gage. It shows the state of the business.

It is complained that this examination of the books by Parker was very imperfect, incomplete, and very much curtailed. Parker was employed to make an examination of the books, in order to the statement and settlement of the accounts between the parties. He spent a week upon the work, and produced his result. He took his own time as he thought sufficient for the purpose, we may suppose, without any hindrance, interruption or curtailment whatever, so far as appeared. He merely says he could have made the examination more full if he had had more time, not intimating that the examination was not sufficiently full for his own satisfaction, and for the purpose required. He says he made out the statement for the purpose of handing it to Loomis, Richmond and Hall, who were to sit as arbitrators. We must think he regarded it as sufficient for them to make a decision upon.

When Bigelow sold out in the spring of 1871, only one day's examination of the books by Parker, and only two or three days of negotiation, sufficed for the purpose of the parties. Bigelow testifies that the negotiation for that purchase of his interest was mainly conducted by appellant, and that the latter made the proposition of the terms of purchase, which were accepted by Bigelow. That purchase from Bigelow gave appellant a recent opportunity to become acquainted with the condition of the firm's affairs. As further opportunity in that way, it appears that the partners, Bigelow and appellant, were furnished with monthly statements in writing, showing the gross amount of all the earnings and disbursements during the month.

Appellant admits the receipt of such statements up to 1865, and says after that John W. Parmalee rarely furnished them. John W. Parmalee says he furnished them until appellant lost one upon the street, when he requested no more to be sent, saying that he would call at the office and take them from the books. The evidence shows that appellant called almost every day in the office, and frequently examined the books, though he testifies that he did not look into the books, further than the cash book, to see what the daily receipts were; that perhaps every day he would look at the cash receipts. It would seem, then, that the settlement was approached by appellant with a pretty good general knowledge of the condition of the affairs of the firm. The persons assisting in the settlement presented to appellant the result as shown, as they found from Parker's examination that $8,000 was the balance due appellant from the concern, and stood to his credit. The arrangement proposed was that appellee should assume the indebtedness of the firm, take the personal property, and pay appellant $8,000. Appellant was dissatisfied with the amount of $8,000. The testimony is that he found no fault with the account as rendered, or the basis on which the balance of $8,000 was figured, but claimed he should be allowed some-

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thing for the good will of the business, for interest, and made objection as to the salary of appellee being more than $1,000.

This, by the way, answers the charge in the bill of mistakes, in regard to more than $1,000 salary being charged, and that appellee fraudulently suppressed the fact that any larger salary than that was charged upon the books. It also shows that not only the question of salary, but that the matters of interest and good will, which are complained of in the bill, were also then considered. Appellant refused to accept $8,000, and the matter of the settlement seemed for the time to have fallen through.

Afterward, appellee made a proposition through Mr. Hall, which both he and Mr. Loomis approved, and advised appellant to accept, which he did accept, and thus the settlement was effected. The proposition was embodied in the agreement in writing, signed and sealed by the parties.

It would thus appear that appellant lumped off his interest for a gross sum, without special reference to what was shown by the books, or what was the actual estimated value of his interest thus disposed of. By the agreement of a settlement, appellant released his interest in the personal property and assets of the firm. Appellee assumed the payment of all its debts and liabilities, and paid appellant $13,000 in bonds, of the consolidated Gregory Mining Company; and also placed to the credit of appellant, upon the books of appellee, the further sum of $5,000, to be paid to and for the use of appellant, in the manner therein specially mentioned.

The $5,000 was placed to the credit of appellant on appellee's books, which appears to have been exhausted, and the balance of the account turned against appellant in a short time, and in reply to appellee's request to settle up the balance against him, appellant, on October 10, 1874, about seven months after the settlement, writes to appellee as follows:

OCTOBER 10, 1874.

FRANK PARMALEE, ESQ.—*Dear Sir:* I regret very much that I am unable to pay in cash all claims against me on presentation, but I feel confident that within a few weeks I shall be in a condition to pay your claim. Mr. Loomis will return in a few days, and then I shall be pleased to pay you back part of the bonds I took of you in January last,—enough to cover your claim. Yours, etc.,

DAVID A. GAGE.

On the 21st of November, 1874, appellant gave appellee an order on H. G. Loomis, directing him to pay to appellee what might be owing to him on settlement from appellant, out of the avails of fifteen bonds which Loomis held, belonging to appellant. At that time, according to appellee's uncontradicted statement, appellant was indebted to him in a sum exceeding $5,000, for moneys advanced upon matters referred to in the agreement of settlement, over and above the $5,000 placed to his credit. Here would seem to have been substantially a ratification of the settlement quite a length of time after it was made. The present bill was not filed until July 7, 1875.

There remains another extraordinary and disagreeable feature of

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the case to be adverted to. It appears that before the filing of the bill herein, it was exhibited to appellee, and he read it on the 1st day of July, 1875. On the 3d and 5th days of July, 1875, by appellee's orders, his clerks took all the books and papers of the firm of Parmalee & Co., making a bulk, in appellee's language, of half a cord, to another part of the city, and burned them in a furnace.

Before characterizing such an act according to one's natural prompting, it will be proper to hear the excuse of appellee. He says that he was induced to do the act from a statement brought to him as having been made by appellant, that he was going to file a bill against appellee for the purpose of exposing his business to the public; that he did not know that he should make anything by doing it, but that he wanted to expose appellee's business to the public. A color of probability of this being the reason for the act, is lent by the fact, that from the examination of the books and the transcript made from them by Parker, there would not seem to have been any very great object in destroying the books for the mere purpose of the suppression of evidence. If the real reason and motive for destroying the books were to prevent exposure to the public of the business transactions of the firm, and not to destroy evidence in this suit, the act should be viewed differently, and the adverse presumption be not so strong, as if the latter had been the purpose. Still, the act deserves severe reprehension, and affords just ground of presumption against the perpetrator.

The maxim is *omnia presumuntur contra spoliatorem*, and appellant's counsel press this into their service as a very strong auxiliary, almost to the extent of insisting upon a literal application of the maxim in the full breadth of its terms, so as to presume a case against the appellee.

In Best on Evidence, vol. 2, p. 704, sec. 414, the author says: "However salutary, and in general equitable, the maxim *omnia presumuntur contra spoliatorem* must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far," citing authorities to such effect. The destruction of evidence, and the refusal to produce it when in the party's power, are treated in the books in the same connection, and as attended with similar results in the cause. In the case of *Law* v. *Woodruff, Admr.*, 48 Ill. 399, the defendant below having refused to produce certain letters, or to give any explanation of his refusal, the court below had given an instruction to the jury authorizing them "to put the strongest construction upon the defendant's letters, which they will reasonably bear against him . . . for the law presumes that they contain evidence against him, or he would not withhold them from the jury."

This court said: "This instruction fails to state the law correctly, and under the unsatisfactory evidence in the case was calculated to mislead the jury to the prejudice of the defendant. As a matter of law no such inference can be drawn." In Wharton on Evidence, vol. 2, sec. 1268, the author, after citing several authorities upon this

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subject, says: "It follows, therefore, that the presumption arising from mere non-production cannot be used to relieve the opposite party from the burden of proving his case;" and see *Chaffe* v. *United States*, 18 Wal. 516; *Joannes* v. *Bennett*, 5 Allen, 169. This culpable act of the destruction of the books justly prejudices the case of the appellee, and we have the inclination to give to it the full legitimate effect against him that may be warranted. But we do not see how, under the proofs in the case, it can be made avail of here to the advantage of appellant, unless there be allowed to it the effect of supplying proof. This we do not think can rightly be done. Proof must be made of the allegations of the bill. The destruction of the books does not make such proof. The presumption of law does not go to that extent. In the weighing of conflicting testimony, there might be scope for the operation of this presumption against the appellee, or in the denial to him of any benefit of secondary evidence. But we do not see wherein the case of appellant can be helped in either of these ways. The only conflict of evidence there is, is produced by his testimony, and where it conflicts with that of appellee the latter is so corroborated to such an extent by other testimony, and by circumstances, as to overbear the testimony of appellant, and of secondary evidence of the books appellee has no need. So, too, if there were a contrariety of evidence in respect of anything testified to as appearing upon the books, this presumption of law might strengthen and add weight to any testimony in such regard, favoring the case of appellant. See *Livingston* v. *Newkirk*, 3 Johns. Ch. 315. But we discover nothing of this kind. In respect of none of the particulars wherein the bill seeks to impeach the settlement, do we find anything in support of the charges testified to as being shown by or appearing upon the books.

There is but conjecture that the books, if produced, might furnish evidence in support of the allegations of the bill. The settlement here, and the agreement in writing under the hands and seals of the parties, appear to have been fairly and deliberately made. Such transactions should not be lightly set aside. We think no sufficient ground has been shown for setting them aside in this case.

The allegations of the bill we do not find to be sustained by the proofs, and the decree dismissing the bill must be affirmed.

Decree affirmed.

SCHOLFIELD, C.J., BREESE AND SCOTT, JJ: We do not concur in this decision.

EDITOR'S NOTE.

RECORDING LAW—*Void deed of trust may afford notice to subsequent purchaser.*—A deed of trust executed by a married woman, her husband not uniting therein, to secure the purchase money due on the premises, though void as a conveyance, is, nevertheless, an instrument in writing relating to real estate, and when recorded is constructive notice, to all subsequent purchasers, of the lien of the original vendor upon the same for the unpaid price. *Morrison* v. *Brown*, 83 Ill. 562.

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

THE PEOPLE EX REL. WM. N. STURGES *v.* BOARD OF DIRECTORS ETC. OF THE BOARD OF TRADE OF CHICAGO.

MANDAMUS—*Petition for mandamus to collect debts.*—Where a party has a legal remedy and has not been disturbed in any of his social, business or property rights as a member of the Board of Trade except the right to prosecute a member for the non-payment of a claim, *but* has been deprived of that right by a decision of the board of directors, that they would not entertain it for reasons deemed by them, in the exercise of their discretion and judgment, to be good and sufficient, and *that*, in a matter not materially, if at all, affecting the public interest, but of private interests, it was *held*, not to be a case which requires the exercise of a discretion or the resolving of doubts in favor of the petitioner.

SAME—*Party defendant.*—Where it was sought to affect the rights of a party and to compel his trial, upon a petition of *mandamus* to which he was no party, and of which he has had no notice, it was *held*, that under Sec. 7 of the *mandamus* act where a party has an interest in the subject-matter he could be made a party defendant.

DEMURRER—*To answer.*—Where the facts set out in the answer, without reference to the allegations as to the status of a party as a member of, or his past relations to, the board, present a clear defense to the petition, it was *held*, that the demurrer to the answer should be overruled.

MCCOY & PRATT and MONROE, BISBEE & BALL, *Attorneys for Plaintiff.*
DENT & BLACK, *Attorneys for Defendant.*

ROGERS, J., delivered the opinion of the court, January 17, 1878:

If we are to regard the case of *The People ex rel. Thos. B. Rice* v. *The Board of Trade of Chicago*, 80 Ill. p. 134, as authority, then it is clear that the petition for a *mandamus* in this case cannot be sustained and that the answer to it presents a perfect defense. It is the latest decision of our Supreme Court upon the questions involved in it; and while it has not given satisfaction to many of the members of the bar, and perhaps not to some of the judges of the courts, yet it has not been recalled nor overruled, and is therefore binding upon the inferior courts of the state. It is suggested that the Supreme Court has consented to a review of the questions, and it is hoped and expected by the counsel in a case now pending in that court that the decision in the Rice case will be overruled. I do not, however, feel that it is becoming in me, if indeed I have the legal right, to disregard and reject the authority of that case, even if I entertained a different opinion and doubted its correctness.

But without the authority of that case, and admitting that the courts will interfere to control the enforcement of the rules and regulations of such associations, whether merely voluntary in its strictest sense, or created and maintained for the transaction of business or for the pecuniary gain of its members and the acquisition of

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property and profits in which its members have a direct interest, still does the present case demand the interference of the court, and does the answer filed by the defendants to the petition of the relator, and to which a demurrer has been filed, present a good and sufficient defense. By filing a demurrer the relator admits all the material facts set up in the answer. Those facts are not very different from the allegations of the petition, and as the decision of the demurrer to the answer will, in effect, be the same as upon a demurrer to the petition, I will consider the questions in that view.

The petition is filed by W. N. Sturges, a member of the Board of Trade of this city, praying for a *mandamus* to compel the board of directors of said Board of Trade to proceed and try Geo. Webster, another one of its members, upon a complaint brought under the rules of the corporation.

The complaint is that Webster had refused to comply with a contract made by him with Sturges, for the purchase of corn, setting out that he had been delinquent in payment of margins called and that Sturges had purchased the corn and paid therefor upon Webster's account, and that Webster had refused to pay the bill presented with the complaint. The petition avers that the board of directors had refused to entertain this complaint, and thereby deprived Sturges of the means of compelling, under the rules of the association, a speedy adjustment of the difference between him and Webster, and that he was prevented from the exercise of, and denied, the privileges and rights to which he was entitled as a member of the Board of Trade.

The right to have Webster tried, for not paying Sturges' bill, is the only one which he claims, was denied to him, and to enforce that right by *mandamus* is the only object sought by the petition. As a result of such trial, if Webster was suspended from his privileges and rights as a member of the Board of Trade, so far as it concerns Sturges, is the expectancy, that Webster, to relieve himself from such suspension, would pay the bill of petitioner.

The real object, therefore, of the complaint made to the board and of this petition for *mandamus*, is to collect or try to collect a debt. It is not claimed that any other right or privilege of a member of the Board of Trade has been denied to the relator. He still has the privilege, by his own showing and by that of the answer, of going upon 'Change and trading and being traded with, and in every other respect enjoying all his rights, privileges and franchises; nor is he deprived of any right of, or interest in, the property of the corporation. He has exercised the right to make a complaint against his fellow member under sec. 7 of rule 4 of the board. That complaint was considered as stated in the answer, and upon consideration in a meeting of the board of directors, as shown by the letter of the secretary of the board, copied in the petition and averred in the answer, "it was voted that the complaint . . . be not entertained by the board." This disposition of it, and its return to the petitioner, he regards as a refusal to receive the complaint and a denial of his right to have the trial of Webster upon the complaint; while the

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defendants set it up as a consideration and disposal of the complaint, by the board, in the exercise of its discretion and judgment. This would seem to be so. It was presented at a meeting of the board; it was considered, and they decided by a vote that "it be not entertained." The reasons for such a disposition of it are not shown. Nevertheless, there was action upon it, and by a vote taken it was disposed of. Whether because the complaint was not sufficiently certain or did not present an offense, in the opinion of the board, which was a subject of complaint and trial, does not appear. Upon examining the complaint, and the rule of the board under which it was made, it appears to me that it was not such as in such cases should be required. That it would be quashed by a court, if it was on information or indictment, or that a demurrer would be sustained to it for not sufficiently setting out the offense complained of, I have no doubt. The petition alleges it was made under sec. 7 of rule 4 of the board, which prescribes that, "When any member of the association has failed to comply promptly with the terms of any business contract or obligation, *and* has failed to equitably and satisfactorily adjust and settle the same, . . . he shall, upon admission or proof of such delinquency, before the board of directors, be by them suspended," etc. Now the complaint was "non-fulfillment of contract as per bill inclosed, which he refuses to pay," and "for delinquency of margins being called which he refused to deposit," but there is no statement in the complaint that he had "failed to equitably and satisfactorily adjust and settle the same." It has been seen that he must have failed to comply with the terms of a business contract *and* failed to equitably and satisfactorily adjust and settle the same before he could be suspended. That he failed to furnish margins, and upon relator's buying in and paying for the corn, upon Webster's account, and Webster's failure to pay the bill — in other words, his failure to comply with the terms of the contract—is not, under sec. 7 of rule 4, an offense for which he could be tried and suspended. There must have been also a failure to "equitably adjust and settle the same." This is not a technical but substantial objection to the complaint. A member may refuse to pay a claim because it is unjust, in whole or in part, without an infraction of the rule in question. But if there is a claim of failure to fulfill a contract, and he also refuses and fails to adjust and settle it, then he is liable to the discipline prescribed.

To refuse to fulfill a contract or to pay a bill is one thing, to refuse to adjust and settle a difference is another and very different thing, and both must concur to make the offense described in the seventh section.

To adjust and settle requires concurrent action, an agreement by the parties and settlement of differences. The rule contemplates an effort between the parties to adjust and settle a difference which may arise in a business contract, and such an effort is required by the letter and spirit of the rules and regulations of the board, and is consonant with the principles and usages of honorable and fair dealing

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merchants. The members of the board of directors, while not lawyers, are no doubt very intelligent business men, and could hardly fail to see that such a complaint as was presented against Webster did not contain a charge of failure "to comply with the terms of a business contract *and* a failure (also) "to equitably and satisfactorily adjust and settle the same." They were required, then, to decide that the complaint should be dismissed or not entertained. If such was the reason, then it was clearly the exercise of a sound discretion and correct judgment, in the exercise of which, it is well settled, courts will not interfere. "*Mandamus* will not lie to compel an inferior court to reverse its action in refusing to dismiss" (or, I add, in dismissing) "a bill of complaint, since in passing upon such dismissal the court must necessarily have exercised its judicial functions." High on Extraordinary Remedies, sec. 173.

Nor will it lie to control corporate officers in the discharge of duties concerning which they are vested with discretionary powers, id. sec. 278. The power exercised by the board in the Webster complaint was quasi-judicial, conferred by the rules of the board, to which the relator subscribed and by which he is bound.

Then there is a specific legal remedy for relator's grievance—he can recover his debt, if it exists, by an ordinary action at law. "The firmly established rule and fundamental principle underlying the entire jurisdiction (of the courts), that the existence of another specific legal remedy, fully adequate to afford redress to the party aggrieved, presents a complete bar to relief by the extraordinary aid of a *mandamus*," unless the recent statute of this state, in force from July 1, 1874, has changed that rule. Sec. 9 of that act provides that ,' the proceedings for a writ of *mandamus* shall not be dismissed nor the writ denied because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy." But, if the writ will not afford a *sufficient remedy*, then the rule remains, and the writ will or should be denied. What, then, is the remedy sought, and would it be sufficient for the purpose of the relator, viz, to collect the debt claimed to be due him. He seeks to compel the board to try Webster, and if they find him guilty, the award or judgment would be, not to pay the debt, but to suspend him from his privileges as a member of the corporation until he did pay it. The suspension would not *necessarily* afford the remedy. Webster could abide the suspension and still refuse to pay the debt, and the board would be powerless to compel the payment. They could threaten and punish by their suspension, and that would be all, so far as they were concerned, and the relator would then be compelled to resort to a court, with power not only to give judgment, but execute it by sale of the property of the debtor. It is true the fear or the fact of suspension might lead to an equitable adjustment and settlement of the claim, but that possibility or even probability is hardly a proper and sufficient remedy. If not, then the court can properly deny the writ, because the relator has a specific legal remedy, which he can pursue. Again, this writ

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is not a writ of right—it is discretionary with the court whether to award it. *People* v. *Hatch*, 33 Ill. 9. In this case Sturges has a legal remedy—he has not been disturbed in any of his social, business or property rights as a member of the Board of Trade except the right to prosecute a member for the non-payment of a claim (which may or may not be disputed), *but* has been deprived of that right by a decision of the Board of Directors, that they would not entertain it, for reasons deemed by them, in the exercise of their discretion and judgment, to be good and sufficient, and *that*, in a matter not materially, if at all, affecting the public interest, but of private interests, namely, to the relator and Webster. And it does not appear to me to be a case which requires the exercise of a discretion or the resolving of doubts, if I had any, in favor of the petitioner.

Another thing entitled to consideration is, that it is sought to affect the rights of Webster and to compel his trial, upon a petition for *mandamus* to which he is no party, and of which he has had no notice. Under sec. 7 of the *mandamus* act (as he has an interest in the subject-matter), he could be made a party defendant.

The facts set out in the answer, without reference to the allegations as to the status of Sturges as a member of, or his past relations to, the board, present, in my opinion, a clear defense to the petition. He is a member of the association, notwithstanding the suit referred to in the answer, and I have not, therefore, given any weight to the facts set out in the answer upon that subject. The demurrer to the answer is therefore overruled. *Demurrer overruled.*

Before the reading of this opinion Judge Rogers stated to counsel that he had formed his judgment of the case and wrote out his opinion before the decision of the Supreme Court in *Sturges* v. *Board of Trade*, filed at Ottawa, January 21, 1878, which case counsel had suggested brought into review the decision in *Rice* v. *Board of Trade*, 80 Ill. 134, and that he had supposed the counsel would take some action, either by petition to dismiss or by defendants to amend the answer by setting out the fact that Sturges was no longer a member of the Board of Trade; but no suggestion being made by either counsel, Judge Rogers read the opinion as prepared.

EDITOR'S NOTES.

BANKS, BANK NOTES.—The finder of a bank note, as against a bailee without reward, to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee. *Tancil* v. *Seaton*, 1 Virg. L. J., 354. Such bailee is not bound to use as great care and diligence in the keeping of the note as would be if he were a bailee with compensation; and if the note was stolen from his possession he will not be liable for it unless the loss was the result of gross negligence on his part. Ib. In such a case, to entitle the plaintiff to recover, he must show that the note was a genuine note and of the value claimed. Ib.

MALICIOUS PROSECUTION—*Probable cause and malice are facts for the jury.* In an action for malicious prosecution, the questions of probable cause and malice

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are ones of fact for the jury, under all the evidence and circumstances shown, and the court has no power to take them from the jury.—*Hirsch* v. *Feeney*, 83 Ill. 548.

SAME—*Question of probable cause does not depend upon part, but all the evidence.* An instruction in a suit for malicious prosecution, reciting portions of the evidence, and telling the jury that if they believe them, they constitute probable cause, and to find for the defendant, is properly refused, where there are other facts shown of important bearing on the question. Ib.

SAME—*Duty of inquiry before arresting person on suspicion.*— To justify the arrest of a person on a bare suspicion of burglary, from the fact of his having come into the store the evening before the burglary and paid a small bill, and whose character is good, the party causing the arrest should use reasonable efforts to learn and know his true character, and if he does not, this may be considered on the trial of an action for malicious prosecution growing out of the arrest. Ib.

SAME—*Evidence in mitigation of damages.*— In a suit for malicious prosecution, the advice given the defendant by police officers may be proved as showing the circumstances under which the prosecution was instituted, and to mitigate damages, but not as a defense. Ib.

SAME—*Instruction as to refusal to publish article exonerating accused.*—In an action for malicious prosecution, the court refused an instruction that if the defendant consulted an attorney as to the propriety of his publishing an article exonerating the plaintiff of the charge, which he had requested, and promised, if done, to end the matter, and the attorney advised the defendant not to publish it, that there was no malice in declining to sign and publish the article: *Held*, that the instruction was properly refused. Ib.

SAME—*Whether damages are excessive.*—Where a party who had always borne a good character, and was employed and entrusted by a wholesale firm with their goods and the key of their establishment, was arrested on a charge of burglary, under circumstances not sufficient to raise a shadow of suspicion, and imprisoned, his house searched, and the prosecutor refused to make reparation by publishing an article exonerating him from the charge; it was *held*, that a verdict of $1,200 damages, in an action for the malicious prosecution, was not excessive. Ib.

ADMINISTRATOR—*Power and right to execute contracts of intestate.*—If a contract with a deceased party is of an executory nature, and his personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract. The exceptions to the rule are, where the contract is of a personal character, or requires, in its execution, the exercise of peculiar skill or taste. *Smith* v. *Manufacturing Co.*, 83 Ill. 49. 1 Par. Cont. 131, 6th ed. *Saboni* v. *Kirkman*, 1 M. & W., 418; *Wentworth* v. *Cook*, 10 A. & E., 42.

SAME—*Responsibility in performing.*—At common law, if an administrator undertakes to perform the contract of his intestate, it is upon his own personal responsibility, and if losses are sustained, he must bear them, and if profits are realized, they become assets in his hands for the benefit of the estate. Ib.

SAME—*Effect of statute as to performance of contract by administrator.*—The statute of this state has so far changed the rule at common law, that where the administrator performs a contract of his intestate under an order of the County Court, the estate will be bound for any loss sustained, as well as entitled to any profits realized. But the statute has not changed the rule which authorizes the administrator to perform on his own responsibility, and if he performs without an order of court, he assumes the risk of losses. Ib.

CONTRACT—*Continues after death of a party.*—The death of one of the contracting parties does not put an end to the contract, and his estate is liable in damages for any breach after, as well as before his death. Ib.

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

BOARD OF PUBLIC WORKS *v.* S. S. HAYES, COMPTROLLER.

CORPORATION—*Power and legal duty of a city to borrow money.*—The city being already indebted in an amount which, when tested by the last assessment of property therein for state and county taxes, is conceded to be equal to five per centum on the value of such property so ascertained, under these circumstances, can the comptroller, with the consent of the mayor and the finance committee, go into the money market and, under the act of 1865, and the ordinance referred to, borrow the sum stated in the petition, which is upward of $20,000, upon an absolute undertaking or obligation to repay it?

HELD—That the corporation having already reached the prescribed limit of indebtedness, it would be in the prohibition of the law to add to that indebtedness by borrowing money and giving an absolute undertaking or obligation to repay it.

ALSO HELD—That where an appropriation has been made for the ordinary current expenses, and the tax levied to meet them, neither the incurring such expenses nor the anticipation of such revenues to discharge them, will constitute a debt within the meaning of the prohibition in question.

Application for *Mandamus*. Argued before Justices McAllister, Farwell, Williams, Rogers and Booth. Decision April 27, 1876.

McALLISTER, J., delivered the opinion of the court:

It appears by the facts alleged in relator's petition and admitted by the respondent, that, tested by the last assessment made for state and county taxes, the city of Chicago is already indebted in an amount at least equal, if not in excess, of the sum of 5 per centum on the value of taxable property therein. The amount of the claim set out in the petition, to pay which the relators' counsel urge that the city has the power to borrow the money, is upward of $20,000. Counsel base the power to borrow such sum upon the act of 1865, amendatory of the former charter of Chicago, and a further act amendatory of the latter (passed in 1869), and upon an ordinance of the common council approved April 30, 1875, before the city became incorporated under the general law of 1872. By the act of 1865 it is provided: "To provide for monthly or any other payment which shall have been authorized by the common council and required to be made at any time before the collection of taxes of any year, the comptroller may, with the sanction of the mayor and finance committee, borrow the necessary money for a time not longer than the 1st day of February thereafter." By the act of 1869 it was provided that "the mayor and comptroller may make temporary loans to pay special assessments against city property when due, and may make all temporary loans now provided for, falling due on the 1st day of June of each year.

The first section of the ordinance of April 30, 1875, embodies the same provisions in substance as the two statutes just referred to. The second section reads thus:

"If for any cause the city has heretofore or shall hereafter fail to

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collect any tax on the general tax warrant of said city in any year, or in case the receipt of the revenue of said city shall fall short of the amounts appropriated by the common council, the mayor and comptroller shall be and are hereby authorized, with the sanction of the finance committee, to borrow a sufficient amount of money to meet any such deficiency, for any length of time not exceeding the close of the next municipal year, and to issue and negotiate bonds or certificates of indebtedness therefor, which said amounts shall be provided for in the annual appropriation bill of the municipal year next succeeding such loan."

It is a legal proposition, as well settled and supported by authority as any of which I have any knowledge, that the charter or statute by which a municipal corporation is created constitutes its organic law, and such corporation can possess or exercise only such rights and powers as are expressly granted to it, or as are necessary to carry into effect the rights and powers so granted, regard being had to the objects of the grant. In *Trustees* v. *McConnel*, 12 Ill. 138, the court say: "That a corporation, which is a mere creature of the law, can only exercise such powers as are conferred upon it by the act of incorporation, is a well settled doctrine."

In *Town of Petersburg* v. *Metzker*, 21 Ill. 205, it is said: "The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them." Again, in *Caldwell* v. *The City of Alton*, 33 Ill. 416: "It is a principle everywhere recognized that a corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created." Dillon on Mun. Corp., sec. 55, and cases in note.

The law is stated by that cautious and reliable author thus: "Of every municipal corporation the charter or statute by which it is created is the organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised or act done which is forbidden by statute" (Dillon on Municipal Corporations, sec. 55); and the doctrine of the text is supported by numerous cases cited in the note to that section.

An instance of the rigid application by the Supreme Court of this state of the doctrine of the last clause above quoted will be found in the case of *The President and Trustees of Lockport* v. *Gaylord*, 61 Ill. 276. There the trustees ordered the street commissioner to repair, or rather open, Seventh street. He proceeded to do so, and in the execution of the work borrowed from the plaintiff, and used for the purpose several hundred dollars. Upon the report of the commissioner the trustees ordered the clerk to issue to plaintiff orders on the treasury for the amount borrowed. That being done, suit was brought to recover the amount, and the plaintiff

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recovered in the Circuit Court and the defendant appealed to the Supreme Court.

The charter of the village contained this provision: "The said trustees shall have no power to borrow money or issue any evidence of indebtedness at any time for an amount above what is already provided for by taxes levied, or other certain sources of revenue, unless specially authorized to do so by a vote of the majority of the legal voters of the corporation."

It appeared that no such vote had been taken, and that the amount borrowed was above what was provided for by taxes levied, or other certain sources. The opinion of the court was delivered by Mr. Justice Sheldon. The court said: "It is contended that, in this transaction, the trustees borrowed money; that orders issued on the treasury are evidences of indebtedness, and that, as the conditions under the foregoing provision of the charter on which these things might be done did not exist, there can be no recovery in this suit. We incline to regard this position as well taken. By the provision in question the legislature seems to have undertaken to protect the citizens of the village against the disastrous consequences which have elsewhere resulted from the reckless and improvident financial management of municipal officers. It is much easier to make public improvements on credit than with ready money; to throw the expense of them upon others who are to come after, than to pay for them at the time. The credit system tempts to the making of lavish and unnecessary expenditures. The contrary one leads to the making of such only as are needful and judicious, and tends to secure economy in the making them. . . . We regard the transaction in question as essentially a borrowing of money by the trustees, and that to sanction it would be to allow a plain evasion of the charter. We deem it our duty to give effect to this provision of the charter and secure to the citizens of this village the protection intended, and not fritter away the provision by construction. We hold, then, that the transaction with the appellee was unauthorized and void, as within the direct prohibition of the charter."

With these doctrines in view, and they are authoritative upon this court, let us examine the material provisions of the charter under which the city of Chicago is organized, and which constitutes its organic law.

Sec. 62 of the act of 1872 (Rev. Stat. 1874, p. 218) is as follows: "The city council in cities, and the president, etc., in villages, shall have the following powers: '*Fifth.* To borrow money on the credit of the corporation for corporate purposes and issue bonds therefor in such amounts and form, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate to exceed five per centum on the value of taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring such indebtedness.'" Now, the

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question is this: The city, being already indebted in an amount which, when tested by the last assessment of property therein for state and county taxes, is conceded to be equal to five per centum on the value of such property so ascertained, under these circumstances, can the comptroller, with the consent of the mayor and the finance committee, go into the money market and, under the act of 1865, 1869, and the ordinance referred to, borrow the sum stated in the petition, which is upward of $20,000, upon an absolute undertaking or obligation to repay it? It was earnestly insisted by counsel in argument that, by construction, this prohibitory clause of the charter could be held to apply only to permanent or long loans, and it therefore left the authority to make temporary loans, as provided for in the previous statutes, untouched. It would seem that the matter of temporary loans did not escape the attention of the legislature, as is apparent from the provisions of the nineteenth section of the act of 1872 (Rev. Stat. p. 227). Temporary loans are here authorized in two specific cases only: one to pay for improvements, the necessity for which had arisen after the annual appropriation bill by reason of some casualty or accident happening after such appropriation is made; the other, to pay any judgment obtained against the corporation. In each case the time of the loan is to expire by the end of the next fiscal year. Now, it might be argued that this position is directly repugnant to the acts of 1865 and 1869. However that may be, and even conceding that those former statutes are not repugnant to the provisions of the nineteenth section just referred to, still, under the prohibition of section 62, the power conferred by such former statutes could be exercised only in case the corporation of Chicago had not become indebted up to the prescribed limit. These former statutes, if in force, must be regarded as modified to that extent by the present charter of the city. But it cannot be disputed that the constitution is the fundamental law. Sec. 12 of art. 9 contains the following: "No county, city, township, school district or other municipal corporation, shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring such indebtedness."

Now, if when the city has already become indebted up to the prescribed limit, when ascertained as prescribed in this provision, as is admitted in this case, the going into the money market, and borrowing the sum in addition required to pay the claim set out in the petition, and giving an absolute undertaking to repay the money borrowed, would constitute a debt within the meaning of that clause, then it is clearly, unquestionably prohibited by it, and the legislature was powerless to authorize it to be done, by any act continuing in force, either the amendatory acts or the ordinance. The ordinance was passed in April, 1875. If the legislature could not then have passed an act authorizing it, much less could it delegate

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the authority to a municipal corporation. It is the duty of courts to so construe the words of the constitution as to give effect to the intent of the people in adopting it. The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant, and the doctrine is firmly established that where the words employed, when taken in their ordinary, natural signification, and the order of their grammatical arrangement given them by the framers, embody a definite meaning, which is apparent upon the face of the instrument, then that meaning is the only one courts are at liberty to say was intended to be conveyed, and there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning. These rules have been fully recognized by the Supreme Court of this state, and are supported by other and the highest authority in the country. *Hills* v. *Chicago*, 60 Ill. 86; *City of Beardstown et al.* v. *City of Virginia et al.*, 76 Ill. 34, and cases cited.

In *People* v. *Maynard*, 14 Ill. 421, the court said: "When the new constitution took effect, any previous provision of a former law which was inconsistent with it became as much unconstitutional as if the law had been subsequently passed. A law cannot be in force in the state, no matter when passed, which contravenes the provisions of the constitution of the state." This principle has been recognized by the Supreme Court in numerous cases since the new constitution of 1870.

The language employed in the prohibitory clause of sec. 12, art. 9, above referred to, is clear and unambiguous, leaving no question open to construction or judicial determination. But the question whether a given transaction of the corporation amounts to "becoming indebted" within the meaning of the clause—as to that question, the words used seem to exclude all distinction between a permanent and what is called a temporary loan.

The language is that "No city, etc., shall be allowed to become indebted in any manner or for any purpose to an amount," etc. Nothing could be clearer than that these words forbid all distinction between a permanent and temporary loan, if the latter, in form and substance, constitute a debt, and I have not the least hesitation in holding, and I do so in the light of the decisions of the Supreme Court of this state, which bind my judicial action as a member of a subordinate court, that to borrow money, and give an absolute undertaking to repay the same, is to "become indebted," within the meaning of the clause of the charter and constitution in question, whether such loan be for one month or twenty years, and even though it might be the intention and purpose to apply the money so borrowed to pay current expenses, like those accruing for cleaning and repairing the streets and alleys, as in this case, and out of the revenues of the present year appropriated to that purpose. Such a loan is not in any legal sense an anticipation of such revenues, be-

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cause it involves the creation of a liability wholly independent of them. But authorities have been cited, and I feel and recognize their force, to the effect that, as respects the ordinary current expenses of the corporation, if there have been an appropriation and tax-levy to meet them, such expenses when so provided for are not to be considered as debts within the prohibition of the clause either in the charter or constitution. The transactions covering the fiscal year are to be regarded as entire transactions, and when the appropriation and tax levy are made, the moneys provided to meet such current expenses are, in legal contemplation, to be regarded as already in the treasury, and no debt accrues.

This doctrine is fully supported by the following authorities: *Grant* v. *City of Davenport*, 36 Iowa, 401, where the constitutional provision is the same as ours. *People* v. *Pachecho*, 27 Cal. 175. *State* v. *Medberry*, 7 Ohio State R. 536. *Reynold* v. *Shreveport*, 13 La. Annual R. 426.

"If a municipal corporation," says Dillon, "has means in its treasury to meet its indebtedness, the issue of warrants to an amount larger than five per cent of its taxable property is not a violation of the section of the state constitution, which provides that 'no municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount exceeding five per cent of the taxable property within the corporation.'" In such case it would not become indebted within the meaning of the constitutional clause (Dillon on Municipal Corporations, sec. 88, and case referred to in note 2).

The principle of these cases justifies the conclusion that there is no legal objection to the anticipation of the revenues, so provided for, by giving warrants specifically payable out of the revenues appropriated to the purpose out of which the claim arises, or to borrowing money on warrants or certificates specifically payable as above stated. In such case the only liability the corporation would incur would be that of an implied undertaking to exercise due diligence to collect the taxes. *White* v. *Snell*, 5 Pickering R. 425; S. C. 9 id. 16; and recognized in *Chicago* v. *The People ex rel.*, 56 Ill. 333. Such a collateral or incidental liability could in no sense be considered as a debt or the incurring it, or as becoming indebted, within the meaning of the law in question.

To this extent the authorities cited by relators' counsel go. But as I understand these cases, they none of them pass upon the question whether the borrowing money and giving an absolute undertaking to repay it, though with the actual intention of applying the appropriate revenues to that purpose, would not constitute a debt within the meaning of the prohibition in question, and so far as they sanction the anticipation of the revenues it is upon the principle that the appropriation and tax levy having been duly made, in legal contemplation such revenues are to be regarded as being already in the treasury.

At the time of the demand upon the respondents and filing the

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petition in this case, there had, in no legal sense, been any tax levied. An appropriation bill is one thing, a tax levy quite another. The levy of the tax is made by an appropriate ordinance of the city counsel. So far as this case shows, it has not been done. I cannot perceive how the principle of the cases cited can apply where no tax levy has been made, unless it be upon the theory that the transactions of the fiscal year are to be regarded as an entirety, as above suggested. The doctrine that the taxes levied are, for the purposes of the ordinary expenses to which they are appropriated, to be regarded as being already in the treasury, is measurably fictitious, and I cannot see how any such presumption can arise before they are actually levied. It is not perceived how any inconvenience can arise from this view, as the levy consists only in the passage of the proper ordinance and certifying the matter to the county clerk, which may be done at any time after the appropriation is made.

On the whole case, I am of opinion that the corporation having already reached the prescribed limit of indebtedness, it would be within the prohibition of the law to add to that indebtedness by borrowing money and giving an absolute undertaking or obligation to repay it. I am further of the opinion that where an appropriation has been made for the ordinary current expenses, and the tax levied to meet them, neither the incurring such expenses nor the anticipation of such revenues to discharge them, will constitute a debt within the meaning of the prohibition in question. And it is upon the principle that when the appropriation and tax levy are made, these means are to be regarded as being already in the treasury, and may be anticipated by orders or certificates specifically payable out of the proper fund to meet the ordinary current expenses. This mode seems to me free from legal objection; the orders, warrants, or certificates, so payable, would be available, for they place the holder in a better position than even a judgment, as in the former case the holder need but present them; in the latter he might have to apply for a *mandamus* to compel a levy.

It is a misunderstanding to suppose that this case involves the validity of certificates heretofore issued. No such question is involved, and its determination would depend upon other considerations. In that case, if they are absolute undertakings, the ultimate question would be whether the power to borrow money, which is effectual before the constitutional limit is reached, absolutely ceases as to innocent holders, the moment that limit is reached, as if it had never been granted. This question is nice and difficult, and so far as I know has never been directly decided. Courts will be likely to so decide it, as that such a prohibition shall not operate as a snare to innocent holders. But in this case the only question is as to the power and legal duty to borrow money under the circumstances disclosed. I am inclined to deny the *mandamus* solely on the ground that no tax levy has been made, and the writ is accordingly denied.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

CITY OF SPRINGFIELD *v.* NINIAN W. EDWARDS.

BORROWING MONEY—*In violation of organic law of a city.*—The borrowing of money and contracting to pay interest thereon, and the payment of money from the treasury in direct violation of the letter and spirit of the organic law of the city, *held* indefensible. Those representing the city can exercise only such powers in its name and on its behalf, as are expressly conferred by its organic law, or as are incidental and necessary to carry into effect the object of the incorporation. "Much less can any power be exercised or act done which is forbidden by statute."

CONSTITUTION—*Rule of construction.*—In considering what construction shall be given to the constitution or a statute, we are to resort to the natural signification of the words employed in the order and grammatical arrangement in which they are placed; and if, when thus regarded, the words embody a definite meaning which involves no absurdity or no contradiction between different parts of the instrument, then such instrument is the only one we are at liberty to say was intended to be conveyed.

SAME—"*To become indebted,*" *in sec. 12, art. 9, construed.*—*Held*, that the prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay, "*in any manner or for any purpose,*" when a given amount of indebtedness has previously been incurred. Also *held*, that a debt payable in the future and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is within the prohibition.

REVENUES—*Appropriation of.*—Revenues may be appropriated in anticipation of their receipt, as effectually as if actually in the treasury; the appropriations of moneys when received meet the services as they are rendered, thus discharging the liabilities as they arise, or rather, anticipating or preventing their existence.

CONTRACT—*Debt upon contingent contract.*—If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute—the debt exists—and it differs from a present unqualified promises to pay only in the *manner* by which the indebtedness was incurred. And since the *purpose* of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else.

SAME—*Levy of tax—legal effect of the contract.*—In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to, with this qualification: 1st. The tax appropriated must, at the time, be actually levied. 2d. By the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, and issuing and accepting of a warrant or order on the treasury for its payment when collected, must operate to prevent any liability to accrue on the contract against the corporation.

INJUNCTION.—Where it was objected that the complainant does not show in his bill that he is injured by the acts complained of otherwise than in common with all other tax-payers of the city, it was *held* that such an injury is sufficient to entitle him to an injunction.

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INTERLOCUTORY ORDER.—Neither an appeal or writ of error will lie on a simple interlocutory order.

Opinion filed October, 1877.

SCHOLFIELD, J., delivered the opinion of the court:

This was a bill in chancery by a citizen and tax-payer of the city of Springfield, to enjoin the municipal authorities of the city from increasing indebtedness, and levying and collecting taxes, in violation of the city charter and constitution of the state. The decree finds as facts proved, which support the material allegation of the bill, that at no time since the adoption of the present constitution has the debt of the city been less than $850,000, and that the taxable property therein, as ascertained by assessment for state and county taxes, has at no time during that period exceeded $6,000,000, but that notwithstanding this the city has incurred indebtedness aggregating as follows: On the 1st day of March, 1871, $4,171.89; on the 1st day of March, 1872, $51,189.02; on the 1st day of March, 1873, $70,249.91; on the 1st day of March, 1874, $101,914.90.

It further finds that money was borrowed by the city for which warrants were issued, amounting to $97,680; that also the further sum of $34,601.81, was borrowed by the city, for which bonds were issued amounting to $37,000, when the interest of the outstanding indebtedness of the city for that and previous years, amounted to not less than $70,000 per annum, and the revenue for the ordinary taxes for the preceding year amounted to $81,066.25; that in said loans to the city for which warrants were issued, the warrants were made payable at a future day, and interest at ten per cent per annum was taken out in advance, and it was provided if the warrants were not paid when due, they should bear ten per cent interest until paid; that said warrants were issued when there were no funds in the treasury for their payment; that appropriations made by the city council for the payment of interest, for improvements, and for city expenses, exceeded the amount of the whole ordinary revenue of the city, for the fiscal year immediately preceding; and that money has been paid out of the treasury of the city for which no appropriations by ordinance were made. The decree perpetually enjoins the municipal authorities in the following language: "From incurring any indebtedness in any manner and for any purpose, including existing indebtedness, in the aggregate exceeding five per centum on the valuation of the taxable property in said city, to be ascertained by the last assessment of state and county taxes, previous to the incurring of any additional indebtedness, and from making in any fiscal year appropriations or levying taxes for the payment of interest, for improvements and for city expenses in excess of the ordinary revenue of the fiscal year immediately preceding, unless in the payment of interest on the public debts of the city, they shall provide according to law, by taxation or otherwise, some additional fund out of which excess of appropriations may be made to meet such indebtedness; or from issuing any warrants or

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authorizing their issue for the payment of any money where there are no means in the city treasury for their payment, or from issuing the same to bear interest, or to become due at a future day, without by ordinance making appropriations therefor, or from assessing and collecting taxes for the year 1874, in any other manner than is prescribed for in the general revenue laws of the state for the assessment and collection of taxes; or from borrowing money when the interest on the outstanding indebtedness shall exceed one-half of the city revenue, arising from the ordinary taxes within the city for the year immediately preceding," etc.

It is provided by sec. 12, art. 9, of the present constitution, that "no county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment of state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation, incurring any indebtedness, as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest of such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." . . .

By the first clause of sec. 4, art. 5, of the "Act to reduce the act incorporating the city of Springfield, and the several acts amendatory thereof, into one act, and to amend the same, approved March 2d, 1854," (Laws 1854, p. 44,) "It is enacted, the city council . . . shall have power . . . to borrow money on the credit of the city, and issue the bonds of the city therefor; but no sum of money shall be borrowed at a higher rate of interest than the rate allowed by law, nor shall a greater sum or sums be borrowed, or at any time outstanding, the interest upon the aggregate of which shall exceed the one-half of the city revenue, arising from the ordinary taxes within the city for the year immediately preceding, and no bonds shall be issued or negotiated at less than par value. The appropriations of the city council for payment of interest, for improvements and for city expenses, during any one fiscal year, shall not exceed the amount of the whole ordinary revenue of the city for the fiscal year immediately preceding; but the city council may apply any surplus money in the treasury to the extinguishment of the city debt, or to the creation of a sinking fund for that purpose, or to the carrying out of the public works of the city, or to the contingent fund for the contingent expenses of the city."

By the 13th section of "An act to amend the charter of the city of Springfield, approved February 21st, 1861," private laws, 1861, p. 289, the controller of the city is required, in the month of April of each year, to submit to the council among other reports, one showing the aggregate income of the preceding fiscal year from all sources, and it is provided that "in no event shall the city council make the

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current appropriations of any year exceed in amount the income of the city during the preceding year, as ascertained by the controller in his said statement, unless in the payment of interest on the public debts of the city. They shall provide, according to law, by taxation or otherwise, some additional fund, out of which such excess of appropriations may be made to meet such indebtedness."

And by the 16th section of the same act, it is provided that "all warrants drawn upon the treasurer must be signed by the controller and countersigned by the mayor, stating therein the particular fund or appropriation to which the same is chargeable, and the person to whom payable, and no money shall be paid otherwise than upon such warrants so drawn."

It thus appears that the decree follows with almost literal fidelity the language of the constitution and that of the city charter combined; and the only question, therefore, that can arise is, does the case made show any necessity for such injunction?

He may dismiss the objection that the complainant does not show in his bill that he is injured by the acts complained of otherwise than in common with all other tax-payers of the city, with the observation that it has been held in this state that such an injury is sufficient to entitle him to an injunction, and that the question is not open to further discussion. *Colton et al.* v. *Hanchett et al.*, 13 Ill. 615; *Perry et al.* v. *Kinnear et al.*, 42 id. 160, and *Beauchamp* v. *Board of Supervisors* etc., 45 id. 274.

Appellant contends that when liabilities are created and appropriations are made, which are within the revenue accruing to meet them, they are not debts within the meaning of the prohibition of the constitution, and that temporary loans are not, when within the limits of the revenue, expected to be realized.

The first branch of this position has support in *Grant* v. *The City of Davenport et al.*, 36 Iowa, 396; *People* v. *Pacheco*, 7 Cal. 175; *Koppekus* v. *State Capitol Com'rs*, 16 id. 253; *The State* v. *McAuley*, 15 id. 455; *The State* v. *Medburry et al.*, 7 Ohio Stat. 522, and *State* v. *Mayor*, 23 La. An. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as actually in the treasury; that the appropriations of moneys when received meet the services as they are rendered, thus discharging the liabilities as they arise, or rather, anticipating or preventing their existence.

In considering what construction shall be given to the constitution or a statute, we are to resort to the natural signification of the words employed in the order and grammatical arrangement in which they are placed; and if, when thus regarded, the words embody a definite meaning which involves no absurdity or no contradiction between different parts of the instrument, then such instrument is the only one we are at liberty to say was intended to be conveyed. There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under considera-

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tion, and to give them that meaning involves no absurdity or contradiction with other clauses of the constitution.

The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay, "*in any manner or for any purpose*," when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe that the convention did not intend what the words convey.

A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute—the debt exists—and it differs from a present unqualified promise to pay only in the *manner* by which the indebtedness was incurred. And since the *purpose* of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else. In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to, with this qualification: 1st. The tax appropriated must, at the time, be actually levied. 2d. By the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, and issuing and accepting of a warrant or order on the treasury for its payment when collected, must operate to prevent any liability to accrue on the contract against the corporation.

The principle, as we understand, is, there is, in such case, no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made and the warrant or order on the treasury is issued and accepted for its payment when collected, the transaction is closed, upon the part of the corporation—leaving no future obligation, either absolute or contingent upon it whereby its debt may be increased. But until a tax is levied, there is nothing in existence which can be exchanged; and an obligation to levy a tax in the future for the benefit of a particular individual, necessarily implies the existence of a present debt, in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy.

If the making of the appropriation and issuing and accepting a warrant for its payment does not have the effect of relieving the corporation of all liability, or in other words, if it incurs any liability thereby, it must manifestly incur, either absolutely or contingently, a debt. Where a warrant or order payable from a specific appropriation of a tax levied but not yet collected, is accepted in exchange for services rendered or to be rendered, or for materials furnished or to be furnished, so that there is in fact but the exchange of one thing for another, the duty remains for the proper officer to collect and

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pay over the tax in accordance with the appropriation. But obviously for any failure in that regard, the remedy must be against the officer and not against the corporation, for otherwise a contingent debt would in this way be incurred by the corporation.

The facts here found as proved, and about which there seems to be no dispute, show an increase in the city debt in plain and palpable violations of the constitution, each year since the adoption of that instrument. At no time since the adoption of the constitution has its outstanding indebtedness been less than five per centum on the value of the taxable property of the city, as ascertained by the annual assessment for state and county purposes, but to the reverse, it has constantly been largely in excess of that amount; and yet its indebtedness was augmented, March 1, 1871, $4,171.89; March 1, 1872, $51,189.02; March 1, 1873, $70,249.91, and March 1, 1874, $101,914.90.

It is impossible that this could have been for current expenses, and satisfied by appropriating to their payment the current revenues as levied each year. If such expenses had been thus satisfied there could have been no debt left standing—for whether the appropriations were made at the beginning or the end of the fiscal year, could make no difference, since in either case, it must satisfy and discharge the current expenses for the year.

The facts found as proved likewise show the borrowing of money and contracting to pay interest thereon, and the payment of money from the treasury in direct violation of the letter and spirit of the organic law of the city. This is indefensible. Those representing the city can exercise only such powers in its name and on its behalf, as are expressly conferred by its organic law, or as are incidental and necessary to carry into effect the object of the incorporation. "Much less can any power be exercised or act done which is forbidden by statute." Dillon on Mun. Corp., sec. 55.

Objection is urged that the court below erred in the proceedings by attachment against the alderman for disobedience to the preliminary injunction. As no judgment was rendered against the alderman on the final hearing it is impossible to see how they have been prejudiced by the attachment. It has been held in numerous cases, that neither an appeal or writ of error will lie on a simple interlocutory order. The city collector was not authorized to proceed to collect the tax. *Cooper* v. *The People ex rel.* (Sept. term, 1876).

A tax having been certified to the county clerk should have been collected by the same officers by which state and county taxes are collected. We see no cause to disturb the decree, and it is accordingly affirmed. *Decree affirmed.*

DICKEY, J.: I cannot concur in what is said in this opinion as to the extent of the limitations of the constitution. I think they are carried too far in this opinion. At present, my other duties deprive me of the time necessary to the proper preparation of a statement of my views. If circumstances permit, I may hereafter file in this case a separate opinion.

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DICKEY J. Dissenting opinion filed January 21, 1878.

I cannot concur in the views expressed as to the extent and subject-matter of the limitation found in the constitution. The section in question, stripped of all verbiage not applicable to a city, is as follows:

> No city shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding 5 per centum on the value of the taxable property therein. Any city incurring any indebtedness, as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any city from issuing its bonds in compliance with any vote of the people which may have been had prior to the adoption of this constitution, in pursuance of any law providing therefor.

The question presented is, what is meant by the words "to become indebted," as used in this section?

I concur fully in the proposition that, "in considering what construction shall be given to a constitution, we are to resort to the natural signification of the words employed, in the order and grammatical arrangement in which they are placed, if, when thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the instrument"; and I concur in the position that in such case that "definite meaning" is "the only one we are at liberty to say was intended to be conveyed." I concur, also, in the position that "there is no difficulty in ascertaining the natural signification of the words employed in the phrase 'to become indebted,'" if taken alone, and that these words, when taken alone, in their natural signification, embrace every kind of indebtedness which may or can be incurred. I concede, too, that the prohibition in the first clause of this section, if the words be taken alone, in their literal and natural signification, without reference to the unreasonable results therein involved, and without reference to the expressions in other parts of the same section, must be held to forbid the incurring of any kind of debt, in any manner or for any purpose, beyond the limit prescribed. All this is made very plain by the reasoning of the Chief Justice. But I cannot concur in the position that to "give them that meaning involves no absurdity of contradiction with other clauses of the constitution." No attempt is made to support this position by either argument or authority. It is left to stand simply upon the statement of the position, as one having the sanction of the court. No attempt is made to show that the meaning attributed by the court to these words (which I concede to be the literal, usual and natural meaning thereof) "involves no absurdity and no contradiction with other clauses of the constitution."

To my mind, the construction adopted does, in its necessary consequences, involve results so unreasonable that they must be denominated absurd; and does at the same time involve a plain contradiction of other words in the very same section.

And first, as to the allegation of absurdity,—it seems to me that

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the broad and sweeping meaning now attributed to the words "to become indebted," found in the first clause of this section, necessarily involves results so astonishingly ruinous and disastrous, that it is simply incredible that the convention which framed the constitution, or the people who adopted it, could have intended to convey that idea by these words.

In 1870, when the constitution was framed and adopted, it was well known, as a matter of public history, that three-fourths of all the cities in the state were already respectively indebted, and had issued their bonds for an amount beyond the limit expressed. It was also well known, as a matter of public history, that the revenues not only of cities and counties, but of the state, were never collected in full during the fiscal year for the expense of which such revenues were provided. In fact, the provisions of law on the face of the statutes, then and ever since, relating to the collection of the revenue, were such that none of the revenues for any given fiscal year could by law be collected until the latter part of such year, and a large part could not be collected until after the whole of the fiscal year had passed.

If, then, this constitution means that no liability of any nature which might ripen into what in any sense might be called a debt should be incurred by cities whose public debt was then beyond the limit mentioned in the constitution, it meant simply that three-fourths of all the cities in the state should cease at once to perform the functions for which they were created.

Such a city could not do anything toward the performance of any function it was provided to perform. Its treasury had no money applicable to the current expenses of that year. Its mayor, clerk, chief of police, policemen and firemen could not lawfully be paid for current services, for there was no money which could be lawfully applied to that purpose. If all its officers and employes should go on doing their respective duties, and any one of them should, at any time afterward, sue the city for his services, no judgment upon this theory could be rendered against the city in his favor, for the city so situated could not lawfully "become indebted." And, before he could recover by any law that I know of, the plaintiff must, in such case, show that the city had become indebted to him, which, upon this theory, is constitutionally impossible. Nor could such officers or employes, upon the logic of this ruling, be lawfully paid by any officer of the city, at any time after the rendering of such services, even if the money levied for that purpose had come into the treasury, for it is not lawful to pay out the money of the city to men to whom the city owes nothing. If I understand the theory of the rule laid down, it involves the idea that a city, which has reached the constitutional limit of indebtedness, can lawfully procure materials or services only in two ways: One, that it may wait until it in some way has the money in the treasury for that purpose, and then materials and services may be paid for in advance, or as received or performed, but not afterward; and the other, that when a tax has

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actually been levied, a city may procure money, materials, or services by paying for them in advance, or when received or performed, in orders on the treasury, to be only out of that levy,—the party accepting the order to take all hazards as to the delay or uncertainty of the collection, and as to the fidelity of the county collector and city treasurer in collecting and paying over the money. In other words, as to a city in that situation, the theory involves the proposition that all its transactions must be accomplished by paying, one way or another, in advance, or simultaneously with the matter received by the city, and not after.

It is plain that the use of this kind of certificates or special order on the fund to come from the levy would be ruinous to any city. The laborer who repairs a street or a sidewalk, or turns a bridge for a city, or a fireman or a policeman who lives from day to day upon his earnings, cannot wait ten months for his pay. If he is paid in such special orders he must have a larger amount, so that after selling at a discount he can realize an adequate reward for his labor. Labor paid for in such orders or by money raised by the sale of such orders, which might be had for $1 in cash, would require, in many cases, orders for $2. True economy demands that the city have power to assure the payment of the temporary loan, whereby the money may be had at about 7 per cent per annum.

A city indebted beyond the constitutional limit, at the adoption of the constitution, without money in its treasury, had, under this construction of this clause, no power to repair a dangerous sidewalk or street, to open or close a bridge across a river in its midst, to put out a destructive fire, to feed its poor, to imprison its offenders, to maintain its schools, or even to collect its first year's taxes. Unless a city in such condition (and most of our cities were in that condition in 1870) can lawfully anticipate collection of its revenues and raise ready money by temporary loans to pay the current expenses of that year, the results alluded to must necessarily follow. To hold that the convention in framing this constitution, or that the people in adopting it, intended to accomplish such results by it is to stultify its authors. Had the framers of this constitution attributed the meaning here adopted to the words "to become indebted," can it be believed that they would have saved so carefully from its operation certain bonds mentioned in the last clause of the section and have omitted to add words saving to such cities the power to provide for the payment of their necessary current expenses?

The literal meaning of a prohibition against "becoming indebted" in any sense, in any manner, or for any purpose, would involve a prohibition against a city becoming further indebted, even by the accumulation of interest on the bonded debt existing at the adoption of the constitution. It will not be contended that such prohibition was intended, and why not? Simply because such a proposition is absurd. By the same reasoning it seems to me that the meaning now adopted ought to be rejected.

Like words in the constitutions of other states have by the courts

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of last resort been held to have no application to temporary liabilities for current expenses not exceeding the amount of the current tax levy. It is so held in Ohio, Iowa, California and Louisiana, and I know of no contrary decision.

Not only should the present construction be rejected because of the unreasonable results which it necessarily involves, but also because it involves a plain contradiction of the words found in the second clause of the same section.

In giving this broad and sweeping construction to these words no notice is taken of the use of the words "as aforesaid," found in the second clause of this same section, and these words are thus rendered utterly meaningless. Without saying so, they are rejected as mere surplusage. This is not allowable. Every constitution or statute must be so constructed as to give some proper effect, if possible, to every word and phrase in the instrument. To my mind, the words "as aforesaid," in the second clause of the section, say plainly that the "becoming indebted," in the first clause (wherein a limit as to amount is placed upon the same), is the same thing spoken of "as the incurring any indebtedness," in the second clause, and by which clause (when not exceeding the limit in the first clause) the proceeding is regulated.

In other words, the language of the whole section imports that the doing of a certain thing, beyond a given limit, is forbidden in the first clause, and the mode of doing that same thing, when not beyond the limit, is regulated by the second clause. The subject-matter of the two clauses is expressly declared by the words "as aforesaid" to be identical. Of this, it seems to me, there can be no doubt. If the words "incurring any indebtedness as aforesaid" do not mean this, what do the words "as aforesaid" mean? No one can imagine that the incurring "as aforesaid" means the incurring of indebtedness beyond the limit prescribed, for that would license the very thing prohibited, which would be absurd. Yet the office of the words "as aforesaid," taken in their literal, natural signification and grammatical order, literally this section says to cities: You must go in debt beyond a given limit; but, when you do so exceed the limit, you must provide for the payment of the interest annually, and of the principal within twenty years. This is the natural, grammatical and literal meaning of the words "as aforesaid," as clearly so as is the meaning attributed to the words "to become indebted," by following their natural, grammatical and literal signification. We unite in rejecting that natural, grammatical and literal signification of the words "as aforesaid," because it involves a contradiction of the first clause. By the same process we must reject the natural, grammatical and literal signification of the words "to become indebted," because they contradict the words in the second clause, and we must seek some reasonable meaning for the words "to become indebted," and for the words "as aforesaid," which will not contradict each other when properly interpreted.

I have shown that the subject-matter of the first and second

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clauses must be taken to be identical — that is, that the thing which is regulated by the second clause is identically the same thing which is limited in the first clause. To ascertain what that subject-matter is, we must find some subject-matter to which all the words of both clauses may appropriately apply. The first clause has no words to guide us, except the general words "to become indebted." The words "in any manner or for any purpose" do not help us. They do not describe the thing forbidden. They only say that the prohibition shall not be evaded by the manner of doing the forbidden thing, or in view of the purpose for which the thing forbidden is proposed to be done; but they give no further clew to the solution of the question of what that forbidden thing is. If the words had been, no city shall be allowed to become indebted in any sense, etc., the words "in any sense" would preclude all search for a sense in which "becoming indebted" was not forbidden, but such words are not found in the constitution.

Let us examine the second clause of the section, and see if there are any words in that clause which will enlighten us as to the subject-matter of that clause. The words are: "Any city incurring any indebtedness as aforesaid . . . shall provide for . . . a direct annual tax sufficient to pay the interest on such debt as it falls due, and, also, to . . . discharge the principal thereof in twenty years." Here we plainly learn that the subject-matter spoken of in the second clause is a debt of such character as usually bears interest, and such as will require an "annual tax" to pay interest upon it annually as it falls due, and such a debt that its principal is not to be discharged within one year. If I am right in saying that the thing limited in the first clause is the same thing which is regulated by the second clause (as shown by the words "as aforesaid"), it necessarily follows that the thing limited in the first clause is a debt of such character as requires "an annual tax" to pay interest upon it annually as the interest falls due, and such that its principal is not payable within one year. Such a debt is not to be incurred in any manner or for any purpose, beyond the limit prescribed in the constitution. This construction gives harmony to every word in the section, and rejects none. The construction adopted by my brethren destroys some of the words in the section, and to sustain such construction, the words "as aforesaid," in the phrase "incurring any indebtedness as aforesaid," and the word "such," in the phrase "such debt," must be rejected as nugatory.

The true meaning of this section will, perhaps, be more apparent by transposing the clauses and reading them thus: "Any city incurring any indebtedness shall, before or at the time of doing so, provide for the collection of a direct annual tax, sufficient to pay the interest of such debt as it falls due, and also to pay and discharge the principal thereof, within twenty years from the time of contracting the same. No city shall be allowed to become indebted as aforesaid in any manner or for any purpose, to an amount, including present indebtedness, in the aggregate exceeding five per centum

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of the value of the taxable property therein, to be ascertained," etc. "This section shall not prevent any city from issuing its bonds in compliance with any vote of the people which may have been had prior to the adoption of this constitution, in pursuance of any law providing therefor."

It will be observed that the exact words of the section are all here preserved. It seems to me no one can contend that the true meaning of the section is at all changed by the transposition. If not, my construction is necessarily the true one on the face of the section.

The view which I take is somewhat fortified by the fact that the exception in the third clause of the section relates expressly to a bonded debt, and tends to show that it was that class of liability which was in mind when the section was framed.

This view is also strengthened from the fact that at the time of its adoption by the convention, this section was declared, in debate by members of the convention, to have reference alone to the bonded debt of cities; and no member of the convention expressed a different view. The people voted for the constitution in the light of this construction. It may be that the debates are not to be resorted where there is no room for construction; but where the meaning of the words, from any cause, is in doubt, the debates may be considered.

The true solution of this question, as I verily believe, rests in the position that this limitation in the constitution has reference only to funded or permanent debts — to such debts as usually bear interest payable annually, and such as are not payable within the current fiscal year; and that it is a perversion of the true meaning of the constitution to give it application to temporary liabilities, payable within the fiscal year, and not exceeding the amount of tax levy for that year.

This view gives reasonable and proper force to every word and phrase in the constitution, brings all its words and phrases into harmony, doing violence to none, and involves no unreasonable and impracticable results. In my humble judgment, it presents the true meaning of that instrument.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

IDA IRENE LAW *v.* THE PEOPLE EX REL. LOUIS C. HUCK.

CONSTITUTION—*The first clause of sec. 12, art. 9, construed to limit the power to create indebtedness.—Held* that this prohibition limits the power of the general assembly, the municipality and all others in the creation of indebtedness by such bodies to the amount named, and they cannot either separately or conjointly transcend that limit. It is the command of the supreme power of the state and must be obeyed. Nor is there lodged in our form of government any authority to dispense with its provisions or requirements, but to them all,

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whether offices or people, must yield obedience. The courts must therefore enforce its provisions and requirements as they are found.

ALSO *held*, that all negative or prohibiting clauses of this character found in the fundamental law execute themselves that legislative provisions the same as other terms prohibiting the incurring such indebtedness, could be no more binding or forcible than the constitution itself.

CERTIFICATES OF INDEBTEDNESS—*Issued to procure temporary loans.—Held*, that these certificates when issued, negotiated and delivered, stating that the city owes the holder the sum named, and promising or directing their treasurer to pay it at a time named, are evidence of indebtedness.

ALSO *held*, that the constitution intended not to use the term in the sense that the sum must be due to be an indebtedness, as that would have created no limitation whatever, as such debts are seldom, if ever, due when they are created.

ALSO *held*, that such municipal bodies can only exercise such powers as are conferred upon them by their charter, and all persons dealing with them are supposed to see that they have power to perform the proposed act.

ALSO *held*, that such corporations are created for governmental and not for commercial purposes; that no power to borrow money is incident to the performance of the duties their charters impose; that it is by grant of power alone they can create debts; that no one has the right to presume the existence of such power, and that persons proposing to loan money to a city should see that there is such power, and if the holders of these certificates omitted to do so when they loaned their money it was their own fault.

ALSO *held*, that these certificates being evidence of debts, and the city having before their issue reached the limit created by the constitution and its charter to incur more indebtedness, there was no power to levy a tax or make an appropriation for their payment; that the debt having been made and the certificates issued in direct violation of law, they were void, and being so they could draw no interest, and if they did it would be equally void with the principal and the levy of a tax or an appropriation, for the payment of the interest is as effectually prohibited as to incur or pay the principal debt; that the interest is as much a debt as the sum borrowed, and is no more lawful or binding, and that the appropriation and levy of this tax to pay interest on these temporary loans were void and can have no legal effect.

CORPORATION—*Constitutional limit—presumption.*—When the constitutional limit has been reached, and a corporation then issues bonds, certificates or other instruments drawing interest, and are in form evidence of indebtedness in addition to the amount, we must presume they are prohibited and void; and if such instruments may under any circumstances be lawfully issued it must devolve on the corporation to establish the fact. In this case the proof shows that the limit had been reached before these certificates of indebtedness were issued, and the city has shown nothing to overcome the presumption that they are unauthorized and void.

TAX—*To entertain visitors.—Held*, that the city has no power to provide a fund by the levy of a tax to entertain official visitors.

APPEAL from the Superior Court of Cook County. Opinion filed February 7, 1877.

WALKER, J., delivered the opinion of the court:

It appears that the bonded indebtedness of the city of Chicago has at all times since the adoption of our present constitution been

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more than five per cent on the assessed value of the taxable property in the city, as ascertained for state and county taxation.

And it further appears that notwithstanding such bonded indebtedness the city has each year since 1872, if not before that time, issued certificates of indebtedness for temporary loans bearing interest intended to be paid out of the revenue levied for the current year, and upon which money was loaned to and used by the city to meet the expenses of its government.

On the 10th day of August, 1875, the city by ordinance levied in detail various sums, to meet the expenses of the different departments of the city government, amounting in the aggregate to $5,123,905.29, reciting that it was the total amount of appropriations previously made for the purpose in accordance with the law.

It appears that among the items thus appropriated and levied, there are a number for interest on temporary loans. One is for payment of interest on general bonded (municipal) debt of the city, and on temporary loans in addition to the unexpended balance on the 1st of April, 1875, and to amounts for interest $300,000. Another for entertaining official visitors, $2,000; for interest on temporary loans for this (water) fund, $40,000; for interest on temporary loans for fire department, $25,000; for interest on temporary loans (police department), $25,000. These amounts were respectively levied in pursuance to an ordinance which had been adopted on the 30th of June, 1875, making the several appropriations for the purposes named.

It appears that there was outstanding on the 1st day of April, 1875, certificates for temporary loans issued after the constitution went into effect and before that $3,000,000 or more. That on the 31st of December, 1875, the certificates for temporary loans and then outstanding, amounted to $4,500,000. And the evidence shows the item of $300,000 appropriated and levied as before stated, was for interest on the bonded debt and on temporary loans then outstanding, and for the former the sum of $251,310, and the remainder to meet interest on temporary loans.

It is insisted that all of the first item levied for interest on temporary loans is void, and that all of the other items above specified were levied without any authority. That the city had not only no power, but is expressly prohibited by the constitution and their charter from making these loans, as the city was at the time indebted beyond the constitutional limit when the debts were incurred, to pay the interest for which this levy was made. That the debt being illegal and void, the city had no power to levy a tax to pay interest on a void debt, and the tax cannot be enforced.

The constitutional provision supposed to be violated, is the first clause of the 12th section of article 9, and is this:

"No county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxa

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ble property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

The language of this clause is clear, explicit and emphatic that no city shall be allowed to become indebted in any manner or for any purpose beyond the limited amount. The city of Chicago was indebted beyond the limited amount when these certificates were issued, and if they in any manner or for any purpose create an additional indebtedness they are clearly prohibited. The language prohibiting indebtedness beyond the limit is so plain as to admit of no doubt, and forbids all construction, and the provision must be enforced as it is written.

When the intention of the framers of the constitution is ascertained, it must, as all will concede, be held paramount to all other powers in the state. It embodies the sovereign power of the state, by virtue of which and by which alone all legislative, executive and judicial power is exercised. It is the source to which all of the departments of government and all its officers must ultimately look to authorize or sustain their official acts. It not only confers power but it also limits its exercise.

This prohibition limits the power of the general assembly, the municipality and all others in the creation of indebtedness by such bodies to the amount named, and they cannot either separately or conjointly transcend that limit. It is the command of the supreme power of the state and must be obeyed. Nor is there lodged in our form of government any authority to dispense with its provisions or requirements, but to them all, whether officers or people, must yield obedience. The courts must therefore enforce its provisions and requirements as they are found.

It has also been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitory clauses of this character found in the fundamental law execute themselves. As legislative provisions in the same as other terms prohibiting the incurring such indebtedness, could be no more binding or forcible than the constitution itself. The general assembly might add a sanction to the provision by imposing penalties and forfeitures on those who should violate its provisions, but that would lend no force to the prohibition such statutory enactment might prevent its violation, but nothing more.

Did these certificates issued to procure temporary loans in any manner or for any purpose create an indebtedness? When issued, negotiated and delivered, did they become debts? That they were, seems to be so plain a proposition that we are at a loss to know how to discuss it or render it more manifest, than by a mere statement of the proposition. We apprehend that these certificates stating that the city owes the holder the sum named, and promising or directing their treasurer to pay it at a time named, are debts according to the definition of any English lexicographer, and we apprehend that among the people no one according to the general understand-

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ing of the word would say they were not evidence of indebtedness by the city. Nor could the framers of the organic law have intended to use the term in the sense that the sum must be due to be an indebtedness, as that would have created no limitation whatever, as such debts are seldom if ever due when they are created. To so hold would abrogate this provision and wholly defeat the intention of the framers of that section and of the people in adopting it. It would render the effort to limit city and municipal indebtedness futile, and defeat the supreme will of the state thus clearly and deliberately expressed.

But it is said that it will, to so hold, work great hardship and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other person who violates the law or does acts contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision, and the fifth clause of the 62d section of the chapter, entitled "cities, villages and towns" (Rev. Stat. 1874, p. 218), which expressly prohibits such indebtedness. Such municipal bodies can only exercise such powers as are conferred upon them by their charter, and all persons dealing with them are supposed to see that they have power to perform the proposed act.

Such corporations are created for governmental and not for commercial purposes, and hence no power to borrow money is incident to the performance of the duties their charters impose, and it is by grant of power only they can create debts, and no one has the right to presume the existence of such power, and persons proposing to loan money to a city should see that there is such power.

And if the holders of these certificates omitted to do so when they loaned their money it was their own fault. The constitutional and statutory prohibition from incurring such indebtedness is so plain that we cannot suppose that men of ordinary business intelligence could, had they read it, have failed to see that such indebtedness was unequivocally prohibited when the limit should be reached, and they could, before parting with their money, have easily learned that it had been passed for years.

But even if it should work a hardship to individuals, that cannot form the slightest reason for violating a clear provision of the constitution, or from wholly perverting its language from its meaning to afford relief. Nor is there any force in the consideration that it will occasion inconvenience to the city officials in conforming to the requirement. They can only exercise the powers granted by their charter and regulated by ordinance. Neither the city or its officials have any inherent power in governing the city. It is all delegated and limited by the charter and ordinances adopted to carry such delegated power into effect. And the question with us and the city authorities is not what would be the most suitable powers to be conferred, but what have been conferred. The people through their representatives are the sole judges of what power shall be granted, what withheld and what prohibited from being exercised, and that

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when legally expressed must be obeyed by courts and municipalities, most certainly in its full spirit and meaning. The constitution and charter must be enforced although it may occasion inconvenience in conforming to their requirements.

These certificates, then, being evidence of debts, and the city having before their issue reached the limit created by the constitution and its charter to incur more indebtedness, there was no power to levy a tax or make an appropriation for their payment. And the debt having been made and the certificates issued in direct violation of law, they were void, and being so they could draw no interest, and if they did it would be equally void with the principal; and the levy of a tax, or an appropriation, for the payment of the interest is as effectually prohibited as to incur or pay the principal debt. The interest is as much a debt as the sum borrowed, and is no more lawful or binding. It then follows the appropriation and levy of this tax to pay interest on these temporary loans were void and can have no legal effect.

But it is claimed that this is but anticipating the revenue already levied and to be collected, and these loans are therefore not indebtedness. They purport to bind the city for their payment and have all the forms of an indebtedness. And if from any cause they should not be discharged from the tax then levied, the lender would, if not prohibited by law, expect and claim that he be paid by the city from some other source. When the attempt was made to create these debts we must suppose the city officials expected to pay the money, notwithstanding the prohibition of the constitution and their charter; and the lender, if he knew as he is presumed to have known, of the prohibition, expected to receive payment.

This is not an anticipation of the revenue provided. It is more than that; it is indebtedness to be paid from such revenue if collected, and if not, then from other revenue. The manner of anticipating revenue already levied was before us and fully considered in the case of *The City of Springfield* v. *Edwards*, 84 Ill. 626, and on the able arguments filed in this case we see no reason to change the rule then announced. The questions are essentially the same in the two cases, and that must govern this, on this as well as the other constitutional questions. The court below therefore erred in rendering judgment for the tax levied to meet the interest on these temporary loans.

We have been referred to nor have we found any other provision of the constitution which has in the slightest degree limited or qualified the first clause, unless it be the last clause of the section which authorizes these bodies to issue bonds in compliance with any vote of the people had before the adoption of the constitution in pursuance of law providing therefor. In the consideration of this question we have, as the rules of interpretation require, given the language its plain, common and well-ascertained and well-known meaning. We have no authority to give it any other.

Nor are these temporary loans sanctioned by the case of *Spring-*

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field v. *Edwards*, *supra*, as here these certificates of indebtedness are held as claims against the city, and the city is levying taxes to pay the interest on them. And the debt of the city is shown to have been increased by these certificates to the extent of $1,500,000 from the 1st of April till the 31st of December, 1875. In *Springfield* v. *Edwards*, *supra*, it was held that after the tax was levied the city might anticipate it by drawing against it if the person performing labor or furnishing articles to the city would receive the warrant in discharge of all liability on the part of the city, and look alone to the officers and not to the city for payment. That a city could not thus make a debt and call it anticipating the taxes already levied. That the warrant thus issued must be received in full for the labor performed or articles furnished, and if not paid the city incurred no liability. That it was at the risk of the person receiving the warrant. Whilst in the case at bar the city is endeavoring to recognize and pay at least interest on certificates thus issued. Thus endeavoring to create indebtedness beyond the limit prescribed. The liability to pay interest on such warrants is not a discharge of the city and looking alone to an officer, but it is looking to the city, at least for the city, for its payment.

When the constitutional limit has been reached, and a corporation then issues bonds, certificates or other instruments drawing interest, and are in form evidence of indebtedness in addition to the limited amount, we must presume they are prohibited and void, and if such instruments may under any circumstances be lawfully issued it must devolve on the corporation to establish the fact. In this case the proof shows that the limit had been reached before these certificates of indebtedness were issued, and the city has shown nothing to overcome the presumption that they are unauthorized and void.

The other question presented by the record, whether the city has the power to provide a fund by the levy of a tax to entertain official visitors who might come to the city, there is no claim that it is expressly authorized by the charter under which the city is now acting. But it is claimed that the amendatory act of the former charter, approved March 9, 1867 (1 vol. Priv. Laws 771), confers the power. And that as that provision is not inconsistent with the present charter by force of the sixth section of the charter, the power may be exercised. That section provides that all laws and parts of laws not inconsistent with the general law shall continue in force and be applicable to any city or village adopting the general law, the same as though the change of organization had not taken place. Is, then, that provision inconsistent with the provisions of the charter?

The 62d section of the general law has in the most ample and specific manner defined the powers of the city. It is so full and definite that there would seem to be no room to doubt that the general assembly intended such bodies to exercise no other powers than those granted by that section. Whilst the general law does not in terms prohibit the exercise of the power, it does in spirit. Where

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that section says such organization "shall have the following powers," it by strong implication prohibits or denies the exercise of other powers.

When the city was authorized to exercise the powers and perform the duties imposed by the 62d section of the charter, it, by implication, confessed the power to levy and collect revenue necessary to carry out those powers. And the 111th section of the act provides that the city council may assess and collect taxes for corporate purposes in the following manner: "The council . . . shall on or before the second Tuesday in September (August) in each year, ascertain the total amount of appropriations for all corporate purposes legally made and to be collected from the tax levy of that fiscal year, and by ordinance levy and assess such amount so ascertained upon the real and personal property within the city . . . subject to taxation as the same is assessed for state and county purposes for the current year."

This section authorizes the levy of taxes for corporate purpose and legally appropriated. In what manner shall we ascertain whether the tax is for a corporate purpose? Manifestly by turning to that portion of the charter which confers the power to perform duties and exercise powers. If the tax is necessary to carry out any of these powers, or to perform any of these duties, then it is for a corporate purpose. If the appropriation is to enable the city to discharge any of these duties or to exercise any of these powers, then it is legally made. If the appropriation is made or the tax levied for some other or different purpose, then the appropriation is illegal and there is no power to levy such a tax.

The levy of a tax to raise a fund to entertain official visitors is not one of the powers granted by the 62d section of the charter, and as its exercise is repugnant to the express powers granted, the section of the old charter under consideration cannot be held to be a part of the present charter. Municipal corporations can only exercise such powers as are conferred upon them by the general assembly. And the grant of power must be express or from implication from the necessity for its exercise to carry out some power that has been expressly granted. The power contended for is not granted, nor is its exercise essential to carry out any other power. We are of the opinion that this section in spirit conflicts with the provisions of the present charter.

It is urged that the ordinance making the appropriations for the various purposes for the fiscal year is void, because in its title is used the word "common" instead of the word "city," as prescribed by the present charter. When this ordinance was adopted there had been no election held after the adoption of the present charter, and the councilmen under the old charter were still performing the duties devolved on the legislative department of the city government, and it may be that body was still the common council until new aldermen should be elected. And if so, then the title was strictly accurate. But, be this as it may, the two terms are so nearly

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precisely the same in meaning that we regard it immaterial which term was used in such an ordinance. Even if the word "city" should technically have been used, the adoption of the language "common council" would not be grounds for reversing this judgment.

The other questions presented by this record have been discussed by my brother Scott, and I refrain from their discussion.

As to all but the city taxes we perceive no error in the judgment, and as to them the judgment is affirmed. But for the errors indicated as to the city taxes, the judgment is reversed and the cause remanded, that the court below may render judgment for the correct amount of the city taxes after deducting the portion illegally levied as above indicated.

Judgment affirmed in part and reversed in part.

SCOTT, J., dissenting on certain points in a separate opinion, as follows:

Among the taxes contested is one levied upon property in the city of Chicago to meet an appropriation made by ordinance to pay interest on what are termed "temporary loans," and that, it is said, is legal. It may be assumed as proven the appropriations made were for the payment of interest on temporary loans for the fiscal year, from April 1, 1875, to April 1, 1876, and being the fiscal year for which the taxes contested were levied. The comptroller is positive in his statement, the appropriation ordinance contains no appropriation for interest on temporary loans prior to that date. Elaborate arguments have been made on this branch of the case, and the difficult questions raised have been the subject of much discussion and reflection on the part of the court. The restriction upon the power of municipalities to contract indebtedness is contained in the first clause of sec. 12, art. 9 of the constitution. Prior to the adoption of the present constitution, the funded debt of the city of Chicago exceeded the limitation fixed by that instrument, and has not since been reduced. There is also what is called a floating indebtedness of many thousand dollars in addition to the bonded indebtedness, much of which, if not all, has been contracted since the adoption of the constitution, but the amount of that indebtedness, and when contracted, are not, in my view, matters that affect the decisions of the questions made. The direct question comes up for decision: Can a municipal corporation, the indebtedness of which exceeds the constitutional limitation anticipate the taxes levied for any current year, so as to make them available for that fiscal year? The limitations imposed by the constitution in such matters as we are considering, should be construed with reference to existing facts, and with a view to the practical working of that instrument. Such literal construction should not be adopted as would defeat the object to be attained. It was no doubt the purpose in framing the constitution to afford protection to municipal corporations. They constitute efficient aids to government that cannot well be dispensed with. Self-preservation is a right inherent in

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everything capable of exercising it, and may be said to pertain to artificial as well as natural persons. Unless prohibited by positive law, a municipal corporation may do all things fairly within the scope of powers conferred to accomplish the purpose for which it was created. Only general powers can be conferred upon municipal corporations, and from that source must be inferred all necessary power to render practicable that which is conferred by the general terms employed. Express authority is given to do anything for the protection of the life and property of the citizen, and with that grant of power must necessarily be connected authority to provide for the expenses attendant upon the maintenance of municipal government; otherwise the grant of power, however comprehensive, would be valueless and unavailing. The taxes levied for any year should be for the expenses of that fiscal year. Unless such taxes can be anticipated in some mode, it is not practicable to make them available for that purpose. It is a matter of which courts must take judicial notice, and taxes levied for any one year are seldom if ever all collected within that fiscal year. Accordingly, when appropriations for ordinary expenses have been made, and taxes levied to meet the same, the revenue so appropriated in legal contemplation is regarded as already in the treasury of the corporation imposing such taxes. The principle is that when taxes have been levied to meet lawful appropriations the corporate authorities may proceed with the expenditure of such funds for the purposes for which the levies were made in anticipation of their collection.

This view of the law has been distinctly recognized by this court in Newell's case, 80 Ill. 592. Other courts, where the constitutions of the states contain provisions similar, if not identical, with our own as to limitations upon contracting municipal indebtedness, have reached the same conclusion. *Grant* v. *City of Davenport*, 36 Ia. 396; *People* v. *Pachee*, 27 Cal. 175; *State* v. *Maberry*, 7 Ohio State R. 522; *Reynolds* v. *Mayor*, Louisiana Annual, 426. Appropriations for ordinary municipal expenses may be made in anticipation of taxes levied in any year, and contracts payable out of such appropriations when the revenue shall be collected are not regarded in any just sense as contracting indebtedness by the corporation. The revenue has already been provided and set apart for a specific purpose, and in contemplation of law it is in the treasury of the corporation. It is obvious, therefore, if the appropriations do not exceed the taxes levied for payment of the same, no additional corporatei ndebtedness is created. Assuming, as I do, that the proposition that a municipal corporation may appropriate its revenues in anticipation of their receipt as effectually as when actually in its treasury may be maintained both on principle and authority, the question occurs, What is the most feasible mode of anticipating such taxes? and no better plan suggests itself than by "temporary loans." It has for its support considerations of convenience and economy. It is not practicable to agree with persons in the service of the cor-

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poration in the various departments to wait for their wages until the revenues for the year in which the services were rendered have been collected. That might in many instances be beyond the term of their employment. An insuperable objection to that mode of defraying all ordinary expenses for any year out of the revenue of that year is, the taxes so levied are not all collected within the fiscal year in which the services are rendered. No prudent man would undertake to manage his private affairs in that way. Implied in the power to make such "temporary loans" in anticipation of taxes levied is the authority to pay interest on the same as an incident to the principal thing done. One is as lawful as the other. *City of Galena* v. *Corwith*, 48 Ill. 423. But the question of most seeming difference is whether "temporary loans" effected with a view to anticipate the revenue of any fiscal year is contracting municipal indebtedness in the sense that term is used in the constitution. I am of the opinion it is not. Both principal and interest of such "temporary loans" are payable out of the revenues for the fiscal year for which they were made. It can make no possible difference, in a legal point of view, whether the revenues for any fiscal year are anticipated in this mode to raise funds for immediate use with which to defray ordinary expenses for which appropriations have been made, or whether it is done by contracts with persons in the service of the corporation to wait for their wages until the revenues of that particular year as a matter of fact come into the treasury. The former would be a practical and economical way of anticipating such revenues, while the latter would involve the necessity of paying increased wages for everything done for the corporation, which would be equivalent to a discount of the usual rate of interest for that period, if not greatly in excess of it. The cases cited *supra* sustain the view of the law we have taken. The same cases were cited by this court in *The Mayor of Springfield* v. *Edwards*, 10 Chi. Leg. News, 51, and the rule recognized in them was assented to by the members of the court concurring in that opinion with two qualifications: 1. The tax appropriated must at the time be actually levied; and 2, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation and issuing and accepting an order on the treasury for its payment when collected, must operate to prevent any liability on the contract against the corporation. It was then said that the principle is that there is in such cases no debt, because one thing is simply given and accepted in exchange for another. That is the precise case presented by this record. All "temporary loans" for which appropriations for the payment of interest were made were obtained after April 1, 1875, and, as far as we can know, both principal and interest were specifically made payable out of the revenue of that fiscal year. No proof is made to the contrary, and no presumptions will be indulged they will not be paid in that way. Sufficient appropriations were made for that distinct purpose, and in the absence of proof it must be understood that which the law re-

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quires the municipal officers to do will be done. Whether these are "temporary loans" that were contracted in previous years that constitute municipal indebtedness and therefore invalid, because inhibited by the constitution, is a question not before us, nor does it in any way affect the present decision, and for that reason I forbear to remark upon it.

The point is made that the revenue act in that provision which requires the state boards of equalization to "value railroad tracks," and divide the aggregate between the several counties and other municipalities in proportion to the length, situated therein, violates the rule of uniformity, which the constitution requires shall be observed, in valuation of property for taxation. The reason assigned is that it deprives counties, towns and cities of the value of this class of property situated within their limits as a basis of taxation. As the taxes in this case were levied on the basis indicated, it is said that all taxes except state taxes, are alike unequal and void, because the law fixes the basis of assessment forbidden by the constitution. The fallacy of this argument is, that it rejects the definition given by the court in *Porter* v. *R. R. I. S. & St. L. R. R.*, 76 Ill. 561, of this class of property, that a railroad and its equipments constitute a single entire property. As was said in that case, "the cost of construction in any particular town or county affords no criterion of the value of that portion of the road, for every mile of the road is equally indispensable to its existence as a whole, and contributes proportionately to its principal earnings." It may be that in centers of traffic a limited number of feet or rods of a railroad may earn, by way of rent from other companies, a large percentage of its costs, exceeding the proportion earned by the balance of the road in its ordinary and legitimate business; but it is apprehended such increased earnings are due to the fact that such companies have extended lines that bring the products and trade of a wide expanse of country over them, and but for such extended lines, crowding business into great centers, no such rents could be realized. It is in that way every mile of the road, whether in one county or another, without reference to its actual cost in any locality, whether laid with steel or iron rails, or over land worth much or little, measured by its acreage, "contributes proportionately to its principal earnings." What may be the relative value of lands in the several counties over which the track is laid, is not a pertinent inquiry in assessing the value of the track as such. Its use by the railroad company is exclusive for a single definite purpose, and it is worth no more in one locality than another for road-bed. Keeping in view the fact a railroad and its equipments must be regarded for most, if not for all, purposes "as a unit, or as constituting a single entire property," the mode prescribed in the statute for assessing it for taxation is one that best observes that rule of uniformity which the constitution enjoins. The State Railroad Tax Cases, 2 Otto, 575, arose under the laws of Illinois, in which the precise point was made as in this case, that "the railroad track, capital stock and franchise is not assessed in each coun-

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ty where it lies according to its value there, but according to an aggregate value of the whole, in which county, city, or town collects taxes according to the length of the track within its limits," and in a well-reasoned opinion this provision of our Revenue Act was sustained.

Among the appropriations made was one making provisions for the expense of the offices of assessor and tax commissioner within the city of Chicago, and objection is urged against the tax levied to pay the same, on the ground that there could be no such offices in that city under the General Incorporation Act. The city became incorporated under the general law, April 23, 1875, and on the 3d day of May, 1875, the city council, by ordinance, declared all municipal officers in office at that date should continue in office and exercise the same powers and perform the same duties as before, until their successors should be elected and qualified, and until otherwise provided for by law or ordinance.

It was declared in *The People* v. *Brown*, 83 Ill. 35, the organization of a city under the General Incorporation Act determines the terms of all officers under its special charter, except such as are within the saving clause of that act. The saving clause, however, includes no such officers as assessor and tax commissioner. But under the general law, the city council had power in its discretion, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, to provide for the election by the legal voters of the city, or the appointment by the mayor, with the approval of the city council, of certain enumerated officers, and "such other officers as may by said council be deemed necessary or expedient." Under the comprehensive power conferred, no reason is perceived why the city council could not, in its discretion, subject to constitutional restrictions, create any office it deemed necessary to the efficient administration of the city government, and establish or provide for filling such offices by election or appointment. That discretion existed, and, in the absence of evidence to the contrary, the presumption ought to be indulged, the city council had in some lawful way exercised the discretionary power with which it is clothed in the creation of such offices, or else it would have been guilty of the extreme folly of making the appropriations for paying the expenses of such offices when none existed. In a collateral proceeding there is no warrant for declaring incumbents were not rightfully exercising the functions of such offices and entitled to receive the emoluments connected therewith.

A sum, insignificant in amount, was also appropriated to pay expenses of entertaining official visitors, and the point is pressed on the attention of the court, but not with much earnestness, that that is an illegal purpose, and hence the tax levied to pay the same is void. No warrant is found in the Appropriation Act for any such appropriations, but the special charter under which the city was incorporated contained a provision expressly authorizing expenditures for entertainment of official visitors. By a provision in the general

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law, cities adopting it may still exercise such powers as were conferred by the special charter by which they had previously been incorporated, as are not inconsistent with the General Incorporation Act. That was so declared in *The People* v. *Brown*, cited *supra*. No conflict exists between that provision of the special charter authorizing expense of entertaining official visitors and the general law, and as to the propriety of such appropriations, that is with the city council.

The case in hand presents some questions about which I am not entirely free from doubt, and impresses the mind with the exceeding great difficulty experienced in making assessments and collecting revenues where so many kinds of taxes are involved under a complicated revenue system. In the same proceeding may be involved state and county taxes, municipal taxes, park taxes, special assessments and special taxes for local improvements, and assessed by different corporate bodies under different enabling acts. That some slight error may intervene is to be expected, and I am more than ever impressed with the reasonableness of the rule declared in *Pennington* v. *the People*, 79 Ill. 11, that mere formal objections to municipal and other taxes should not be entertained when the irregularities complained of do not affect unjustly the interests of the citizen. A tax is treated by writers on political economy as a "just debt," due from the citizens to the state for protection to life and property; that he is under both moral and legal obligations to discharge, and the withholding of which is deemed a public wrong. It is said the obligation proceeds from the highest considerations that concern the public welfare. The captious objector is one who is unwilling to pay a due proportion of the expense of government that secures that protection to his property that gives it all the value it has, and without which he could not enjoy it. Without such protection it would be a prey to every lawless desperado who might possess sufficient physical power to appropriate it to his individual use. Our law is that all needful tax shall be levied by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its property, and such taxes shall be uniform in respect to the persons and property within the jurisdiction of the body imposing the same. But exact uniformity, either in respect to persons or property, is not attainable. An approximation to such result is all that can be expected. All property, were it possible, should be made to bear its just burden of taxation, but mere irregularities that may intervene, either in making valuations or in levying taxes, will not vitiate the tax unless it is apparent such irregularities affect substantially the justness of the tax levied, or debars the citizen of some important right secured by law. It is a cardinal principle every tax should be so contrived as to take from the people as little as possible over what it brings to the treasury of the body imposing it. It ought not to be wasted upon unnecessary officers, nor frittered away by forfeitures as suffered to the state—a practice now much resorted to, as it seems to be favored by the existing revenue

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law. In this way a tax is sometimes rendered more burdensome to the people than beneficial to the state. Some system ought to be adopted that would induce prompt payment of all needful taxes imposed. Such a result would lessen, in a great degree, the aggregate amount of taxes required to be levied. Uncertainty in taxation encourages persons who would pay no taxes whatever, unless the law seized their property and appropriated it to that purpose. Deficiencies arising from non-payment must be made up in some way from other taxpayers, and their burdens in this respect are unjustly increased. Uniformity in payment of taxes is quite as indspensable as uniformity in levying taxes to effect the purpose of the constitution, and every person and corporation shall be compelled to pay a tax in proportion to the value of his or its property.

The present is a time of unusual financial embarrassment, and even a needful tax becomes a burden on the owner of property, but there exists no authority in courts to relax the rules of law on that account. A precedent set now in that respect, would be productive of evil results, when this great depression is removed, as it must needs soon be, and would thereafter embarrass the collections of revenue indispensable to the government of a prosperous people. Great care should be taken to levy no more tax than is needful, and prompt payment should be enforced. There are and can be no just grounds for complaint that the property of contestants in this case has been made to bear more than its just burden of taxation, and in my opinion the judgment ought to be affirmed as to all the taxes litigated.

All the members of the court concur in this opinion except as to what is said as to the validity of taxes levied by the city of Chicago to pay interest on temporary loans, and also as to the taxes levied by the city to pay expenses for entertaining official visitors.

DICKEY, J., dissenting on certain points:

I concur fully with the views of the court on all the questions passed upon in this case except two.

I cannot agree to the views entertained by the majority of the court as to the illegality of the city tax for interest on "temporary loans," or as to the supposed illegality of the city tax for money to entertain official visitors.

The latter is a matter of comparatively small moment, and on that subject little need be said. By a provision of the charter of the city of Chicago, express power is given to the city to make appropriations for that purpose. There is nothing in the general law for the reorganization of cities under which that city was working at the time of this appropriation in any manner inconsistent with that provision in the old statute. In section six (6) of art. one (1) of the general law, it is provided that "from the time of such change of organization . . . *all* laws or *parts* of laws, not inconsistent with the provisions of this act shall continue in force and be applicable to any such city, *the same* as if such change of organization *had not taken place.*" I cannot think that when the statute expressly declares

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that in such case all parts of laws not inconsistent, etc., shall continue in force the same as though such change had not taken place, that it meant to save *only general public* statutes, not inconsistent with the act. Such general laws needed no such clause to save them from repeal. There are only two classes of repeal by implication. First where a new statute contains provisions so inconsistent with any provision of a former statute that they cannot stand together, the former statute must yield and cease to be operative. Second where a new statute seems to cover a subject fully, so that it makes of itself a complete system of law on that subject, so much so that it is fairly inferable that the legislature intended it as a substitute for all former laws on that subject; it is held that the former statutes cease to be operative, although the former statute may not be strictly inconsistent with the latter. If this clause of section six had been left out, it is plain that this general law would have been construed to be a substitute for all former statutes forming part of the old charter of a city adopting the general act. It seems to me that the object of this clause in section six was to exclude that conclusion, and that is its only office. Any other construction makes that clause a dead letter. If it does not save such special provisions as the one in question, it does not save anything, for, as said above, any general law, not a part of the old charter, and not repugnant to the new law, would have continued in force without the aid of this section. It was inserted for some purpose, and if possible some effect ought to be attributed to it.

The matter of the tax "for interest on temporary loans" is of much greater moment, and that subject I feel it my duty to discuss more at large.

The statute requires of every city the passage of an annual appropriation bill, appropriating such sums as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, specifying the objects for which such appropriations are made and the amount appropriated for each object (Rev. Stat. 227, sec. 89). This is in anticipation of the tax levy. The statute also requires that the city council shall *ascertain* the total amount of all appropriations legally made and to be assessed and collected, and that an ordinance shall be passed, levying and assessing such amount so ascertained, etc. A copy of this last ordinance is certified to the county clerk, and he is to extend the tax at a rate which will produce the amount so ascertained and certified. Upon this the collector's warrant is founded as regards city taxes. In the case at bar all this was done.

It is objected that so much of the appropriation bill as professes to appropriate money "for interest on temporary loans," is unlawful and void, and this because before and at the time of the passage of the ordinance, the city of Chicago, being already indebted largely beyond the limit in the constitution, could not lawfully become indebted and hence could not lawfully make temporary loans, or provide for paying interest thereon.

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The items in this appropriation alleged to be subject to this objection are $40,000 for interest on temporary loans for the water fund, $25,000 for interest on temporary loans for the fire department, $25,000 for interest on temporary loans for the police department, and $48,690 for interest on temporary loans (purpose not specified) included in the item of $300,000, appropriated in part for interest on bonded debt.

Are the temporary loans here referred to unlawful?

According to the opinion of this court in the late case of *The City of Springfield* v. *Edwards*, 84 Ill. 626, loans by a city in excess of the constitutional limitation, when made *on the credit of the city*, are in violation of the constitution and void; but such loans, when made *on the credit merely of taxes already levied* and in course of collection, as I understand that opinion, are not forbidden by the constitution, for they constitute in no sense a debt of the city. In that case this court said: Appellant contends that when liabilities are created and appropriations are made, which are within the limit of the revenue accruing, to meet them, they are not debts within the meaning of the prohibition of the constitution; and that temporary loans are not, when within the limits of the revenue expected to be realized.

The first branch of this position has support in *Grant* v. *The City of Davenport et al.*, 36 Iowa, 396; *People* v. *Pacheco*, 7 Cal. 175; *Koppekus* v. *State Capital Commissioners*, 16 id. 253; *The State* v. *McAuley*, 15 id. 455; *The State* v. *Medberry et al.*, 7 Ohio St. 522; and *State* v. *Mayor*, 23 La. An. 358.

These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence.

In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to, with this qualification: First—the tax appropriated must, at the time, be actually levied. Second—by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation and issuing and accepting of a warrant or order on the treasury for its payment must operate to prevent any liability to accrue on the contract against the corporation.

The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation, leaving no future obligation, either absolute or contingent upon it, whereby its debt may be increased. But until a tax is levied there is nothing in existence which can be exchanged; and an obligation to levy a tax in the future, for the benefit of a particular individual, necessarily implies

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the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy. If the making of the appropriation and issuing and accepting a warrant for its payment, does not have the effect of relieving the corporation of all liability, or, in other words, if it incurs any liability thereby, it must, manifestly incur, either absolutely or contingently, a debt.

Where a warrant or order, payable from a specific appropriation of a tax levied but not yet collected, is accepted in exchange for services rendered or to be rendered, or for materials furnished or to be furnished, so that there is, in fact, but the exchange of one thing for another, the duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation, but, obviously, for any failure in that regard, the remedy must be against the officers and not against the corporation, for otherwise a contingent debt would, in this way, be incurred by the corporation.

On a careful examination of the record in this case, nothing is found tending to show that the appropriations in question were made for an illegal purpose, or that the loans contemplated in the ordinance, and on which interest was to be paid, were to be effected in any manner not sanctioned in the opinion in the Springfield case.

Testimony was heard showing that on April 1, 1875, (the beginning of the fiscal year in question,) the funded debt of the city of Chicago was $13,500,000, and that it had not been less than that amount since the first of July, 1870; that on April 1, 1875, the floating debt of the city, evidenced by certificates on which money had been borrowed during the year ending on that day, was about $3,000,000, that the amount of such certificates were more in 1874, than in 1873, and were more in 1873 than in 1872.

The bonded debt of $13,500,000 was in existence at the time of the adoption of the constitution. This debt was then secured by bonds, with interest coupons attached, and these interest coupons bore interest after due as is usual with all coupons attached to such bonds. The constitution in no way affected that indebtedness when it declared that this city should not become further indebted until this debt should be reduced below the constitutional limit. It was not intended that this bonded debt already contracted should not continue to bear interest and grow greater by the accumulation of interest, if the city was unable to pay the interest as it fell due. Nor was it intended by that provision of the constitution that the city should not, from time to time, have power to make appropriations and assess and levy taxes for the purpose of paying interest upon that bonded debt, or for the purpose of paying interest upon the interest mentioned in the coupons, if by any misfortune or misadventure the revenues of the city for any given year or years should not be sufficient to pay necessary current expenses, and also at the same time to pay the coupons as they fell due, and the interest upon coupons past due.

It is well to remember, in this connection, that in 1871, the prin-

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cipal part of this city with its personal property was destroyed by fire. This record shows that part of the money for which this bonded debt was contracted was at that time in the city treasury and was destroyed at the same time.

It ought not to be thought strange if, in the three and one-half years which intervened between that great calamity and the time of the passage of the ordinance in question on April 30, 1875, the amount of revenue actually collected from an impoverished people, may not have been sufficient to pay the necessary current expenses of the city, and at the same time to pay and discharge the accruing interest upon this enormous bonded debt. In such case it was the duty of the city to apply its revenues first to the discharge of its current expenses. The unpaid interest upon the bonded debt in such case must have remained in the hands of the coupon holders bearing interest, unless the city borrowed the money to promptly pay off the coupons. This could only be done by substituting for the coupon debt, which bore interest, evidences of indebtedness in some other form, bearing interest. To borrow money to take up these interest bearing coupons, even on the credit of the city, in such case involved no violation of the constitution, either in letter or in spirit. The making of such loans created no debt; it simply substituted one form of interest bearing security for another. Such transactions are properly denominated "temporary loans," and the payment of interest upon such loans is not unlawful.

Nor is it to be thought strange if in 1874, temporary loans were made in the way suggested for the purpose of meeting lawful liabilities growing out of this bonded debt, which was made before the constitution; and if this was accomplished by merely substituting one kind of interest bearing paper for another, no debt was thereby created. If this were done it was not unlawful for the city to provide for taking up such certificates of 1874, by temporary loans in 1875, nor was it unlawful to provide for the payment of interest upon such proposed temporary loans.

The items for interest on temporary loans, for water, fire and police departments, relate clearly to necessary current expenses. On the principle of the Edwards case, the tax levy of the fiscal year of 1875, might lawfully be anticipated by interest bearing certificates payable only out of that levy and given directly in payment for services rendered or material furnished or given for money to pay such services or materials.

To meet these current expenses, and to pay the accrued interest on the bonded debt (whether evidenced by coupons or by certificate substituted therefor), it was known to the city council ready money would be needed before the tax levy of that year could be collected, and to meet this want the appropriation bill in question seems properly and lawfully to provide for the payment of interest on temporary loans to be effected in a lawful manner and for these lawful purposes.

It is not to be assumed that the appropriation was for an unlawful end if its language is consonant with a lawful purpose. It is not

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to be assumed that the term "temporary loans" means loans to be effected upon the credit of the city, where such loans would be unlawful, unless such a meaning is unequivocally shown by the context and the circumstances under which the words were used. The language of an ordinance or statute is not required to have the same certainty as that of a declaration tested upon a demurrer.

The meaning of a statute or ordinance is to be sought from its words alone if they are unambiguous and not qualified by other parts of the same instrument. If the words are equivocal, are open to construction, then they are to be so construed (if it can be reasonably so done) as to express and provide for that which may be lawful, though its words may be capable of a construction expressive of an unlawful purpose. This is according to the canons of construction.

Following then the teachings of the opinion in the Edwards case, the words "temporary loans" for current expenses of any kind must not be construed to be loans, made on the credit of the city upon contracts from which a liability either absolute or contingent can accrue against the city, but these words must in such case be construed to mean such loans as may be made after the levy, not on the credit of the city, but upon the credit merely of the tax levy, and payable only out of the fund to arise from the collection thereof. The term "temporary loans" in this ordinance must by all rules laid down by the authorities be held to mean such as may lawfully be made, if any such can be lawfully made, and must not in such case be taken to mean such as the law and constitution forbid. There is nothing in this record, showing the form of order, warrant or certificate on which such temporary loans were to be made, and my brethren have no just ground for assuming that the form was such as on its face professed to create a debt. The proof in this case gives no light on that subject. Nor is it conceived that the mere form is a constitutional question. All contracts are to be construed as though the true law was written at large in them. These loans then must be held to be such that the legal effect is not in violation of the constitution.

To validate a contract (made for the purpose of anticipating the collection of taxes) relating to necessary current expenses according to the rule laid down in the Edwards case, it was only necessary that the tax at the time of making the contracts should be actually levied, and that the legal effect of the contract should be such that it does not operate so as to incur any liability on the part of the city either absolute or contingent.

The principle is that when the order on the treasury is issued and accepted, the transaction is closed on the part of the corporation, leaving no future obligation either absolute or contingent upon the city whereby its debt may be increased. It follows, that temporary loans to raise money for a lawful purpose not made on the credit of the city but merely on the credit of taxes already levied are not forbidden. The *legal effect* of such transaction does not operate to create any liability against the city on the contract of loaning. The

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tax is actually levied, and when the certificate or order on the treasury for the payment of the loan is issued and accepted, the transaction is closed on the part of the city. There is in fact an exchange of one thing for another, and nothing remains but the duty of the officers to collect and pay over the tax in accordance with the appropriation. For a failure in this regard the holder of the certificate has his remedy against the officers and not against the city.

The only question presented in this record is whether this court will permit the collector to perform this duty thus imposed upon him.

It is contended that the tax levy is unlawful because before December, 1875, unlawful temporary loans had been made by the comptroller to which this tax, if collected, will be unlawfully applied. This, if true, cannot affect the question of the legality of the tax, and the proof fails to show that the allegation is true in fact.

If the ordinance making the appropriation and the ordinance for the levy of the tax were valid when passed, they are still valid. The subsequent acts of the comptroller, though unlawful, cannot invalidate ordinances valid at their passage, nor can the tax be invalidated by any such cause. The objection to be effective must reach and nullify the ordinances on which the tax levy is founded. If they be valid all else must stand.

If a statute for appropriations passed by the general assembly, seems on its face to be for a purpose not obnoxious to any provision in the constitution, it would not be competent to call the state auditor, or members of the finance committee who prepared the bill to prove that the estimates which led to its enactment related to a subject-matter touching which appropriations were forbidden by the constitution. Nor could such statute be invalidated in court by proving that under like statutes former state officers had allowed claims and paid out money upon them for purposes forbidden by the constitution.

Upon the same principle, the validity of an ordinance, which on its face seems not obnoxious to any provision of the statute or of the constitution, cannot be assailed in court by proof that the estimates which led to its passage related to a subject-matter in relation to which appropriations are forbidden by law or by the constitution; or by proof that taxes collected under former ordinances of the same kind had formerly been misapplied by the city officers and paid out for purposes thus forbidden.

Nor is it perceived from this record that any unlawful acts are brought home to the comptroller. It is true, part of the loans for the fiscal year of 1874 were taken up by money arising from temporary loans made in the fiscal year of 1875. It is insisted, that by law the loans of 1874, were chargeable only to the fund arising from the tax levy of that year, and could not lawfully be paid out of any other or subsequent fund. This position is sound or the rule announced in the Edwards case, if it were shown that the temporary loans of 1874, so taken up, were made for the current expenses

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of that year. If made out on account of liabilities in 1874, which lawfully grew out of and constituted part of the liability of the city on account of the bonded debt, which existed before the adoption of the constitution, then these temporary loans of 1874 were valid obligations upon the city, not dependent alone upon any special fund of 1874, for their payment, and in such case it was not unlawful for the comptroller to take up such temporary loans of 1874 by money raised by like temporary loans made in 1875. The proof fails to show that the temporary loans of 1874, so taken up, were not of a character approved by the law and sanctioned by the constitution.

It is not sufficient to invalidate an appropriation (whether made by the legislature of a state or the city council of a city), to show that it may be for a purpose forbidden by the constitution. The burden of showing the illegality of the ordinance in question rested upon appellant. Such an ordinance cannot be set aside on this ground, unless it is made clearly and affirmatively to appear that it is for a purpose not warranted by law. Unless the objector has shown that these appropriations for interest on temporary loans were made, when under the constitution and law, no lawful temporary loans could be made, or that provision had been made by ordinance to appropriate this tax to interest on a class of temporary loans which are forbidden, the objection cannot properly prevail. Nothing in this record approaches such a showing.

It is shown by the proofs that the bonded debt of the city was not less than $13,500,000 at the time of the adoption of the constitution and that the interest on that debt runs at a rate of from six to eight per cent. Assume, if you please, that this interest was promptly paid for 1870 and for 1871. In October, 1871, the chief part of the city was consumed by fire. In 1872, it lay in ashes and its citizens were with herculean energy rebuilding. It will not be an unreasonable presumption that no more money could be raised by taxation in 1872 than was demanded for current expenses of that year. It is known to this court that a very large part of the tax levy for 1873 could not be collected because this court decided that the "city tax act" under which it was levied was so imperfect that it could not be made effective. It is fair to assume that for that year no more taxes were collected than was needed for current expenses. The imperfections of that law were promptly supplied by the general assembly, but it is known to this court that a large part of the tax levy for 1874 was not collected, for the reason that this court then decided that the "city tax act" under which it was levied was unconstitutional.

If then, for the causes suggested, the taxes actually collected in the years 1872, 1873 and 1874, were not more than sufficient to pay the necessary current expenses of those years, it is not strange that the floating debt consisting of unpaid coupons and interest thereon should have been greater in 1873 than in 1872, and greater in 1874 than in 1873, or that at the end of the fiscal year of 1874 it should amount to $3,000,000.

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If the interest on the bonded debt falls due, say on July 1, of each year, the unpaid coupons on a bonded debt of $13,500,000 at seven per cent per annum, falling due in each year, amounted to $945,000. The amount of these coupons which fall due, on this supposition, on July 1, 1872, 1873 and 1874, would, by June 30, 1875, amount (without interest on coupons) to the round sum of $2,835,000. The coupons bear six per cent interest and by June 30, 1875, would be—

Interest on coupons of 1872, 3 years	$170,000
Interest on coupons of 1873, 2 years	113,400
Interest on coupons of 1874, 1 year	56,700
Total interest on coupons to June 30, 1875	$ 340,100
Principal on coupons past due	2,835,000
Total floating debt arising solely from bonded debt on June 30, 1875	$3,175,100
To this add coupons to fall due July 1, 1875	945,000
Floating debt (belonging to bonded debt) July 1, 1875	$4,120,100
This consists of principal of coupons $945,000 in each year, for 4 years, 1872, 1873, 1874, 1875	3,780,000
And interest as above to June 30, 1875	340,100
	$4,120,100
Interest on ($3,780,000) principal of coupons from July 1, 1875, say 9 months, until the money could be realized out of the tax at 6 per cent	170,100

In these computations it will be observed that no interest has been compounded. No interest has been computed upon interest, except upon the interest expressed in the body of the coupons.

So it is made to appear that this city, with allher untoward calamities, had, in those three and a half years, not only always paid her current expenses, but had paid something on her floating debt, growing out of the bonded debt, so that instead of being $3,175,000 April 1, 1875, it was only $3,000,000, and instead of calling for $170,100, for interest on temporary loans to be made in 1875, on account of and in connection with the bonded debt, call is made for but $48,600, less than one-third of that amount.

It seems to be thought strange that this floating debt should have increased from $3,000,000 on April 1, 1875, to $4,500,000 on 31st of December, 1875.

It must be remembered that during that time the coupons falling due for 1875, say $945,000, had been added, and interest on money to pay interest (on the $3,000,000, of former coupon debt until the collection of this tax, say nine months, at rate of six per cent), say $135,000, and for money for current expenses, say $420,000, making an addition of $1,500,000, all of which would have been lawfully paid long ere this had not this tax levy been arrested, and all this in no way at variance with the doctrine of the Edwards case.

This estimate is made on the assumption that the coupons on the bonded debt were left to stand, by simply providing yearly for the interest on the coupons, partly by taxation and partly by temporary loans for that purpose.

The evidence shows that instead of this the coupons as they fell

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due were paid by money borrowed for that purpose upon interest bearing certificates, and from year to year the interest on these has been paid, as would appear, by taxation, and the principal of this coupon debt from money borrowed on like certificates to run for one year. It is plain, as already said, that this substitution of one interest bearing security for another of the same amount is not the creation of a new debt. It is a mere change in form and not in substance. The constitution was not made to control form, but substance.

It is suggested that the term "temporary loans" *prima facie* imports the making of an absolute debt, a debt on the credit of the city, and hence that the burden rested on the city to show by proof that they were not to be made on the credit of the city, not to be made on contracts binding the city absolutely to pay.

This is the point on which I differ with the majority of the court; so far as I perceive, this is our only point of difference.

To this suggestion it may be said that the term "loan" certainly does not always import a binding contract to pay. When we read, "*He that giveth to the poor, lendeth to the Lord*," we do not get the idea that the Lord has entered into any binding contract to pay.

I have also shown that it is not every binding contract to pay, made by the city of Chicago, which is unlawful, for she may lawfully make any appropriate binding contract, as to matters growing out of her bonded debt, existing before the constitution, if in so doing she contracts no new debt. If the loan relate to money for current expenses, it is not a binding contract upon the city, for no matter what the form of the paper may be, its officers cannot bind the city thereby. The rule laid down in the Edwards case confines such a paper, in its legal effect, simply to the office of an effective assignment to the holder of so much of the tax levy when collected. The city in such case has no further concern with the temporary loan for current expenses, or with the collection of so much of the tax which has been assigned. By operation of law, whatever the form of the certificate, the holder is alone interested in the collection of this part of the tax. Does such burden of proof rest on such holder? It would, to say the least, seem unreasonable to adopt a rule requiring the thousand and one firemen and policemen, or their assignees, to hover around the county court to prove that their claims are not unlawful. Such a rule would render such orders or certificates practically worthless. The appellant made no such point in the court below, for the objectors called the comptroller as a witness and took upon themselves the burden of proving this tax levy unlawful. Appellant ought not to be allowed to raise that point (if sound) for the first time in this court.

It is not right, in my judgment, for this court to reverse a judgment rendered for the collection of taxes, upon the apprehension that when collected they may be unlawfully appropriated to purposes not contemplated by the constitution and law.

The mode of vindicating that provision of the constitution forbidding any city to become indebted above the constitutional limit is

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not by an appeal to the courts to arrest the collection of a tax, which may be applied lawfully without violation of the constitution. That vindication, if made in the courts, must be by proceedings forbidding the making of the inhibited contracts, or by restraining municipal officers from unlawfully applying the public money to the satisfaction of such unconstitutional undertakings or by holding such contracts void when proceedings are instituted in court for their enforcement, or by actions against public officers, either criminally or civilly, for a violation of duty in making such contracts or in unlawfully applying public money in the payment thereof. In such proceedings the nature of the contracts can be investigated, on proper pleadings and proofs. It is *impracticable* to set out in a collector's warrant all the facts on which the validity of each tax is supported. Such a proceeding would make that warrant too voluminous to be brought before any court.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

LOUIS C. HUCK, COLLECTOR, ETC., ET AL. *v.* THE CHICAGO & ALTON RAILROAD COMPANY.

RAILROAD COMPANY—*Owner of leased property—Assessment of.*—A railroad company is for all purposes of taxation at least, if not for all other purposes, to be regarded as the owner of its leased property, which may be assessed like its other property.

SAME—*Assessment of capital stock.*—Where it was contended that the state board of equalization, in assessing the value of the capital stock, included in the assessment the capital stock of each of the lessor companies, and where a note at the bottom of that table showed that the property of the lessor companies, embraced in the table, was assessed against the company, it was

HELD that the table relates only to tangible property, and has no reference whatever to anything else, and that this property was assessed against the company.

It was also *held* that it was for every practicable purpose just as much its property as any other property over which it exercised ownership. It forms a part of its capital, and its assessed value was properly deducted from the equalized valuation of the capital stock of that company.

Also *held* that the fact of ownership should have been communicated to the board of equalization before the assessment was made out.

MUNICIPAL CORPORATION.—Regarding the franchises as property, there can be no question of the right of the general assembly to confer authority upon municipal corporations to tax it to the extent that it has existence within the corporate limits.

ASSESSMENTS—*Relief against.*—Courts of equity do not relieve against assessments on account of mere irregularities.

SAME—*Presumptions.*—Courts have no right to indulge in presumptions to defeat the collection of a tax.

APPEAL from Cook County. Opinion filed January 21, 1878.

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SCHOLFIELD, C. J., delivered the opinion of the court:

The state board of equalization assessed the capital stock of the Chicago, Alton & St. Louis Railroad Company, in the year 1875, at $5,723,319 for purposes of taxation; and the object of the present suit is to enjoin the collection of all taxes, state, county and municipal, extended upon that assessment.

The Chicago & Alton Railroad Company was incoporated by an act of the general assembly in force February 18, 1861. The first section of the act appoints certain commissioners to organize the corporation "subject to all the conditions, franchises, rights and privileges conferred by the act." The second section empowers a majority of the commissioners to acquire "by purchase, transfer or conveyance, all and singular the railroad and all its property, real and personal, with the corporate rights, franchises, rights, privileges and effects, now or hereafter belonging to or owned or vested in the Alton & Sangamon Railroad Company, afterward called the Chicago & Mississippi Railroad Company, and also the Chicago, Alton & St. Louis Railroad Company.

The eleventh section empowers "the president and directors of the coporation, by and with the written consent of a majority of its stockholders, to acquire by lease, purchase or otherwise, any extension of its road necessary and proper to its business," and provides that "all the property so acquired shall become part of the property of said corporation, and shall be as fully subject to the provisions of this act as if the same constituted part of the original purchase by said commissioners, hereinbefore named."

The thirteenth section empowers the president and directors of the corporation "to do everything necessary to preserve and maintain its railroad property and effects, not inconsistent with the provisions of the act," and "to prescribe by-laws for the government of its officers, fix the rates of toll in the transportation of freight and passengers over its railroad, and ordain rules and regulations for the division of its profits."

The Joliet & Chicago Railroad Company, the Alton & St. Louis Railroad Company, and the St. Louis, Jacksonville & Chicago Railroad Company, by their several leases, dated respectively January 1, 1864, April 16, 1864, and April 30, 1868, leased their railroads and property used in connection therewith, to the Chicago & Alton Railroad Company, forever. In each of the leases the Chicago & Alton Railroad Company covenants that it will at all times, and at its own proper cost and expense, keep in good and sufficient repair and working order the several railroads, make all needful repairs and additions thereto, including the renewal of track, etc., and all additions thereto which may be necessary and proper to secure the prompt and efficient dispatch of the ordinary business of the roads. It also covenants, in the leases of the first two named companies, that the leased premises shall be forever used and operated *as a part of the main line of the Chicago & Alton Railroad*, and in all of the leases it covenants that it "will at all

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times hereafter pay all taxes, whether state, federal or municipal, which are or may hereafter be assessed against the premises hereinbefore demised and leased at the time when said taxes may be due and payable."

The revenue law requires "every person, company or corporation, owning, operating or constructing a railroad, to return a schedule of the taxable property of such railroad for taxation (Rev. Stat. 1874, p. 865, sec. 40). And the rolling stock is to be listed and taxed in the several counties, towns, villages, districts and cities in the proportion that the length of the main track used or operated in such county, town, village, district or city bears to the whole length of the road *used or operated by such person, company or corporation, whether owned or leased by him or them in whole or in part.*

We think it very clear, from the corporate powers conferred by its charter, the terms of the leases, and the provisions of the revenue law referred to, that the Chicago & Alton Railroad Company is, for all purposes of taxation at least, if not for all other purposes, to be regarded as the owner of all the leased property. See also *Kennedy* v. *St. L. V. & T. H. R.R. Co.*, 62 Ill. 396.

There can, therefore, have been no error in assessing the property held by virtue of the leases, in common with all its other tangible property, against it for taxation, and as we understand the argument of the counsel for the company, it is not claimed there was any error in this respect.

But it is contended that the state board of equalization, in assessing the value of the capital stock, included in the assessment the capital stock of each of the lesser companies.

A careful examination of the evidence relied on to establish this charge has convinced us that it has no foundation in fact.

The only evidence upon this point is the published report of the proceedings of the state board of equalization, in which appears the following:

TABLE "A."

Showing the assessment made by the state board of equalization on the capital stock of railroads accompanying and made part of the report of the "Committee on Assessment of Capital Stock of Corporations."

Name of Company.	Capital stock paid up.		To all indebtedness except for current expenses.	
	Total.	Proportion in Illinois.	Total.	Proportion in Illinois.
Chicago & Alton	$11,335,300	$11,335,300	$8,242,200	$8,242,200
Alton & St. Louis	.....	.....	.....	.....
St. Louis, Jacksonville & Chicago.	2,347,800	2,347,800	2,725,000	2,725,000
Joliet & Chicago	1,500,000	1,500,000	306,000	306,000

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Name of Company.	Market or actual value of paid up capital stock and debt, as determined by the state board.	Capital stock and debt as equalized with the aggregate assessment of the state by deducting 50 per cent of market or actual value.	Total equalized value of tangible property assessed by state board and in counties.	Assessed equalized value of capital stock, being excess of equalized value of capital stock and debt over equalized value of tangible property.
Chicago & Alton	$20 350,269	$10,175,135	$4,451,816	$5,723,319
Alton & St. Louis	.....	.....	.....	.....
St. Lou's, Jacksonville & Chicago.	3,005,170	1,502,585	.....	.....
Joliet & Chicago	1,866,300	933,150	.....	.....

It will be observed by reference to this table that the amount of $5,723,319 is the assessed and equalized value of the capital stock after deducting the assessed value of the tangible property of the Chicago & Alton Railroad Company alone, and from the table it is impossible that the capital stock of the other companies could have entered into the amount. Thus the total capital stock of that company, paid up its total indebtedness except for current expenses, the market or actual value of the paid up capital stock and debts as determined, and the equalized value of the capital stock and debts are given in a single line; against the Alton & St. Louis Railroad Company no amounts are carried out, but against the other two companies amounts are carried out under each of these specifications in consecutive lines, directly under that referring to the Chicago & Alton Railroad Company. The equalized valuation of the capital stock and debts of the Chicago & Alton Railroad Company is given as $10,175,135. The assessed value of its tangible property is given as $4,451,816. Deducting the latter from the former, we have precisely the amount assessed against the Chicago & Alton Railroad Company, as the valuation of its capital stock subject to taxation $5,723,319. But the equalized value of the capital stock and debts of the St. Louis, Jacksonville & Chicago Railroad Company is given as $1,502,585, and that of the Joliet and Chicago Railroad Company is given as $1,502,585.

Adding these two amounts to that of the Chicago & Alton Railroad Company, as must be done if they are included in the assessment against the Chicago & Alton Railroad Company, under the same specification and we have $12,610,870 from which to deduct $4,451,816, assessed value of tangible property, leaving to be taxed as capital stock $8,159,870, being an excess of $2,436,551 over the amount actually assessed.

But counsel for appellee say they have the explicit statement of the board of equalization that the capital stock of the lessor companies was included in the assessment of the capital stock of the Chicago & Alton Railroad Company, and that it is found among their proceedings in table marked "B."

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A note at the bottom of that table shows that the property of the lessor companies, embraced in the table, was assessed against the Chicago & Alton Railroad Company. But that table relates only to tangible property, and has no reference whatever to anything else. This property, as before said, was properly assessed against the Chicago & Alton company.

It was for every practicable purpose just as much its property as any other property over which it exercised ownership. It forms a part of its capital, and its assessed value was properly deducted from the equalized valuation of the capital stock of that company.

An objection is waged that the power to tax persons and corporations using franchises is limited to the general assembly and cannot be conferred on municipal corporations.

Regarding the franchise as property, there can be no question of the right of the general assembly to confer authority upon municipal corporations to tax it to the extent that it has existence within the corporate limits for it is expressly provided by sec. 10, art. 9 of the constitution that the general assembly "shall require that all the taxable property within the limits of municipal corporations shall be taxed," and in *Wiggins* v. *City of Chicago*, 68 Ill. 372, we held against a like objection that sec. 1, art. 9 of the constitution, which declares that the general assembly shall have power to tax peddlers, auctioneers, brokers, and the other classes therein enumerated, including persons, incorporations owning or using franchises, does not operate as a prohibition on all other bodies to tax such persons, and for other purposes than state revenue; but the general assembly may authorize municipal corporations to impose taxes on such persons and corporations. It results that the objection is untenable on any ground.

Another objection urged is, the Chicago & Alton Railroad Company owns 337 miles of main track, and operates under the leases 210 miles of main track owned by the lessor companies, and the valuation of the capital stock of that company is improperly distributed to those counties where it operates simply the leased lines.

It is conceded by counsel that the valuation of rolling stock is properly distributed to the counties where only the leased lines are operated, but it is claimed the phraseology of the statute does not authorize such a distribution of the valuation of the capital stock.

The statute requires (Rev. Stat. 1874, p. 876, sec. 110), that the aggregate amount of capital stock assessed shall be distributed proportionately to the several counties in like manner that the property of railroads, denominated "rail track" is distributed.

"Railroad track" is defined to be "right of way, including the superstructures of main, side or second track and turnouts, and the stations and improvements of the railroad company on such right of way" (Rev. Stat. 1874, p. 865, sec. 42), and its value is to be distributed to the several counties, etc., in the proportion that the length of the main track in such county, etc., bears to the whole length of the road in the state. Id. sec. 43.

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The words "main track" is plainly used in the different sections of the revenue act in contradistinction to side or second track and turnouts and is as applicable to tributary lines of railway as to trunk lines; and we think it wholly unimportant in the present instance that it so happens that some of the tracks included in the assessment of the capital stock are leased lines.

Such lines are to be listed by the corporation running or operating them (Rev. Stat. 1874, p. 866, sec. 48), and we have here, also, the express covenant of the lessee to pay the taxes assessed against this property.

It is a misapprehension to suppose that the Chicago & Alton Railroad Company has no franchise as to these leased lines. As we have previously shown, its charter authorized it to obtain by lease, purchase or otherwise, any extension of its road necessary or proper to its business," and provides "that the property so acquired shall become part of the property of the corporation.

It is authorized to operate these lines forever, charging fares and freights with the freedom that it may exercise in regard to any other part of its road, and the franchise attaching to the property is therefore necessarily the franchise of the Chicago & Alton Company.

We think the entire property was properly assessed together without regard to the source or nature of the title.

The next objection to which our attention is invited is that the assessment in question included the value of $800,000 of shares of the capital stock of the Alton & St. Louis Railroad Company, which are by law exempt from taxation.

The proof on this question is as shown by the abstract, "it was also admitted that during the year 1875 the Chicago & Alton Railroad Company owned $800,000 of the shares of stock of the Alton & St. Louis Railroad Company, so far as said company, under the law had power to own such property."

It does not appear what this stock was worth, or that it had any value, nor does it appear that it was for that year, assessed for taxation, otherwise than in appellee's capital stock.

The revenue law exempts from taxation the shares of stock of a corporation, where its tangible property, or capital stock is assessed. But it does not appear here that the tangible property or capital stock of the Alton & St. Louis Railroad Company was assessed for taxation for the year 1875.

But again, courts of equity do not relieve against assessments on account of mere irregularities. *Scholfield* v. *Watkins*, 22 Ill. 66; *C. B. & Q. Co.* v. *Fray*, id. 34; *Munsen* v. *Minor*, id. 594; *Metz* v. *Anderson*, 23 id. 463; *DuPage County* v. *Jenks et al.* 65 Ill. 275.

It was incumbent on appellee to show that it was injured, and to what extent, by the fact that these shares of stock were included in the assessment of its capital stock. *O'Kane* v. *Treat et al.* 25 Ill. 567. If they were of no value they obviously did not affect the assessment, or if their value was purely nominal the same result followed.

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We have no right to indulge in presumptions to defeat the collection of a tax.

A court of equity will, in many cases, enjoin the collection of a tax attempted to be enforced against property exempt by law from taxation; but that affects only the tax on the property exempt. Here the claim is that exempt property was included as a factor in determining a valuation of an aggregate property, and that thereby the whole assessment is rendered void. The circumstance of these shares of stock being a factor in this valuation depended on their ownership at the time of the assessment, and we think to have availed of it in any contingency the fact of ownership should have been communicated to the board of equalization before the assessment was made. Without knowledge there could be no fraud, and if there was mistake it resulted from the fault of the corporation in not disclosing the fact. We are not inclined to hold that a party could base his right to equitable relief on a mistake resulting from his own wrong.

The remaining objection is that the entire assessment of the capital stock for the year 1875 is void, because no valuation of capital stock was returned, as to certain corporations. This same objection, on precisely the same evidence, was before us in *C. B. & Q. R. R. Co.* v. *Siders*, January term, 1877, and we held the objection not well taken. It is unnecessary to repeat what was then said.

For the reasons given, we are of opinion the court below erred in decreeing complainant the relief prayed by its bill.

The decree of the court below is reversed and the cause remanded, with directions to that court to dismiss the bill.

Reversed and remanded.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1878.

THE C. B. & Q. R. R. Co. *v.* JOHN W. SIDERS ET AL.

CAPITAL STOCK — *Assessment of.*—The effect of the deduction of the assessed value of the tangible property from the valuation of the capital stock as determined by the board of equalization, is both to avoid double assessment and to equalize the different values.

ASSESSMENT — *Discrimination in valuation of property.*—Whether the valuation of railroad property is represented solely in the valuation of its tangible property, or in the valuation of its tangible property *and* that of its capital stock, it cannot be regarded as *per se* evidence of an unjust and fraudulent discrimination.

SAME.—Appellant's assessment is not fraudulent and void from the simple fact that a number of other corporations are returned as having nothing taxable beyond the assessed value of their tangible property.

INJUNCTION.—The collection of a tax will not be enjoined simply because of errors of judgment in the assessors.

SAME — *Equitable intervention.*—The fact that the assessment is not strictly and

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literally, in all things, according to the letter of the law, is not ground for equitable intervention.

SAME—*Equitable relief—allegations and proof.*—Where equitable, not legal, relief is sought to warrant the injunction against the collection of the tax, it should appear clearly from the allegations and proofs that the assessment works such an injury to appellant as a court of equity alone is competent to redress.

APPEAL from McDonough County.

SCHOLFIELD, C. J., delivered the opinion of the court:

The questions discussed upon this record relate to the validity of the assessment of appellant's capital stock for taxation by the state board of equalization, for the year 1875.

The case involves directly only the taxes sought to be collected of appellant in the county of McDonough, but the questions are equally applicable whenever taxes are sought to be collected of appellant, on that assessment.

Elaborate and exhaustive arguments of the questions contested have been made orally and in printed briefs; and it would be due to counsel that we should give an extended and careful expression of our views upon every phase of these questions, were time to that end afforded us, and were it not also that, in previous cases, we have said all that, in our opinion, need be said in reference to some of them. As it is, we feel constrained to notice only such questions as have not been heretofore decided in kindred cases, and to give our conclusions thereon, as lucidly as we can, under the pressure and hurry by which we are driven in consequence of the rapid accumulation of cases upon our dockets.

The arguments in support of the objections, that the assessment of the state board of equalization was of the shares of stock, and not of the property of the corporation: that, if the assessment shall be held to be that of the property of the corporation, it is a double and unequal assessment; and that, if the tax be regarded as a franchise tax, it cannot be sustained, present nothing new to us, save the very ingenious and forcible manner of their presentation. Like objections were urged and pressed upon our attention in able arguments, and overruled, in *Porter et al.* v. *R. R. I. & St. L. R. R. Co.*, 76 Ill. 561, and other cases depending on that for decision; in *R. Life Ins. Co.* v. *Pollack*, 76 id. 292; *Ottawa Glass Co.* v. *McCaleb*, 81 id. 556, and in *Grand Pacific Hotel Co.* v. *Lieb*, 83 id.

The same objections in substance were also urged in the Supreme Court of the United States, but disregarded in *The State R. R. Tax Cases*, 2 Otto (92 U. S.) 575. There is nothing in the record before us, so far as relates to these objections, variant from the records in those cases; and the questions presented by these objections can therefore no longer be considered as open to discussion. It is charged in the bill "that the state board of equalization wrongfully and fraudulently and intentionally failed and refused to assess, by valuation, any portion of the tangible property of forty of the railroad corpo-

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rations of the state, which underlies the rails upon the roads, including bridges and culverts, but left it unassessed by valuation under the pretense of intending to include it in the capital stock and franchises of said companies respectively, and then wrongfully, fraudulently and intentionally failed and refused to make any assessment whatever against said forty railroad companies for capital stock and franchise, or either of them, so that forty companies were, by the action of said state board, released and discharged from any taxation upon their capital stock and franchises, and upon all their tangible property which underlies the rails upon their roads, including culverts and bridges." The answer admits "that in assessing railroad track, and right of way, the state board of equalization did not take into consideration the improvements beneath the ties and iron, and superstructure, but excluded such improvements from their assessment, to be included under the designation of capital stock."

It also admits "that there is a large number of railroad corporations in the state against which no assessment was made by the state board for capital stock for 1875," but alleges "that, as appears by exhibit 'A' filed with the bill, the total ascertained value of all the capital, property and franchise, of the companies did not exceed the assessed and equalized value of their tangible property," and willfully disregarded the laws, and the rules adopted by the board with the purpose of compelling appellant to pay taxes out of proportion to the value of its property, and in excess of the proportional taxation of other railroad corporations in the state, and generally denies all fraud charged in the bill."

The only important evidence introduced on the issue raised that is competent is that contained in the published report of the proceedings of the state board of equalization, and a stipulation of the parties filed with the record.

It appears by the stipulation that in 1873 the auditor of public accounts, in answer to an inquiry addressed to him by the state board of equalization, gave the opinion "that the law does not contemplate the assessing of the cost of the construction, or grading, or any part of the property denominated "railroad track" in section 42 of the revenue law; but that the value resulting from or belonging to such grading can only be legally and actually ascertained in the assessment of capital stock of any railroad company, and that the board adopted and made the assessments for that year in conformity with such opinion of the auditor.

It is there stipulated "that the same board made the assessment in 1875, and pursued the same plan in respect to the exclusion of the cost of the grading and improvements of the road-bed beneath the iron from their consideration in the assessment of the railroad track, under the supposition that it could be more fully and justly reached in the assessment under the designation of "capital stock." The mode of valuation of capital stock adopted by the board was the same as that in the preceding cases decided by this court, to

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which we have made reference, the resolutions prescribing which are set forth at length in *Porter et al.* v. *R. R. I. & St. L. R. R. Co.*, 76 Ill., at pages 586–7. And it appears that, as to a number of railroad companies, the board determined that the assessed and equalized value of the capital stock did not exceed the assessed value of the tangible property; and so there is nothing upon which to extend the taxes, as against such corporations, except upon the equalized assessed value of the tangible property. There is no evidence, other than what may be found in this action of the board, tending to prove fraud.

Since the value of the bridges, culverts, embankments, etc., forming the superstructure of the track, is represented, as is everything else of value belonging to the corporation, in the value of its capital stock, and since appellants' road is treated like every other road in the state, in having such property excepted from assessment as tangible property, it is impossible to see how appellant is injured by this action of the board. It is not shown that the valuation of appellants' capital stock is larger than it would have been had the superstructure been assessed as tangible property, and its value then deducted from the equalized value of its capital stock, nor are we able to perceive how, otherwise, it must necessarily have prejudiced appellant.

The superstructure, aside from the franchise to use it for railroad purposes, could have but little value, if any at all, and since its actual value, as a part of a particular railroad is the value to be ascertained for taxation, it is impossible to discover, in the mode of valuation adopted, sufficient evidence of unfairness or injustice, either toward railroad corporations or individuals, to justify the interposition of a court of equity.

If it had been shown that the action of the board of equalization, in ascertaining that the equalized value of the capital stock, including the franchise of certain railroad companies, did not exceed the assessed value of their tangible property, resulted from a fraudulent disposition to exempt the property of such corporations, a different and more difficult question would be presented than that before us; but it is not conceded that even that would render void the entire assessment.

But we are not to assume that, in all cases, the equalized value of the capital stock must exceed the assessed value of the tangible property. There is no evidence that supports such a view, and we can readily conceive that, in many cases, it might not be so. The *actual* value of the capital stock, must always exceed the *actual* value of the tangible property, by some amount — it may be great or very small — accordingly as the value of the franchise. But *actual* values and *assessed* values, we all know from experience, are quite different terms.

Rolling stock and railroad track, as well as capital stock, are to be assessed by the state board of equalization; but all other railroad property is to be assessed by local assessors; and the board of equali-

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zation has nothing to do with its valuation, except as a board of equalization.

When it is remembered that it is impossible for any human agency to ascertain valuations, at all times, with entire accuracy, it must be evident that it may frequently and yet honestly happen that the valuation placed on tangible property, when it is assessed as such, does not correspond with the amount the tangible property represents in the valuation of the capital stock as determined by the board of equalization. When this happens, the necessary effect is to increase or diminish in proportion to the want of such correspondence, the difference between the assessed value of the tangible property and the valuation of the capital stock.

And if the tangible property, when assessed as such, is valued, relatively, too high by an amount equal to, or in excess of, all other values belonging to the corporation, there can be nothing remaining under the designation of capital stock on which to levy taxation, after deducting the assessed value of the tangible property. Yet, in such case, it would not be entirely correct to say the other values are not taxed, for they would, in a certain sense, be represented and taxed in the taxation imposed on the excessive valuation of the tangible property. If the tangible property, when assessed as such, is valued relatively too low, then when the amount of such valuation is deducted from the valuation of the capital stock as determined by the board of equalization, there will remain, of necessity, in addition to the valuation of whatever other property may be represented in the capital stock, an amount equal to that which the assessed value of the tangible property falls below the amount that property represents in the valuation of the capital stock.

The effect, therefore, of the deduction of the assessed value of the tangible property, is both to avoid double assessment, and to equalize the different valuations.

Whether the valuation of railroad property is represented solely in the valuation of its tangible property, or in the valuation of its tangible property *and* that of its capital stock, we cannot regard, as *per se*, evidence of an unjust and fraudulent discrimination, since, in our opinion, under certain circumstances, the valuation might without intentional unfairness be returned in the one way, while, under different circumstances, it should be in the other way; and either, under the circumstances to which it is appropriate, would, in the absence of other evidence than that of the mere fact that the valuation was so returned, be a sufficiently accurate approximation of value to form the basis of taxation. It results that we do not feel justified in holding appellants' assessment fraudulent and void; from the simple fact that a number of other corporations are returned as having nothing taxable beyond the assessed value of their tangible property. As has been seen, the value of their franchises, and other property not assessed as tangible property, may be represented in the excessive valuation of their tangible property beyond its ratable proportion when compared with the valuation of their

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capital stock, as determined by the board of equalization, and, if this be true, it will be sufficiently subject to taxation; or, it may be, in point of fact, their franchises, and other property not included in the assessment of the tangible property, were only of nominal value, and if this be true, no one is prejudiced by the return.

It is not our province to determine the wisdom or entire accuracy of this assessment. It is, doubtless, liable to grave objections on both these grounds. But this court has repeatedly held that the collection of a tax will not be enjoined simply because of errors of judgment in the assessors.

Nor is the fact that the assessment is not strictly and literally, in all things, according to the letter of the law, ground for equitable intervention. Equitable, not legal, relief is sought by the bill, and, to warrant the injunction against the collection of the tax, it should appear clearly from the allegations and proofs that the assessment works such an injury to appellant as a court of equity alone is competent to redress.

Such a case, in our opinion, is not made out, and the decree must therefore be affirmed. *Decree affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

SAMUEL H. CROWL *v.* FRANCIS C. NEAGLE.

MECHANIC'S LIEN — *Sec. 28, ch. 82, Rev. Stat. 1874., p. 668, construed.*—The plain meaning and intention of the statute, when strictly yet fairly construed, is, that mechanics and material men shall enforce their rights against all parties having, or claiming to have, an interest in the premises, by suit to be commenced against them within six months. It will not do to say that a suit was commenced against the party contracting for the labor or materials, for he may have no interest whatever in the premises. The law means that parties having an interest shall be the parties to the suit.

SAME — *Commencement of Suit.*—A fair and reasonable construction of the statute requires that a suit should be commenced against a party claiming an interest in premises within six months after the last payment was due and payable before his rights can be cut off.

SAME —*Incumbrancer.*—Where a party occupies the position of incumbrancer, the statute is clear that he should have been a party to the petition, and made so within the statutory limitation. The rights of the petitioner must be subordinate to him. Bringing him in at a time subsequent is in effect commencing a suit against him at that time.

SAME —*Lien.*—The lien given to the mechanic and material man as against creditors and incumbrances is upon the condition that suit shall be instituted within six months.

SAME —*Amendment to petition to bring in party.*—Where a party was brought into the case, after the lapse of more than two years, by an amendment to the petition, it was *held*, that so far as he is concerned there was no suit pending against

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him within the six months, but only from the time of the amendment. Also *held*, that this can have no relation back to the time of commencing suit against the original parties.

APPEAL from Cook County. Opinion filed January 21, 1878.

BOUTELL & WATERMAN, *Attorneys for Appellant.*
T. A. MORAN, *Attorney for Appellees.*

BREESE, J., delivered the opinion of the court:

This was a proceeding in the Cook county Circuit Court to enforce a mechanics' lien. The petition was filed to the June term, 1873, in which Francis C. Neagle was complainant and Clarissa Filkins, John L. Manning and Charles H. Marsh were defendants who appeared and answered, and to their answers replications were filed. At the June term, 1874, the petition was amended by making James E. Dalton a party petitioner.

No further step seems to have been taken in the cause until at the November term, 1875, when the petition was further amended on the motion of the petitioners, by making Samuel H. Crowl a defendant. Notice to him was given by publication, and at the March term, 1876, he put in a plea, duly verified, alleging that on the 16th of January, 1873, Clarissa Filkins executed to one Edwin Rogers a trust deed of the premises described in the petition, to secure the payment of $1,000 in one year from the date thereof, with interest at ten per cent per annum, which deed was duly recorded on the 18th day of January, 1873. It then avers default in the payment, a sale by Rogers on the application of the holder of the note on February 23, 1874, and a conveyance through to him, Crowl, and further averring that he took immediate possession of the premises, and has ever since remained in possession, alleging that the suit and proceedings against him were commenced on November 11, 1875, more than two years after the completion of the contract set out in the petition, and more than two years after the last payment for labor and materials became due and payable as alleged in the petition. The plea further avers that this attempt to enforce a mechanics' lien is to the prejudice of defendant as a creditor, and to the prejudice of the incumbrance made by the said Clarissa Filkins, quoting the statute.

The plea was duly set down for argument, and the same was overruled by the court, and a decree passed as prayed, reciting the sale of the interest of defendant Crowl, as well as that of the other defendants in satisfaction of the lien.

To reverse this decree, Crowl appeals, insisting that no suit was instituted against him within six months after the last payment became due and payable, and that the same is a condition precedent to the enforcement of the lien to the prejudice of any creditor or any incumbrance as in his plea alleged.

Sec. 28 of chap. 82, title "Liens," is as follows: No creditor shall be allowed to enforce the lien created under the foregoing provisions

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as against or to the prejudice of any other creditor, or any incumbrance, unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due, and payable. Rev. Stat. 1874, p. 668.

It is insisted by appellees that the institution of proceedings to enforce a lien against Clarissa Filkins, John L. Manning and Charles P. Marsh within the statutory time was a compliance with the statute, and appellant could be made a party at any subsequent time before a final decree.

This involves the construction of the section quoted, which it has not received by any adjudication of this court to which we have been referred. The lien given to the mechanic and material man as against creditors and incumbrances is upon the condition that suit shall be instituted within six months.

Appellant contends that there has been no compliance with this condition, for the reason that the suit, although commenced against the contracting party, and the then owner of the premises, was not commenced within the six months, and that he, being an incumbrancer, was not brought into the case until some three years thereafter, and should not be prejudiced by the proceedings.

The suit to enforce the lien was commenced and was pending at the June term, 1873, to which all the parties therein named appeared and answered. It is not denied that this was within the six months next after the last payment became due and payable, and therefore in time. Now the question is distinctly made and argued at great length, that although appellant purchased the premises before the petition was filed of the trustee of Clarissa Filkins, one of the defendants, and he not made a party to the suit until 1875, that as to him more than six months had elapsed, and his interest therefore is not subject to the lien.

Is this a fair construction of the statute? It is conceded no literal intendment or construction will be given to this act, and this is the doctrine of this court.

A party, therefore, seeking the benefit of this statute, must by his pleading bring himself strictly within its terms.

We think, after a careful consideration of the arguments presented to us, that the plain meaning and intention of the statute, when strictly yet fairly construed, is that mechanics and material men shall enforce their rights against all parties having, or claiming to have, an interest in the premises by suit to be commenced against them within six months. It will not do to say that a suit was commenced against the party contracting for the labor or materials, for he may have no interest whatever in the premises. The law means that parties having an interest shall be the parties to the suit. In this particular case, and it would be so in most cases, there was no obstacle in the way of making appellant a party within the six months, as the deed conveying the premises to him was on record before the petition was filed. Great hardships and difficulties would result from a different construction of this act. None can result

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from the construction we have given it, and it seems to agree both with reason and justice.

It seems to be conceded by appellee that appellant occupies the position of incumbrancer. On that concession we think the statute is clear he should have been a party to the petition, and made so within the statutory limitation.

Appellant was brought into the case after the lapse of more than two years by an amendment to the petition. So far, then, as he is concerned there was no suit pending against him within the six months, but only from the time of the amendment. This can have no relation back to the time of commencing suit against the original parties. Story's Eq. Pl., sec. 904. It is unnecessary to remark specially upon the cases cited by appellee, as they do not seem to have any direct bearing upon the point in issue.

We are satisfied a fair and reasonable construction of the statute requires a suit should be commenced against a party claiming an interest in premises within six months after the last payment was due and payable before his rights can be cut off.

No suit having been commenced against the incumbrancer, the rights of the petitioner must be subordinate to him.

Bringing him in at a time subsequent is in effect commencing a suit against him at that time. Similar views are expressed in *Dumphey* v. *Riddle et al.*, decided at this term.

For the reasons given, the decree is reversed and remanded.

Decree reversed and remanded.

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION. JUNE TERM, 1877.

ALFRED B. SAFFORD *et al. v.* THE PEOPLE OF THE STATE OF ILLINOIS.

(To appear in 85 Ill.)

INJUNCTION BY STATE COURT—*Receiver appointed by Federal court.*—Where an injunction is granted by a state court, and served on a railway company, restraining it and its servants from obstructing a public avenue in a city with its trains, etc., the same will be binding upon a receiver of the company subsequently appointed by the United States court, and such receiver, the same as a subsequent purchaser, will be punishable for contempt for disobeying the mandate of the writ.

SAME—*Punishment after removal from office.*—If the receivers of a corporation disobey an injunction against the corporation, made before their appointment, the fact that they have been removed at the time they are tried for a contempt, affords no defense whatever.

SAME—*As to receiver not actively participating.*—Where a railway company passes into the hands of receivers after it and its servants and agents are enjoined from obstructing a certain avenue, etc., with its cars, and in managing its business the injunction is disobeyed, one of the receivers cannot be exonerated because he

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took no active part in the matters complained of. It is his duty to see that the injunction is obeyed.

SAME — *Of railroad company as its agent.*—A receiver of a railway company appointed by the court to manage its business, is legally the agent of the company, although under the direction of the court appointing him.

SAME —*Powers.*— The court, in appointing a receiver for a corporation, has no power to enlarge or restrict the corporate powers and duties conferred on the corporation by its charter. The receiver is bound by the charter to the same extent as the directory. If the company is under a legal duty to perform or not to do a certain act, the same will devolve upon its receiver.

WRIT OF ERROR to the Circuit Court of Alexander County; the Hon. DAVID J. BAKER, Judge, presiding.

SAMUEL P. WHEELER, *Solicitor for Plaintiffs in Error.*

WALKER, J., delivered the opinion of the court:

It appears that on the 6th day of March, 1873, a bill was filed praying an injunction against the Cairo & Vincennes Railroad Company, to restrain it, its agents, employes and attorneys from the further use of Commercial avenue, in the city of Cairo, for loading and unloading cars, from leaving them standing thereon, or making up trains, and from using railroad tracks for switching cars or trains thereon, or for any purpose other than for transit of cars and trains over their tracks, except the company might use their tracks south of and below Sixth street for making up trains and switching, and of using their tracks below Fifth street, except at street crossings, for storing, loading and unloading cars, and of using their tracks between Seventh and Eighth streets, and between Eighth and Ninth streets, for standing passenger trains for such time as might be necessary on the arrival and departure of trains. A writ was, on that day, granted, according to the prayer, restraining them until the further order of the court. The writ was served on an agent of the company on the next day.

On the fifth day of March, 1874, plaintiffs in error were appointed receivers of the road by the United States Circuit Court for the Southern District of Illinois, and entered upon the discharge of their duty as such. They, in disregard of the injunction, caused to be switched, daily, upon the side track large numbers of cars to be loaded and unloaded, and allowed cars to be left standing on the side track in the portion of the avenue in respect of which the company had been restrained.

It is, however, set up as a defense, that they were not the agents or servants of the railroad company, but, being appointed receivers by the Federal court, they were its agents, and not amenable to nor were they restrained by the injunction of the State court, and if they were, by force of the writ, it was, in effect, annulled by a decree of the Federal court, authorizing them to perform the several acts which are charged as violations of the injunction.

The railroad company was under restraint, by an order of a court of competent jurisdiction, at the time plaintiffs in error were ap-

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pointed receivers, and no question can be, with any pretense of legal principle for its support, urged against the binding force of the injunction. According to every principle of the law, it was binding upon all persons to whom it was directed, and in the very necessities of the case its scope and operation must be broader than is claimed by plaintiffs in error. The order and writ are matters of public record, of which all persons are bound to take notice, at their peril. If the court were to enjoin a person from doing a specified act, in reference to a piece of property of which he was the owner, and he were to sell it pending the injunction, can it be possible that the authority of the law, as spoken by its appropriate tribunals, could be defied and successfully resisted by the purchaser doing the very act the law had prohibited his vendor from performing? Most assuredly not.

Suppose, in this case, the road, property and franchises of the company had been sold, would that have revoked and annulled the restraining order of the court, and permitted the purchaser to have proceeded to the performance of the prohibited act? Most unquestionably not. The authority of the law cannot be so easily evaded and thwarted. It surely has some vigor, and its decrees must have some force. To hold otherwise would be to render the courts impotent, and their power only effective so far as litigants might choose to acquiesce. In the cases supposed, besides a large number of others that might be cited, the purchaser would take the right precisely as it was held by the seller. If he were under restraint as to its use, the vendee would be under the same restraint.

In this case the injunction was against the corporation as a legal entity, and its agents, servants, etc. When the receivers were appointed by the Federal court, there was no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but simply its acts were performed by agents appointed by the court, and not by the corporation. The agents appointed by the court to perform its duties and exercise its functions, are legally its agents, although they are under the direction of the court appointing them, within the limits of its charter. The court only authorizes the receiver to exercise the privileges and perform the duties prescribed by the charter. The court does not, nor could it if attempted, enlarge or restrict the powers and duties conferred by the charter. When it appoints the receiver, the court assumes the management of the corporation under and in accordance with the charter, and is bound by its provisions to the same extent that are the directory, and the agents appointed by the court are required by it to act within the limits of the charter, and to perform all duties imposed thereby.

When the court thus seized the control and management of the road, the company was not thereby released from any debt, legal liability incurred, or the performance of any duty imposed. In this case, this company was under the duty to obey the injunction, and the Federal court did not nor could it legally dissolve the injunction

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rightfully granted by the State court. The decree appointing the receivers does not, in the least, pretend to do such an act. The petition for their appointment does not ask for it, nor does the decree in any, the remotest, manner refer to or purport to, in anywise, dissolve, modify or affect the injunction, and the law did not operate to interfere with its operation in any degree. The receivers were, then, bound to observe and obey the injunction whilst in force, precisely as though they had been appointed and were acting under the directory of the company. The decree of the Federal court neither required nor authorized them to act differently.

It appears that plaintiffs in error and two of their employes, being attached for contempt of court in disregarding the injunction, applied to the Federal court to annul the injunction, and to have the attorney causing their arrest attached for contempt of that court, and for leave to lay additional track in a portion of the avenue. Of course, the prayer to annul the order granting the injunction by the State court, and the attachment of the attorney, was not, as it could not be, granted. But the court authorized the laying of the side track, as asked, for the purpose of passing of trains, and "for standing of cars thereon, above Twentieth street, in such manner as not to unnecessarily interfere with the public right thereon, or obstruct street crossings, and only such reasonable length of time as may be required for loading and unloading such cars." Now, here was only permission to stand cars above Twentieth street, and yet these plaintiffs in error, in violation of the injunction of the State court, and in utter disregard and contempt of the order of the Federal court, permitted cars to stand on the avenue, and to be loaded and unloaded, below Twentieth street. They thus seem to have been actuated by a disregard for all authority, both Federal and State, in their management of the road in the city. When they have so acted, it is strange that we shall be asked to indorse and sanction their acts.

We do not perceive the slightest excuse for their conduct. They first defy the injunction of the State court, and when they are about to be compelled to submit to its power and authority, they, to carry out their purposes, appeal to the Federal court to abrogate the order of the State court, and punish its officers for attempting to enforce its decree, and to obtain permission to proceed in acts violative of the injunction, and, failing in that, by only obtaining leave to stand, load and unload cars above Twentieth street, they persistently continued in their purpose, and did stand and load and unload cars below that point, and then ask this court to say that such defiance of authority is legal, justifiable, and not a contempt of the authority of the state.

Nor is it any, the slightest, excuse, to say they did not know the force and effect of the injunction. They, by their petition to the Federal court, set out, in terms, the order of the judge granting the injunction, and cannot be heard to say they did not understand its force, as the language was plain, simple and easily understood by

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the most ordinary intellect. But, had it not been easily comprehended, it was their duty to learn its import. They do not say, in their petition to the Federal court, that they cannot understand its import, but they ask that it be held to be void. Even if they had not seen the writ, knowing that it had been issued, it was their duty to see and learn its import.

Nor is Safford exonerated from responsibility because he, by arrangement with Morrill, took no active part in the running arrangements of the road. He was equally bound for Morrill's acts, and, knowing of the injunction, and the limitation of their powers by the order of the Federal court, on his own petition, he was bound to see that the orders were not disobeyed by Morrill or their employes. He could not escape liability by merely remaining inactive. He was bound to act to prevent disobedience to these orders, and can not shield himself by saying others did the act.

Nor is it any defense to say, if they did defy the authority of the state, acting through its properly constituted authorities, they have been removed from the receivership, and their contempt was thereby purged. As well say, an officer committing a criminal official act cannot be punished because he has been removed from office or his term has expired.

An examination of the entire record presented to us in this case discloses no ground for a reversal, and the judgment of the court below must be affirmed. *Judgment affirmed.*

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

BARRETT B. CLARK *v.* JOHN WEIS.

TENDER—*Defined.*—Tender only means a readiness and willingness, accompanied with an ability on the part of one of the parties to do the act which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness.

INSTRUCTION—*As to tender.*—Where the jury were instructed that, in order to make a legal tender of money, "the exact amount of money then due must have been actually produced by the plaintiff in lawful money, and by him offered to the defendant," it was *held* properly refused, and that, in order to have the advantage of a tender of money, the party making the tender must keep it good.

SAME—*Evidence.*—Where the court instructed the jury that unless they believe from the evidence that the plaintiff has sustained the issues of "a contract payment, and tender of payment by the plaintiff in full performance of his part of the contract," as alleged by a preponderance of proof, then the law is for the defendant, the instruction was properly refused under the facts.

APPEAL from Will County. Opinion filed January 21, 1878.

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SCHOLFIELD, C. J., delivered the opinion of the court:

On the 27th of April, 1864, appellant executed and delivered to appellee his penal bond for $2,000, subject to the condition that he should make and deliver to appellee a deed with usual covenants of warranty for a certain tract of land, on or before the 27th of April, 1866, provided appellee paid him therefor the sum of $1,717, with interest at ten per cent.

Appellee paid appellant $100 at the time of the execution of the deed, and $500 about three months thereafter.

The declaration contains two counts. The first is special on the bond, and the second is for money had and received by appellant to appellee's use.

The issues presented by appellant's pleas were, 1st, general issue; 2d, statute of limitations, and 3d, set off. But since appellant only questions the sufficiency of the evidence, and the ruling of the court in respect of tender and payment by appellee in performance of his part of the contract, it will only be necessary to notice those questions. Appellant asked the court, and the court refused, to instruct the jury as follows: "The material issues in this case on the part of the plaintiff are a contract-payment and tender of payment by the plaintiff in full performance of his part of the contract as stated in his declaration and replication, and unless the jury believe from the evidence that the plaintiff has sustained said issues by a preponderance of proof, then the law is for the defendant, and the plaintiff cannot recover. In order to make a legal tender of money as stated in plaintiff's declaration, the exact amount of money then due must have been actually produced by the plaintiff in lawful money, and by him offered to the defendant; and unless the jury believe from the evidence that such a tender was made by plaintiff to the defendant, as stated in said declaration, then the law is for the defendant, and plaintiff cannot recover."

In order to have the advantage of a tender of money, the party making the tender must keep it good.

The evidence very clearly shows that appellant never was in a condition to make a good title to the property to appellee. His claim of title rested upon a deed which is shown to have been a mortgage-in-fact, and since satisfied, though not formally released. Besides appellant had, by quit-claim deed, expressly disposed of all his interest in a part of the property at the time the bond was executed; and at no time subsequently did he repossess himself of the title, or offer to do so. A portion of the property was also in the actual occupancy of the party claiming to be the real owner — the mortgagor — and so remained.

This party never was legally dispossessed at any time, nor does it appear that he could have been.

Under this state of facts we think the court very properly refused the instructions.

The promises of the parties here were mutual and dependent; and as a clear exposition of the law applicable, we quote from the

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opinion of Storrs, C. J., in *Smith* v. *Lewis*, 26 Conn. 110: "As the agreement required only that the acts of both the parties should be done at the same time, neither was obliged to do the first act, or, consequently, to perform his part of the agreement without or before the other. The plaintiff, in order to sustain this action, need only to show that he did what the law required of him, and all that it required was that he should be ready and willing to perform on his part, if the defendant was ready to perform on his. Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender, or offer, by the parties as applicable to the case of a mutual and concurrent promise. The word tender, as used in such a connection, does not mean the same kind of offer as when it is used in reference to the payment, or offer, to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the act which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. *Such readiness*, ability and notice, are sufficient evidence of, and indeed imply, an offer or tender, in the sense in which those terms are used in reference to the kind of agreements we are now considering. It is not an absolute unconditional offer to do or transfer anything at all events; but it is in its nature conditional only and dependent on, and to be performed only in case of the readiness of the other party to perform his part of the agreement." *Hough* v. *Rawsen*, 17 Ill. 588, and *Smith* v. *Lamb*, 26 id. 398, are in accordance with this view of the law. The latter case differs from the present only in the fact that there the party refused to convey — admitting that he had no title — while here the party did not convey — and the evidence shows that he had no title — a difference entirely unimportant in principle.

Appellee testifies that he was ready and willing, and prepared, to comply with his part of the contract whenever appellant complied with his, and that he so notified appellant on repeated occasions. It is impossible to say the jury manifested either ignorance, passion or prejudice, in choosing to believe him.

We think there was no substantial error in the ruling of the court in granting, refusing or modifying instructions, and that the verdict is authorized by the evidence. *The judgment is affirmed.*

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

CYRENUS D. STONE *v.* JOHN F. WOOD.

FRAUD—*Title to property of husband procured by fraud of wife.*—Where, the entire evidence considered, one is unable to resist the conclusion that a wife contrived the whole scheme to procure the title to her husband's property, and by fraud and misrepresentation succeeded in accomplishing her purpose, it was *held*, that a decree for the reconveyance of the property was correct, and required by the evidence.

SAME—*Relief in equity against wife—or husband.*—When either party becomes untrue to their vows and marital duties, and by fraud obtains an unjust advantage of the other, equity will as readily afford relief as it will between other persons not occupying that relation.

PRACTICE—*Irrelevant evidence in chancery cases.*—The practice in chancery cases is to decide them on the legitimate evidence before the chancellor, without regard to what may not be proper. The court does not consider the irrelevant or improper evidence in the hearing. The chancellor is presumed to know what shall be rejected and what shall not, as well on the hearing as on a motion to exclude. And on appeal, if the legitimate evidence sustains the decree it will be affirmed, but if not, then it will be reversed.

EVIDENCE—*In reference to wife's chastity—fraud.*—If a wife was not chaste and true to her husband, or if improper relations existed between her and appellant, this would not of itself prove fraud, but would be a strong circumstance in connection with others that she had entered into an alleged conspiracy to defraud her husband of his property.

SAME.—And where she was a party defendant to the suit, and her equitable claim to the land as against her husband was involved, the evidence was not improper. It tended to characterize, to some extent at least, her acts in acquiring the conveyance to herself.

COSTS—*In attachment suit.*—The costs paid when a party purchased land, and took an assignment of the judgment in an attachment suit, were a valid lien on the land, to satisfy which it could have been sold. The payment was made to discharge the lien and preserve the title, and that sum with interest should have been allowed as a credit in stating the account.

APPEAL from Knox County. Opinion filed January 21, 1878.

WALKER, J., delivered the opinion of the court:

In September, 1870, John M. Wood, who was residing in Galesburg, went to Bloomington to work, leaving his wife at home. Whilst there his wife visited him on several occasions and falsely represented to him that she had an offer of eighteen hundred dollars for the house and lot in controversy, and that it would be unsafe for him to return to Galesburg. That if the title to the property were placed in her name she could sell it without sending to him for a deed and that when she should sell the property she would pay off his debts, and with the balance they would go west and purchase a home. She advised him to go to Lincoln, Nebraska, promising

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that when the property should be sold she would join him at that place. He was thus induced to convey the property to Thomas Sabin, who conveyed it to Mrs. Wood. He soon after this went to Lincoln, Nebraska, where he arrived in August, 1871. Early in the next month she went to Lincoln, and remained a short time with him. She then assured him that she would sell the property, pay his debts, and take to him the balance of the money. After returning she wrote him that she had sold the property to Stone for one thousand dollars, five hundred to be paid down, which she would bring to him, and the remainder to be paid the 1st of June following. She sent with the letter a deed for him to execute, which he did on the 21st of December, 1871, and returned it to his wife. She had but a few days previously executed and delivered to Stone a deed by her alone for the property, but hearing that it was necessary for her husband to join in its execution, the deed sent to him was prepared for him to execute. Soon after he returned the deed she went to him in Nebraska, where he had rented a house and placed their furniture therein, which she had sent to him. After remaining a short time she returned to Galesburg, and remained there until the latter part of February following, when she again joined him at Lincoln. She at that time represented to her husband that she had received no money and she could get none, unless he would make an affidavit, that she had a certain amount of interest in it by reason of her having paid a mortgage. He signed the affidavit. She then induced him to go to Lawrence, Kansas, promising to join him there, but instead thereof, she returned to Galesburg. Soon after he returned to Galesburg, and claims to then have learned that his wife was and had been untrue to him from the time he had first left that place. The evidence, we think, clearly establishes this fact. On the 10th day of June, 1872, Stone executed and acknowledged before a police magistrate of Galesburg, an instrument in writing by which it was recited that he had advanced and loaned to Mrs. Wood $173.80, and agreed that when she should pay the same, the deed made by her and her husband should be void. Another writing similar in character to this also executed by Stone and acknowledged before the same officer, in which he declares that no part of the consideration named in the deed of Wood and wife to him had been paid, but he had loaned Sarah M. Wood, from time to time, sums of money and amounting to $173.80, for which he held her promissory note, and when it should be paid, and be released from liability, and when all conditions therein should be complied with, the deeds should be deemed and held as absolutely void, and in the meantime are held as a mortgage security for said indebtedness and liabilities hereinbefore mentioned. The bill was originally filed against Stone alone, but at the return term he demurred, because Mrs. Wood was not a party, and the demurrer was sustained, the bill amended and she made a party defendant. Answers were filed and replications put in, proofs made, and a hearing had thereon, when the court found that the conveyance obtained from Wood was procured by fraud,

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and decreed that Stone reconvey the property to him. A reference was made to the master, who stated an account of rents that were or could have been received by Stone and allowing him for repairs, and all money advanced, and on striking a balance he was found to be indebted to Wood in the sum of $105.48, and decreed that he pay it, and in default thereof that execution issue to collect the same. Thereupon Stone appeals. It is first insisted that Stone purchased in good faith. It is true that he, Mrs. Wood and Ekin also testify. But an examination of the evidence satisfies us that the transaction was fraudulent and only colorable to enable Mrs. Wood to hold the property as against her husband. That she acquired it from her husband by fraud, and Stone then or afterward became a party to the fraud. He, when he acquired the deed, took it without examination of the title, and only had an abstract thereof made some days afterward. He according to the proof could not have paid more than one hundred dollars on the delivery of the deed, and only made advances afterward to the amount in all of $323.80, and $150 of that sum was in the purchase of a judgment under which he sold and purchased in the property at sheriff's sale, and subsequently received a deed thereunder. He gave no notes, mortgage on the property or other security for the payment of the purchase money; nor does it appear that any definite time was agreed upon for its payment, by installments or otherwise. Again, he gave an instrument in writing in which, he stated that he had loaned Mrs. Wood $173.80, which, when paid, should render the deeds made by her and her husband to him absolutely void. He then let her into possession of the property, and it was proved that he admitted that he did not own it, but held it for Mrs. Wood. Nor does he offer to pay for it or secure the purchase money, but is endeavoring to hold it on the partial payments he claims to have made.

These circumstances, to our minds, most clearly overcome the evidence of these witnesses. It is impossible for us to believe that they can exist unexplained as they are, and Stone's purchase be fair and *bona fide*. They unerringly indicate that he only held the property for Mrs. Wood, and not for himself.

Ekin testifies the sale was made in good faith, but so far as we can see, this is but an expression of his belief. He appears to have acted as the agent of Mrs. Wood in effecting the sale. And he says the property was worth $1,400, when there is no pretense that appellant was to give more than one thousand dollars; and Ekin, notwithstanding he was Mrs. Wood's agent, testified that he offered to go into the purchase of the property with Stone at the one thousand dollars, the consideration named in the deeds. He thus shows himself, if really her agent, regardless of her interest, as he would, as agent, be bound to protect it, and would not be allowed to speculate on the property.

It is, however, claimed that appellant paid Mrs. Wood $173.80, and $150 on Detritch & Hoover, judgment on the attachment against the property, toward the purchase. The money was no doubt so

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paid, but he may have had it in his hands from the rents, so far as he made advances to her or knew he would be soon reimbursed the amount from that service. And he seems to have taken an assignment of the judgment and had the property sold and became the purchaser, so that he could thus be doubly secure in making the advance. If intended as a payment, why sell the property? We can see no sufficient reason for such a course. If he owed the money for the property, why not pay it? Why sell it, when he had already purchased the property and owned the money? In any view we can take of the circumstances developed by the evidence, we are unable to hold that Stone was a purchaser in good faith, but they satisfied us that he, for some reason, and most probably to aid Mrs. Wood in the fraud she was perpetrating on her husband, became the nominal owner of the title, to be afterward restored to her, as he agreed it should, on her paying him the $173.80 he had advanced her. It is next urged that appellee conveyed the property to his wife, and he is thereby estopped from recovering back the title. If the conveyance had been made by him for the purpose of vesting the title in her to hold as her sole and separate property, then the proposition would be true. But we are satisfied from the evidence that such was never contemplated by him. He testifies that it was conveyed to enable her to sell it, pay his debts, and to return to him the balance of the money. This she does not deny, but says it was conveyed to her because her money paid for it. But of the $2,100 he gave for the property, the evidence shows that she only paid $330 to release a mortgage with which the property was incumbered. And it is not claimed that there was any understanding at that time that the property was to be conveyed to her.

The first we hear of such an arrangement is when she visited him at Bloomington, when she told him if he returned to Galesburg he would be arrested and his life would be in danger, and proposed that it be conveyed to her that she might sell it, pay his debts, and with what remained purchase a home in the west. Her paying but little over one seventh of the cost of the house gave her no right in law or equity to have the title to the property. And she has received back from appellant $173.80, to which she was not entitled. So she is only out but $156.20. Nor has she appeared and assigned error because that sum was not decreed to her. Nor can appellant, even if she is entitled to it, urge it for reversal, as it in nowise affects his interests or rights. Her inducing her husband to remain in Bloomington, to go to Lincoln, Nebraska, to there rent a house and to remove the household goods there, her then inducing him to go to Lawrence, Kansas, when she with their goods returned to Galesburg, instead of joining him, all has the appearance of a scheme to keep him from returning to Galesburg, and learning the true condition of the pretended sale. In fact, the entire evidence considered, we are unable to resist the conclusion that she contrived the whole scheme to procure the title to this property, and by fraud and misrepresentation succeeded in accomplishing her purpose.

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It is, however, urged that in his affidavit he stated she had paid of her own means, toward the purchase of the house, two mortgages which are claimed to have amounted to $600 or $700. In her deposition she only claims that it was one mortgage; nor does she state in whose favor it was held, but she claims it was for five hundred dollars. We believe in this she was mistaken, as Frost swears that she paid one, and that was $330. This must be that to which she refers. He may have sworn recklessly, but if so, it was by her procurement and by making false statements, as the record does not disclose how it became necessary that he should make the affidavit to obtain the money, as she represented to him that it was. Nor can we see how it could under any circumstances have been required. She proved by Frost the payment of his mortgage with her money, but no effort was made to prove the Webster mortgage was thus paid.

There can be no doubt that a man may have relief from such frauds as this, in equity against his wife. So may the wife against the husband. There is nothing in the marriage relation that can prohibit it. If it were not so there would be a wrong without a remedy. That courts are seldom called on in such cases does not militate against the rule. It is a fraud that is not sanctified by that relation. When either party becomes untrue to their vows and marital duties and by fraud obtains an unjust advantage of the other, equity will as readily afford relief, as it will between other persons not occupying that relation. It is urged that the evidence in reference to Mrs. Wood's chastity was irrelevant and should have been excluded. Concede this to be true, still it was not error requiring a reversal. The practice in chancery cases is to decide them on the legitimate evidence before the chancellor, without regard to what may not be proper. The court does not consider the irrelevant or improper evidence in the hearing. The chancellor is presumed to know what shall be rejected and what shall not, as well on the hearing as on a motion to exclude. And on appeal, if the legitimate evidence sustains the decree, it will be affirmed, but if not then it will be reversed. This rule has been repeatedly announced by this court.

But we are not prepared to hold that it was irrelevant as showing the relations between her and her husband. If not chaste and true to him, or if improper relations existed between her and appellant, then it would be more reasonable to suppose that she with appellant would enter into a conspiracy to defraud the husband than if she were chaste, affectionate and true to her husband.

It would not of itself prove fraud, but would be a strong circumstance in connection with others. And inasmuch as she was a party defendant to the suit, and her equitable claim to the land as against her husband was involved, we cannot say the evidence was improper. It tended to characterize, to some extent at least, her acts in acquiring the conveyance to herself. All of the evidence considered, we are clearly of the opinion that it required the decree for the reconveyance of the property to appellee, and in that regard it is correct.

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It is claimed by appellant that he should have been allowed the sum of $43.05, costs paid to Detritch & Hoover, when he purchased and took the assignment of the judgment in the attachment suit against the house and lot. He swears he paid that sum as costs in addition to the $150 he paid to purchase the judgment. These costs were a valid lien on the land, to satisfy which it could have been sold. The payment was made to discharge the lien and preserve the title, and that sum with interest should have been allowed him as a credit in stating the account. The interest on that sum for three years, which we infer was the period the money was paid before the account was stated, would be $7.75, which, added to the sum thus paid, aggregates $50.80, which, deducted from the balance found by the master of $105.48, leaves $54.68, the amount he should be charged, and the decree is so modified as to require him to pay only that sum as a balance due from him to appellee, and the decree is in all other things affirmed. *Decree affirmed.*

CRAIG, J., took no part in the decision of this cause.

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

BURRADELLA G. SIMPSON *v.* SAMUEL G. LEECH.

DOWER—*In partnership property.*—A widow has no dower in partnership real estate until all partnership debts have been paid, and until all accounts between copartners have been adjusted, and any mode of sale that passes the title to the property for that purpose will bar the widow's claim to dower.

PARTNERSHIP PROPERTY—*How applied.*—Partnership property must first be applied to the payment of partnership debts, and the true and actual interest of each partner in the partnership stock is the balance found due to him after payment of all partnership debts and adjustment of partnership accounts between himself and copartners, and in equity real estate forms no exception, but stands on the same footing in this respect with personal property, no matter in whom the legal title may be vested.

ERROR to Peoria County. Opinion filed January 21, 1878.

SCOTT, J., delivered the opinion of the court:

The estate in which petitioner claims dower was partnership property and belonged to a firm of which her husband was a member. A part of the property was mortgaged by the individual members of the firm in whom was the legal title, to secure firm indebtedness.

Petitioner did not join in the execution of the mortgage, nor was she made a defendant to the bill to foreclose it. No redemption having been made by the mortgagors from the sale under the decree of foreclosure within twelve months, other creditors, within fifteen months from the date of the sale, cause an execution, issued on a

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judgment against the firm, to be levied upon the mortgaged property, and redeemed it from the prior sale. Under the latter sale defendant acquired title to the property. The other tract described was levied upon by an execution issued on a judgment recovered against the firm for partnership indebtedness, and from the purchaser at a sale made thereon defendant obtained title. All the facts material to a decision are either admitted or are so fully proven as to bar all controversy. Whatever diversity may be in the decisions of other courts on the question made whether a widow is entitled to dower in lands that were partnership property that belonged to a firm of which her husband was a member in his lifetime, and that were sold to pay partnership indebtedness, is not a new question in this court, and we do not feel called upon to enter upon any elaborate discussion of it. The exact question was in *Bobt* v. *Fox et al.*, 63 Ill. 540, and the conclusion was in such cases, the widow had no dower. It was there said partnership property must first be applied to the payment of partnership debts, and the true and actual interest of each partner in the partnership stock is the balance found due to him after payment of all partnership debts and adjustment of partnership accounts between himself and copartners, and in equity real estate forms no exception, but stands on the same footing in this respect with personal property, no matter in whom the legal title may be vested. In support of the views expressed in that case, reference was made to *Dyer* v. *Clark*, 5 Metc. 562, where this whole doctrine is most elaborately discussed.

We are not aware it makes any difference how this property was appropriated to the payment of partnership indebtedness, whether under a mortgage or execution sale, or under a decree of court for that purpose, or by the acts of the members of the firm, the principle is, a widow has no dower in partnership real estate until all partnership debts have been paid, and until all accounts between copartners have been adjusted, and any mode of sale that passes the title to the property for that purpose it is apprehended will bar the widow's claim to dower.

Whether demandant has a technical claim to dower in the premises that might be asserted in a court of law, unless barred by a decree in some proceeding to which she was made a party, is not necessary to be considered. She has chosen to come into a court of equity, and it is made to appear she has no equitable claim to dower in these lands, that are conceded to have been partnership property, and she will not be permitted to invoke the aid of a court of conscience to give her that to which she has no equitable title.

The decree will be affirmed. *Decree affirmed.*

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

TERRY, APPELLANT, *v.* ANDERSON.

STOCKHOLDER—*Individual liability.*—Where by a statute of limitations of a state, actions against a stockholder of a bank to enforce his individual liability were not barred until twenty years from the time the action accrued, and where by an act of the legislature of said state, passed March 16, 1869, it was provided that such actions accruing before June 1, 1865, should be barred if not commenced before January 1, 1871, it was *held*, that the legislature had a constitutional right to shorten the statute of limitations as to actions upon contracts already made, a reasonable time being left to enforce the contract; also, *held*, that the time given was reasonable.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

WAITE, C. J., delivered the opinion of the court:

In *Terry* v. *Tubman*, 92 U. S. 156, we decided that where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholder arose when the bank refused or ceased to redeem, and was notoriously insolvent, and that when such insolvency occurred, prior to June 1, 1865, an action against a stockholder not commenced by January 1, 1870, was barred by the statute of limitations of Georgia of March 16, 1869. That act, as recited in its preamble, was passed on account of the confusion that had "grown out of the distracted condition of affairs during the late war," and substantially barred suits upon all actions which accrued before the close of the war, if not commenced by the 1st day of January, 1870.

This is a suit to enforce the liability of the stockholders of a bank under a provision of the charter similar to that considered in *Terry* v. *Tubman*, and it is expressly averred in the bill that the bank stopped payment on the 20th February, 1865, and never resumed. The affairs of the bank were closed up under an assignment made May 24, 1866, and which paid only a small percentage upon its liabilities. The case is thus brought directly within our former ruling, but it is insisted that the act of 1869 is unconstitutional because it impairs the obligation under which the complainants claim, and as that question was not directly passed upon in the other case, we are asked to consider it now. The argument is that as the statute of limitations in force when the liability of the defendants was incurred did not bar an action until the expiration of twenty years from the time the action accrued, a statute passed subsequently, reducing the limitation, impaired the contract, and was consequently void.

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This court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins* v. *Barney*, 5 Pet. 466; *Sohn* v. *Waterson*, 17 Wall. 599; *Christmas* v. *Russell*, 5 id. 300; *Jackson* v. *Lamphire*, 3 Pet. 290; *Sturgis* v. *Crowninshield*, 4 Wheat. 206. And it is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain. We have had occasion to consider this subject at the present term, in *Tennessee* v. *Sneed*, not yet reported.

In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge, and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts.

Here nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more. The section of the statute affecting the present case is as follows:

"That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations under the statute or acts of incorporation, or in any way by operation of law which accrued prior to 1st June, 1865, not now barred, shall be brought by 1st January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement shall be forever barred."

The liability to be enforced in this case is that of a stockholder, under an act of incorporation, for the ultimate redemption of the bills of a bank swept away by the disasters of a civil war, which had involved nearly all of the people of the state in heavy pecuniary misfortunes. Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become subjects of bargain and sale as merchandise. Both the original billholders and the stockholders had suffered from the same cause. The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society de-

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manded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here, and no more. At any rate, there has not been such an abuse of legislative power as to justify judicial interference. As was said in *Jackson* v. *Lamphire*, *supra*, "The time and manner of their operation (statutes of limitation), the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment."

The Supreme Court of Georgia, in *George* v. *Gardner*, 49 Ga. 450, held that the time prescribed in this act was not so short or unreasonable under the circumstances as to make it unconstitutional, and the Circuit Court of the United States for the southern district of Georgia held to the same effect in *Samples* v. *The Bank*, 1 Woods, 529. We are satisfied with these conclusions. The circumstances under which the statute was passed seems to justify the action of the legislature. The time, though short, was sufficient to enable creditors to elect whether to enforce their claims or abandon them.

This disposes of the question arising upon the individual liability of the stockholders under the charter. It still remains to consider the cases of the stockholders whose subscriptions were not paid in full at the time of the failure of the bank. For this purpose, it is not necessary to decide whether this liability passed to the assignees under the assignment. If it did not, and the present complainants have the right to sue for it, their action is barred by the statute of 1869. It was a debt due the corporation, June 1, 1865, and by section 6 of that statute all actions upon any debt or liability due a corporation, which accrued prior to that date, and was not barred when the act was passed, must be brought by January 1, 1870. The case of *Cherry* v. *Lamar*, decided by the Supreme Court of Georgia, in January, 1877, is not, as we understand it, at all in conflict with this. There the charter of the bank made a call by the directors, and sixty days' notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions, and it was consequently held that the statute did not commence to run against such a liability until the requisite call had been made and notice given. Neither in this case nor in *Terry* v. *Tubman* does any such provision of the charter appear. For all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them.

These complainants are neither of them judgment creditors of the bank. In a suit instituted by the assignees to close up the assign-

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ment, they proved their claims, and the amount due them was found for the purposes of a dividend. The finding was sufficient for the purposes of distribution, but it has none of the characteristics of a judgment or decree, to be enforced as against anything but the fund which the court was then administering.

We see nothing to take this out of the operation of the decision in *Terry* v. *Tubman*, and the decree of the Circuit Court is therefore affirmed. *Decree affirmed.*

SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

JANUARY TERM, 1878.

GARNISHMENT.—Motion to strike plea from files.

Mr. MOSES: 69,493. This is a garnishee proceeding upon a judgment. I have served notice that I would move to strike the plea from the files.

GARY, J: The regular mode is for the garnishee to set up that the claim belongs to somebody else than the nominal plaintiff. If it appear that any credits in the hands of the garnishee are claimed by any other person by virtue of an assignment the court will permit such claim to appear and maintain his right.

Mr. MOSES: In this case I would like to have the issue tried immediately under the statute.

GARY, J: The statute says I shall do it *immediately*, Rev. Stat. 1874, 551, sec. 7, which I understand to mean as soon as I can. That is the best I can do. I can't undertake to make a special providence of myself. The legislature can't confer upon me power to do more than I do. The legislature meant that I should try the case as soon as I could. I won't pick out one class of litigated business to try it in preference to another class of litigated business. If you will try it without a jury then I will give you a hearing.

EDITOR'S NOTE.

SURETYSHIP.—The contract of surety is essentially different from that of a guarantor. It cannot be limited by bond. 8 Pick. 423; 10 Watts, 258; 1 Pars. Bills, 233. It is the duty of the surety to see that the principal performs. 6 Ves. Jr. 714. Equity will sometimes interfere in behalf of the surety to compel him to proceed at law to collect the debt from the principal. 1 Story, Eq. Jur., sec. 327; 6 Ves. Jr. 714; 4 John. Ch. 153; 13 Vt. 81. Mere delay of the creditor will not in the absence of fraud discharge the surety. *Pain* v. *Packard*, 13 John. 174. Notice by a surety to the creditor will operate to discharge the surety from liability. *Pain* v. *Packard*, 13 John. 174; 25 N. Y. 552; 17 John. 384. *Vide: Goulner* v. *Van Nostrand*, 13 Wis. 543.

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APPELLATE COURT OF ILLINOIS.

THIRD DISTRICT. NOV. TERM, 1877.

THE TOWN OF PANA ET AL. *v.* CHARLES E. LIPPINCOTT ET AL.

STATUTES.—Where there are two statutes referring to the same subject-matter, the latter is an amendment to the former, and so much of the former as is not repealed is in full force, the whole forming but one law, complete in itself, and clearly defining the only terms and conditions upon which municipal corporations could make donations to a railroad. Also *held*, that the special acts under which the donation was voted did not authorize the vote to be taken at a special town meeting called for that purpose, and presided over by a moderator, instead of an election held by the judges appointed by law for that purpose.

BONDS—*Issued without authority of law.*—Where bonds were not only issued without authority of law, but in violation of the very law recited on their face, as the authority for issuing them, they are absolutely void.

MUNICIPAL BONDS—*Purchase of bond issued without authority—laches—recitals.*—One who purchases a municipal bond issued without authority, or in violation of law, is not an innocent purchaser; the law makes it his duty to look to the authority under which the agents or officers of the town have acted, and if he neglects this duty he does so at his peril, and cannot call upon a court of equity to relieve him against his own laches. He may rely upon the recitals in the bond for some purposes, but not for the proof of the authority of the agents. When there is a want of authority such recitals are not binding on the principal.

APPEAL from Christian County. Opinion filed March 11, 1878.

HENRY & DOVE, *Attorneys for Appellant.*

THORNTON & WENDLING, *Attorneys for Appellees.*

HIGBEE, P. J., delivered the opinion of the court:

This is a bill in chancery to enjoin the collection of a special tax levied to pay the interest on $100,000 in bonds, issued by said town to the Springfield & Illinois Southeastern Railway Company, and to have the bonds declared void.

An injunction was issued, and upon answer filed the same was dissolved and the bill dismissed. The company to which these bonds were issued was formed by the consolidation of two other companies—the Pana, Springfield & Northwestern Railway Company and the Illinois Southeastern Railway Company, both of which had been created by special charters granted by the legislature of this state; and all the rights, privileges and powers of the new company are derived from these charters and subsequent amendments thereto. No legislation was ever passed in favor of the new company after the consolidation took place.

On the 30th day of April, 1870, and after the consolidation, a special town meeting was held in the town of Pana, presided over by a moderator, at which it was voted to donate to the said Springfield & Illinois Southeastern Railway Company $100,000 in the bonds of said town, to be issued upon certain conditions named in the submission, to run twenty years, and to bear interest at the rate of

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eight per cent per annum, payable semi-annually. In 1873 the bonds ($100,000) were issued by the supervisor and town clerk, and delivered to the railroad company, since which time interest has been paid on said bonds for three years, with money levied and collected in the town for that purpose.

It is insisted that the laws under which these bonds were donated and issued, limited the right of the town in making such donation to said company, to a sum not exceeding $30,000, and that they were not voted at such an election as was required by law, and that for these reasons the bonds are void. Municipal corporations like the town of Pana are created by the legislature for governmental purposes only, and have no power to engage in commerce or to make subscriptions or donations to railroads, unless the same is conferred by statute, and when such power is given by statute it must be clearly conferred and strictly pursued. *Hardin* v. *R. R. I. & St. L. R. R. Co.*, 65 Ill. 92.

The statute authorizes the consolidation of railroad companies, and provides that "said companies when so consolidated shall have all the powers, franchises and immunities which said separate companies shall have by virtue of their separate charters, before such consolidation." Had the legislature authorized the town of Pana to donate $100,000 to either of the original companies, before the consolidation? If not, such a donation to the new company, after the consolidation, would be void for want of authority. The consolidation conferred no additional power upon the town, it only entitled the new company to the benefit of whatever donation the town was authorized to make to either of the former companies.

The act incorporating the Pana, Springfield & Northwestern R. R. Co. was passed February 16, 1865. It authorized any town in *Sangamon* county to subscribe to the capital stock of said company, in any sum *not exceeding* $50,000 each, upon a vote to be taken for that purpose; but no such vote to be taken unless at a regular election for town and county officers. By an amendment to this charter, which went into force April 16, 1869, any town on the line of said road was authorized to subscribe to the capital stock of said company in any sum not exceeding $50,000, upon a vote to be taken as required by the original charter.

Neither this charter nor the amendment conferred upon the town of Pana the power to donate to the company $100,000, nor did they authorize a vote for subscription to be taken at a special town meeting called for that purpose.

It is recited on the face of these bonds, that, "this bond is one of a series amounting to $100,000, issued by virtue of authority conferred by an act of the general assembly of the State of Illinois, entitled an act to incorporate the Illinois Southeastern Railway Company, approved February 25, 1867, and an act amendatory thereof, approved February 24, 1869." It also recites an election held on the 30th day of April, 1870. The first act referred to in the bond incorporated the Illinois Southeastern Railway Company, and

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authorized towns on the line of the road to donate to said company any amount *not to exceed* $50,000, provided the same be first voted at an election to be held, canvassed and returned as other regular town elections.

No election to be held unless the directors of the road should first file with the county clerk and the town clerk a proposition to the voters, and then the vote was to be for and against the proposition, notice of the election to be given for twenty days, and if the proposition was adopted, the amount donated was to be collected by taxation and paid to the directors of the road in money. The amendment to this charter was passed February 24, 1869. It contained no express repeal of the $50,000 limitation in the former act, but provided "that any *village*, *city*, county or township organized under the township organization law of this state, along or near the route of said railway or its branches, or that are in anywise interested therein, may in their corporate capacity subscribe to the stock of said company or make donations to said company to aid in constructing or equipping said railway. It authorized an election upon a petition of twenty legal voters, required thirty days' notice of an election, and required the same to be held, conducted and returns thereof made as provided by law for general elections in this state, dispensed with registration of voters, and in case of a donation, it authorized the issuing of bonds, to run not exceeding twenty years, and fixed the interest they should bear.

Did the latter act repeal the restriction in the former? If so, the repeal must be implied from repugnancy between the two statutes. Repeals by implication are not favored by law, and are never allowed when the two statutes can be reconciled and construed together. *Bruce* v. *Schuyler*, 4 Gil. 271; *City of Chicago* v. *Quimby*, 38 Ill. 274.

The former act says, *counties and towns* may donate to the company; the latter act, that *villages*, *cities*, counties and towns may subscribe stock or donate to the company; the former act, that towns shall not donate exceeding $30,000; the latter act is silent as to the amount, and is in no sense antagonistic to the former. Both are upon the same general subject and must be construed together; the first act plainly fixed the amount which might be donated by a town and the amendment does not change it.

It is also a well settled rule of construction that a subsequent statute which is general does not abrogate a former statute which is special. *Town of Ottowa* v. *County of La Salle*, 12 Ill. 341; *Supervisors* v. *Campbell*, 42 Ill. 492.

Again it is stated that although the provisions of two statutes are different, one of them general in terms, but containing no negative words, such general provision will not repeal the prior one which is particular. *Brown* v. *Commissioners*, 9 Harris, Pa. 37; *Haywood* v. *Mayor*, 12 Ga. 404, 1 Bishop's Criminal Law, 178.

The original act was particular and definite in its term, upon a question of the greatest importance. The amendment simply extends

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the right of donation to other municipalities in general terms. To ascertain the legislative intent in passing an amendment to a former law, we must know what the original act was, for what cases it provided, what the defect in it, and how reached and changed by the amendatory act, what the mischief and what the remedy. *Jackson* v. *Warren*, 32 Ill. 339. In this case under the old law the right to donate to the company was limited to *counties* and *towns*, the amendment extended the right of donating to *villages* and *cities*. Under the old law an election was inaugurated by a proposition in writing from the directors of the company, under the new law by a petition of twenty legal voters. The notice of election by the old law was to be twenty days, by the amendment thirty days. Registration was dispensed with by the amendment, and instead of an election to be held "as other town elections" the amendment required it to be held, conducted, and returns made, as in cases of general elections under the laws of the state. Instead of cash payment the amendment authorized bonds to be issued, fixed the time they should run and the interest they should bear.

These are the important changes made in the original charter by the amendment, and show the object of its passage.

The limitation upon the amount which a town could donate was an important part of the law, placed there for the protection of the taxpayers, many of whom were liable to be compelled to help pay the sum donated without their consent and against their will, and we cannot hold that an amendment authorizing villages, cities, counties and towns to make donations to the company was ever intended to repeal it, and thereby enable these municipalities to donate an unlimited amount to the railroad company.

In the case of *Harding v. R. R. I. & St. L. R. R. Co.*, 65 Ill. 90, there were two acts, the first limited the right of the counties named (one of which was Warren Co.) to a subscription not exceeding $100,000, and required thirty days' notice of an election. The second act (unlike this) provided that said counties "are authorized and empowered to subscribe to the capital stock in *such an amount as said counties shall determine or deem best and proper*." Private Laws, 1859, vol. 3, p. 368. And that the question of subscription should be submitted to the voters "in such manner as the county authorities might determine." The only question passed on by the court was, whether the last provisions repealed the express provision in the former law requiring the thirty days' notice. In the opinion of the court by Justice Thornton we find the following language: "In the first a specific notice was required, and the number of days for which it should be given, and the manner of its publication was plainly fixed. In the second act there is nothing necessarily antagonistic to these requirements. The only words inconsistent with the continued existence of the first provision are the following: 'Such question shall be submitted in such manner as the county authorities may determine.'" They do not, by necessity, refer to the time of notice; and as both acts have reference to the same subject-matter,

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and are for the benefit of the same railway, the language of the tenth section may properly, and should, be construed to have reference to the conditions to be inserted in the notice as to the amount of subscription, the period in which the bonds would mature, and the rate of interest. Less than thirty days' notice, as required by the original act, was given, and the Supreme Court for that reason held that the county had no authority to issue the bonds.

Apply the reasoning of this case to the case under consideration, and with what show of reason can it be contended that the limitation in the former act is repealed by the amendment. Here the amendment has no reference whatever to the amount of donation, nor does its general scope and object conflict with the limitation in the former law.

But it is contended that the last act is auxiliary to, and in aid of, the former law, and should be treated as cumulative, and that a compliance with either would be sufficient.

We cannot adopt this reasoning. The latter act is an amendment to the former, they both refer to the same subject-matter, and so much of the former as is not repealed is in full force, the whole forming but one law, complete in itself, and clearly defining the only terms and conditions upon which municipal corporations could make donations to the road.

We are also of opinion that the special acts under which the donation was voted did not authorize the vote to be taken at a special town meeting called for that purpose, and presided over by a moderator, instead of an election held by the judges appointed by law for that purpose. *The People v. Town of Santa Anna*, 67 Ill. 61; *People etc.* v. *The Town of Laenna*, 67 Ill. 65. But it is insisted that the town having issued these bonds and paid interest on them for several years with funds levied and collected for that purpose, it is now too late to question their validity, in the hands of persons who have purchased them in the market for a valuable consideration. Whether this would be a sufficient answer to the manner of voting the bonds we do not decide.

If we are correct in our construction of the law, these bonds were not only issued without authority of law, but in violation of the very law recited on their face, as the authority for issuing them.

There is a wide difference between an act defectively performed under authority, and an act performed without authority, or in violation of law. The former may become binding by ratification or acquiescence, but the latter is absolutely void. The town had no authority to issue the bonds, nor has it any power to ratify them, so as to bind the taxpayers. The legislature never authorized the donation of $100,000 to be made in any manner whatever, and without legislative authority the town possesses no power to create this debt, and the bonds are therefore void. One who purchases a municipal bond issued without authority, or in violation of law, is not an innocent purchaser; the law makes it his duty to look to the authority under which the agents or officers of the town have acted,

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and if he neglects this duty he does so at his peril, and cannot call upon a court of equity to relieve him against his own laches. He may rely upon the recitals in the bond for some purposes, but not for the proof of the authority of the agents. When there is a want of authority such recitals are not binding on the principal. The Floyd acceptance, 7 Wallace, 666; *Marsh* v. *Fulton County*, 10 Wallace, 676; *Loan Association* v. *Topeka*, 20 Wallace, 660; *Elmwood* v. *Marcy*, 2 Otto, 289; *Township of Concord* v. *Savings Bank*, 2 Otto, 625; *Harshman* v. *Bates Co.*, 2 Otto, 572; *Marshall County* v. *Cook*, 38 Ill. 51; *Bissell* v. *City of Kankakee*, 64 Ill. 249; *Schuyler County* v. *The People*, 25 Ill. 181; *Clark* v. *Supervisors Hancock Co.*, 27 Ill. 305; *Baltimore* v. *Reynolds*, 20 Md. 1; *Hodges* v. *Buffalo*, 3 Comstock, 430; *Livingston* v. *Weider*, 64 Ill. 427. Dillon on Municipal Corporations, sec. 372.

The decree dissolving the injunction and dismissing the bill is reversed and the cause remanded, with directions to grant the prayer of the bill. *Decree reversed and remanded.*

EDITOR'S NOTES.

VENDOR'S LIEN.—Where the vendor's lien is retained in a contract of sale of land, though the contract is not recorded, the vendor's lien is superior to that of a judgment creditor of the vendee. *Shipe, Cloud & Co.* v. *Repass, etc.*, 1 Virg. L. J., 484.

DEEDS.—A deed perfect on its face cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void, and the deed is at once operative. *Miller* v. *Fletcher*, 1 Virg. L. J. 43.

EQUITY JURISDICTION.—Equity has jurisdiction of a suit brought by a party in possession to set aside a deed which has been placed upon record, whereby the complainant's land has been wrongfully conveyed to a purchaser at a tax sale. *Carroll* v. *Brown*, 1 Virg. L. J. 620.

ESTOPPEL.—When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter when not disclosed by the pleadings, must be shown by extrinsic evidence. *Davis* v. *Brown*, 1 Virg. L. J. 462.

EVIDENCE.—To authorize the reversal of a judgment for error in admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the adverse party. If he *may* have been so prejudiced, even though it be doubtful whether in fact he was so or not, it is sufficient ground for reversing the judgment. *South. Mut. Ins. Co.* v. *Trear*, 1 Virg. L. J. 674. To render the admission of illegal evidence sufficient ground for the reversal of a judgment, it must be *excepted* to, and must be such as *may* have been prejudicial to the exceptant. Ib.

FRAUDULENT SALES.—A bill in equity brought to set aside a sale as fraudulent, under secs. 5128 and 5129 of the Rev. Stat. of U. S. as amended June 22, 1874, must charge that the defendant *knew* that the sale was in fraud of the provisions of the bankruptcy act, and this *knowledge* must be proved in evidence. *Crump, assignee*, v. *Chapman*, 1 Virg. L. J. 309. Where such an averment and such proof are wanting, the bill will be dismissed. Ib.

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APPELLATE COURT OF ILLINOIS.

BARRETT B. CLARK *v.* SAMUEL GOTTS.

EVIDENCE—*To prove liability of parent for necessaries furnished child.*—Where appellant offered to prove all the circumstances attending the leaving of her home by the child; that the father treated her cruelly and turned her out of his house, and received the wages she was able to obtain from her labor, it was *held* that the court below erred in excluding from the jury the offered evidence.

SAME—*Testimony of two witnesses—Instruction.*—It does not necessarily follow that the testimony of two witnesses should outweigh that of one in all cases, and an instruction that it does is erroneous.

INFANT—*Furnishing necessaries to—Implied promise.*—A party furnishing necessaries to an infant is bound to inform himself of the condition of the child, and the reasons why the parent does not provide for it himself, and if it cannot be shown that the necessities of the child are the result of the parent's act, no action can be maintained upon such implied promise.

BURDEN OF PROOF—*Party furnishing means must take.*—The parent is to be the judge of the wants of the child and of his ability to supply them, and where a third party furnishes means for the support of the child, he must take the burden of showing to the satisfaction of the court and jury that the parent expressly promised to pay for the same, or show such facts and circumstances bearing upon the question of the parent's neglect and treatment, and his evident intentions, views and purposes regarding the necessities of and provision for the child, that a promise can be properly inferred therefrom.

JURY—*Disregarding testimony.*—The jury may be justified in many cases in disregarding the testimony of a witness without imputing to such witness the crime of perjury.

APPEAL FROM WILL COUNTY. Opinion filed March 20, 1878.

BARBER, RANDALL & FULLER, *Attorneys for Appellants*, cited: *Hunt* v. *Thompson*, 3 Scam. 181; *Tyler on Infancy and Coverture*, sec. 64, p. 106; 2 Kent's Com. 193; *Baker* v. *Keen*, 2 Starkie, 501; *Van Valkinberg* v. *Watson*, 13 Johns. 480; *Mortimer* v. *Wright*, 6 M. and W. 482; *Rawlins* v. *Vandyke*, 3 Esp. Cas. 252; *Stanton* v. *Wilson*, 3 Day, 37; *Call* v. *Ward*, 4 Watts and Serg. 118; 2 Kent's Com. 191; *Simpson* v. *Robertson*, 1 Esp. Cas. 17; *Ford* v. *Fothergill*, Ia. 211; *Stanton* v. *Wilson*, 3 Day, 37; *Van Valkinberg* v. *Watson*, 13 Johns. 480; *Benson* v. *Reinington*, 2 Mass. 115; *Nightingale* v. *Withington*, 15 Mass. 274; *Keen* v. *Sprague*, 3 Greenl. 77; *Plummer* v. *Webb*, 4 Mason, 380; *Gale* v. *Parratt*, 1 N. H. 28; *Day* v. *Everett*, 7 Mass. 145; *Wood* v. *Wood*, 3 Alabama, 756; *In Matter of Ryder*, 11 Paige, 187; *Chapman* v. *Cawry*, 50 Ill. 520; *Trish* v. *Newell*, 62 Ill. 202; *Aurora Fire Ins. Co.* v. *Eddy*, 55 Ill. 222; *Baldwin* v. *Killian*, 63 Ill. 551; *C. B. & Q. R. R.* v. *Van Patten*, 64 Ill. 517; *I. C. R. R. Co.* v. *Maffit*, 67 Ill. 435. Instructions should not be prolix or argumentative. *Rockford Ins. Co.* v. *Nelson*, 75 Ill. 553; *C. B. & Q. R. R. Co.* v. *Griffin*, 75 Ill. 499; *Merritt* v. *Merritt*, 20 Ill. 80; *Thompson* v. *Force*, 65 Ill. 372. They must not ignore any particular ground of recovery. *Thorne* v. *McVeagh*, 75 Ill. 8; *C. B. & Q. R. R. Co.* v. *Griffin*, 75 Ill. 407.

W. S. MYERS, L. S. PARKER, *Attorneys for Appellee*, cited: 2 Kent, 193; 1 Scam. 47; 25 Ill. 240; 1 Conley, Bl. Com. 448; Chitty's Con. 140, 141; 3 Scam. 181; 2 Am. Rep. 515; 6 ib. 499; 1 Scam. 128; 2 ib. 535.

PILLSBURY, J., delivered the opinion of the court:

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This action was originally commenced before a justice and taken by appeal to the Circuit Court of Will county. Two trials have been had at the Circuit. In the first the plaintiff recovered verdict and judgment, and on appeal to Supreme Court by defendant the judgment was reversed and cause remanded. 78 Ill. 229.

On the second trial verdict and judgment were rendered for the defendant, and the plaintiff brings the case here by appeal.

The action is brought to recover for goods sold to the wife and minor daughter of the defendant, and the defendant relies upon payment by the wife for the goods obtained by her and denies his liability to pay for the goods sold to the daughter.

The daughter was not living at home at the time she obtained the goods from appellant, and the former judgment in favor of the appellant was reversed because he did not show an express promise on the part of the appellee to pay for them or prove any circumstances from which such promise could be legally inferred.

On the retrial of the cause the appellant offered to prove all the circumstances attending the leaving of her home by the child; that the father treated her cruelly and turned her out of his house, and received the wages she was able to obtain from her labor.

The court excluded all such offered evidence and the appellant reserved an exception to such ruling and now assigns the same for error.

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act in bringing them into the world, for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterward see them perish. 1 Black. Com., p. 447.

This natural obligation is a sufficient consideration to support an express promise by a father to pay for necessaries furnished his child, and under certain circumstances may be sufficient to raise an implied promise to that effect.

While that principle of law has afforded no means of enforcing this duty imposed by nature, as such, yet the experience of mankind has shown that in certain instances the parent had not enough of that natural and inextinguishable affection which Providence has implanted in the breast of every parent, to prevent him from turning his helpless infant out upon the world, to suffer for the want of food and clothing actually necessary for the preservation of life, when the unnatural father has been of sufficient ability to maintain, protect and educate his child in accordance with this natural obligation; in such case when the stranger, who was under no such obligation to the infant, had relieved its necessities, the common law, ever ready in the interest of justice to furnish a remedy, consistent with its principles, for every wrong, inferred that the parent had promised to pay the stranger for the necessaries thus furnished his child; thereby placing the right to recover upon contract rather than enforcing the natural duty as a common law obligation.

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At the same time the rights of the parent are fully protected. A party furnishing necessaries to an infant is bound to inform himself of the condition of the child, and the reasons why the parent does not provide for it himself, and if it cannot be shown that the necessities of the child are the result of the parent's act, no action can be maintained upon such implied promise.

The parent is to be the judge of the wants of the child and of his ability to supply them, and where a third party furnishes means for the support of the child, he must take the burden of showing to the satisfaction of the court and jury that the parent expressly promised to pay for the same, or show such facts and circumstances bearing upon the question of the parent's neglect and treatment, and his evident intentions, views and purposes regarding the necessities of and provision for the child, that a promise can be properly inferred therefrom.

And it will be for the jury to say, in a given case, whether all the facts and circumstances warrant the finding of a promise expressed or implied. *Hunt* v. *Thompson*, 3 Scam. 480; *Kelly* v. *Davis*, 49 N. H. 179. Tyler on Inf. and Cov., p. 106.

In *Oatfield* v. *Warring*, 14 Johns. 188, which was *assumpsit* brought to recover compensation for supporting defendant's slave, the point was made that the facts proved did not justify an inference that the maintenance of the defendant's slave was at his request. SPENCER, J., said: "A request may be inferred from the beneficial nature of the consideration and the circumstances of the transaction."

In *Van Valkinburgh* v. *Watson*, 13 Johns. 480, the court said: "A parent is under a natural obligation to furnish necessaries for his infant children, and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril." In the case of *Bainbridge* v. *Pickering*, GOULD, J., says with great propriety: "No man shall take upon himself to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father. Where the infant is *sub potestate parentis* there must be a clear and palpable omission of duty in that respect on the part of the parent, in order to authorize any other person to act for and charge the expense to the parent."

In *Hunt* v. *Thompson*, 3 Scam. 180, it is said: "If it had been proved that it was by the command of the defendant that this son remained abroad until additional clothes became necessary and he neglected to provide them, an authority in one who should supply his omission of duty might well be presumed."

This case at bar was reversed by the Supreme Court because no reason was shown in the evidence why she did not live at home, and the circumstances proven would not justify the inference that she had

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authority to buy the goods on the credit of defendant. 78 Ill. 229.

The doctrine is here clearly implied, as stated in Tyler on Inf. and Cov., that "the child need not, however, have an express authority to bind his parent, for an authority may be implied under certain circumstances, and it is always a question for the jury whether the circumstances are sufficient for that purpose."

In *McMillan* v. *Lee*, 78 Ill. 443, the Supreme Court, while recognizing the principle that the right of recovery in such cases rests upon a promise expressed or implied, hold that where the father and mother separate and the father promises the mother to take the children with her, he constitutes the mother his agent to provide for the children and is bound to pay for necessaries furnished the child at request of the mother.

We are therefore of the opinion that the court below erred in excluding from the jury the offered evidence.

The fourth instruction asked by appellant was properly refused. It does not necessarily follow that the testimony of two witnesses should outweigh that of one in all cases. The one may be supported by all the other facts and circumstances in evidence, to such an extent that the testimony of the one induces belief as being reasonable and probable while that of the two do not. The weight of the testimony is for the jury, and while they have no right to arbitrarily disregard the testimony of an unimpeached witness, yet they are to consider it in connection with all the circumstances in proof, and applying reason and judgment to it, give it such weight as it is entitled to.

This will also apply to the fourth instruction given for appellee.

The jury may be justified in many cases in disregarding the testimony of a witness without imputing to such witness the crime of perjury.

The judgment must be reversed and the cause remanded.

Judgment reversed.

JACOB FELDMAN *v.* THE CITY OF MORRISON.

INTOXICATING LIQUOR.—*Held*, that cider is not wine, and that it is not intoxicating liquor by legislative enactment, and should be *proved* to be intoxicating.

SAME.—*Fraudulent admixture with cider unlawful.*—If there were a fraudulent admixture of spirituous, vinous or malt liquor with the cider, the sale of such a mixture without a license would be unlawful.

APPEAL FROM WHITESIDE COUNTY. Opinion filed March 20, 1878.

O. F. WOODRUFF, *Attorney for Appellant*, cited: *Kettering* v. *City of Jacksonville*, 50 Ill. 39, 42; *Caswell* v. *The State*, 2 Humph. 402; *The State* v. *Moor*, 5 Blackf. 118; *The Village of South Evanston* v. *Adam Mares*, 1 Chic. L. J. 58; Hurd's Rev. Stat. 1874, 222, sec. 68.

F. D. RAMSAY, *Attorney for Appellee.*

LELAND, P. J., delivered the opinion of the court:

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The city of Morrison, by an ordinance approved by the mayor April 29, 1874, ordained and adopted, substantially, secs. 1 and 2 of ch. 43 of the Rev. Stat. of 1874, on the subject of dram shops, except that all the words after the words "twenty dollars" are omitted. Otherwise it is in substance like the statute, and it should receive the same construction.

A suit was commenced in the name of the city against appellant before a justice of the peace. The summons was in the usual form enacted in sec. 17 of ch. 79 for justices. On the trial the defendant was found guilty as charged, and there was judgment that the city have and recover of defendant fifty dollars and costs.

The case was appealed to the Circuit Court, where there was a trial before the court without a jury. The court found the issues for the plaintiff, whereupon it was ordered that said defendant be and he hereby is fined the sum of twenty dollars, and that he pay the same to the plaintiff, with all the costs in this proceeding.

The action was one brought by the city against the defendant for selling, in June, 1877, the juice of apples, expressed the preceding October, and denominated cider. The only evidence in the cause is the stipulation of the parties, which is, in substance, as follows: That the ordinance was duly passed, setting it out that the defendant sold cider by the glass, in June, 1877, to be drank on the premises where sold, that it was drank there and in the city, and paid for at five cents the glass; that the sold cider was made in the month of October preceding, and the natural fermentation allowed to take place between the making and the sale, and that defendant kept a baker's shop and restaurant, and not a dram shop, and this was all the evidence.

It will be perceived that there was no evidence of any witness that the fluid was intoxicating liquor, and the point most strongly urged by appellant is that the judge who tried the cause below could not, if it was not intoxicating by enactment, determine that it was by applying his own general knowledge of cider and its effects upon mankind, or his special knowledge of its effect upon himself. If this fluid be either a spirituous, vinous or malt liquor, then the legislature has enacted that the cider mentioned is intoxicating liquor, and it is so by legislative enactment if in no other way. The counsel for the appellee insists earnestly that it is intoxicating *per se*, and also by legislation, as a "vinous" liquor. He does not seriously insist that cider could properly be termed a "spirituous" liquor, and we certainly have no knowledge of having heard it so denominated. It is not produced by distilling. *Walker* v. *Prescott*, 44 N. H. 511; *Caswell et al.* v. *State*, 2 Humph. 412; *The State* v. *Moon*, 5 Blackf. 118.

It surely cannot properly be called malt liquor. In determining whether cider is a vinous liquor we must take a common-sense view of what the legislature meant by the use of the word "vinous." If we could apply our judicial knowledge to the subject so far as to perceive who were legislators when the act was passed, and how

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many of them had apples to gather and cider to make and sell, we would suppose that they did not mean to include cider in the act as a fluid for the sale of which there should be a license. But let us endeavor fairly to ascertain what the word "vinous" does mean. Without endeavoring to trace it any farther back, we may say that it is derived from the Latin *vinum* (wine), and so named because made from the fruit of the vine. Wine is defined in Worcester's dictionary, after the statement of its derivation and after reference to the word in the language of many nations, and among others to the Latin *vinum*, as meaning, first, the fermented juice of the grape; second, the fermented juice of certain fruits, resembling, in many respects, the wine obtained from grapes, but distinguished therefrom by naming the source when it is derived, as ginger wine, gooseberry wine, currant wine, etc. Nothing is said about apple wine or pear wine, unless they are included in the etc. It is also said in this dictionary "that some chemists apply the term wine to any saccharine solution the sugar of which has been wholly or partially changed into alcohol."

If the city ordinance or the statute might include among the "vinous" fluids those which come from the juice of fruits which grow on vines and bushes, and are named wine, we do not think it should be construed so liberally as to apply the term *vinous* to the juice of fruits which grow on trees, and in common parlance cider and perry are never called vinous liquors, or wine, although there may be found, in works on chemistry, general expressions that "wine is the expressed juice of ripe fruits containing sugar, which causes it to readily undergo fermentation," as stated in appellee's brief. Appellee's counsel has certainly made a very scientific and thorough examination of the subject, and we have read his brief with much interest, but we still think that cider is not wine, and that it is not intoxicating liquor by legislative enactment, as "vinous." If it has not been enacted to be such, then we think it should have been proved upon the trial to have been intoxicating, and that, as there was no testimony to that effect, the finding was not supported by the evidence.

It is evident that the object of the legislation that spirituous, vinous and malt liquors were intoxicating, was to render it unnecessary to prove it on the trial. Where the statute simply imposes a penalty for selling intoxicating liquor, without naming any kind as such, cider should, we think, be proved to be intoxicating.

If cider had been named in the statute or ordinance, and its sale prohibited under penalties, then the case of *Kettering* v. *City of Jacksonville*, 50 Ill. 39, would be in point for appellee. See, also, *Com.* v. *Dean*, 14 Gray, 99, as to cider when named in the act.

It was, therefore, a question of fact whether cider of the kind sold was intoxicating liquor, to be determined by the jury, or by the court acting as a jury. Suppose that cider of a certain age may have enough of alcohol in it to produce intoxication, if the quantity taken is large enough, still it might be that no amount of the kind sold in

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this case could be taken large enough to produce such effect. Cider, for some period of time after the juice is pressed from the apple, has no intoxicating principle in it at all, and if a jury could say that it was intoxicating liquor in June, without evidence, could they also say just what time between October and June it became so? When did acquitting days end and convicting days begin? We do not think the fact whether the cider in this case was intoxicating when sold was one to be ascertained by jurors by applying their own knowledge only. Though courts have taken judicial notice, and have said that jurors might from their own knowledge alone determine that whisky, brandy and other liquors which are always intoxicating, were so, this should not be so as to that which might or might not be an intoxicating fluid when sold, but only to that kind which is always so, and known to everybody to be so.

We have not deemed it necessary to refer to any adjudged cases on the subject, as none were cited in the brief of appellant or appellee. In our judgment, however, cider is not within the spirit, or, more accurately speaking, not within the liquor, of the act. It could not have been intended that a farmer who desired to sell cider on the farm in quantities less than a gallon, or who may have desired to take a barrel of it to a fair, to be retailed by the glass, should first obtain a license to keep a dram shop, nor should the giving a glass to a minor on a farm violate sec. 6. Nor do we consider that the act was intended to induce persons situated as the defendant is, who sell cider, and not any spirituous, vinous or malt liquors.

A dram shop is defined as a place where spirituous, vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act. Under the maxim that the expression of one is the exclusion of another, the fluids not included among those for the sale of which a license is necessary should be excluded, and no license as to them be required. The license under sec. 4 would, of course, be one to sell spirituous, vinous or malt liquors. To sell without license that which should be licensed would be an offense. To sell that without license for selling which a license need not be obtained could not be an offense.

It being made necessary only to obtain a license to keep a shop where spirituous, vinous and malt liquors are sold, it cannot be necessary to have a license to keep a place wherein fluids which are not spirituous, vinous or malt liquors may be sold.

Intoxicating liquor, therefore, mentioned in the second section, is that kind for which it is necessary to have a dram shop license. As there are so many fluids in which alcohol is contained, either in an infinitesimal or slight quantity, and as alcohol when used as drink is intoxicating, either in a perceptible or imperceptible degree, the legislature deemed it proper to draw a line somewhere, and though there may be no good reason why very old cider and lager beer should not be on the same side of it, it was drawn, in our judgment, between those fluids which were spirituous, vinous and malt liquors on the

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one side, and those which do not come within that definition on the other, though they may contain some alcohol, the idea being to prohibit the sale, without a license, of those fluids the drinking of which produced a substantial perceptible intoxication by the use of them. And these were defined as aforesaid.

Of course, if there were a fraudulent admixture of spirituous, vinous or malt liquor with the cider, the sale of such a mixture without a license would be unlawful.

As there is no case made against the defendant, according to the facts as stipulated, the judgment is reversed.

Judgment reversed.

CROFT PILGRIM v. THOMAS MELLOR.

JURISDICTION OF JUSTICE OF THE PEACE—*In actions for damages to real estate lying in different counties.*—A justice of the peace has jurisdiction to try a cause commenced before him to recover for an injury done by erecting a dam upon premises in his county so as to obstruct the natural flow of the water, and produce an injury to the adjoining land of the plaintiff lying in another county.

PILLSBURY, J., dissenting, *held* that a justice of the peace derives his jurisdiction from the statute alone, and that the statute has not conferred upon him the jurisdiction in actions for damages to real estate located in a county different from his territorial jurisdiction.

APPEAL FROM STARK COUNTY. Opinion filed March 20, 1878.

MILES A. FULLER, *Attorney for Appellant*, cited: Rev. Stat. 639, sec. 18, div. 2; 1 Chitty's Pl. 269; Gould's Pl. sec. 108; 1 Chitty's Pl. 269; Gould's Pl. 3, sec. 108; Bulwer's Case, 7 Coke, p. 60; Bac. Ab., Actions A., p. 81; *Mayor etc. of London* v. *Cole*, 7, Term R. 583; Comyn's Dig., Actions N, 3, 11; *Bordon* v. *Crocker*, 10 Pick. 383; 14 Eng. Rep. (Moaks) Notes on p. 641 and 642; *Com.* v. *Lyons*, Penn. Law Jour. 167; 2 Wharton's Crim. Law, sec. 1812; Gould's Pl., ch. 3, sec. 109; Story on Conflict of Laws, sec. 539; *Eachus* v. *Trustees*, 17 Ill. 535, and authorities cited; Rev. Stat. 1845, 413, sec. 2; Rev. Stat. 1874, 775, sec. 2; *Genin* v. *Grier*, 10 Ohio, 209; *Eachus* v. *Trustees*, 17 Ill. 538; *Wooster* v. *Winnipiseogee*, 5 Foster, 525; 2 Bouv. Law Dic. 79; ib. 634, and authorities therein cited; 2 Waterman on Trespass, 446; *Mersey and Irwell Nav. Co.* v. *Douglas*, 2 East. 497; *Harmer* v. *Raymond*, 5 Taunt. 789 (1 Eng. R. 483); 1 Hill, Torts, 659, sec. 29; *Loeb* v. *Mathis*, 37 Ind. 306; *Thompson* v. *Crocker*, 9 Pick. 59; *Eachus* v. *Trustees of Ill. & Mich. Canal*, 17 Ill. 534; Tyler on Ejectment, 382, 3; *Munkhart etc.* v. *Hankler*, 19 Ill. 47; *Reed* v. *P. & O. R. R. Co.*, 18 Ill. 404; *Sturman* v. *Colon*, 48 Ill. 463; *Whitaker* v. *Forbes*, 15 Eng. R. 234.

C. K. LADD, *Attorney for Appellee*, cited: Rev. Stat. 1874, 269; *Corp. of N. Y.* v. *Dawson*, 2 John. Cases, 335; *Sterenson* v. *Lambard*, 2 East. 579; *Barker* v. *Damer*, 3 Mod., 338; *Wey* v. *Yally*, 6 Mod., 194; *Sir Stephen Bord* v. *Cudmore*, Croke's Car. 183; 1 Chitty's Pl. 271. Trespass *quare clausum fregit* is local, and must be tried in the county where the land lies. Selwyn's N. P. 1253; Stephens' N. P. 2639; Gould's Pl., ch. 3, sec. 107; 1 Chitty's Pl. 268; *Daulson* v. *Matthews et al.* 4 Term, 503. Actions on the case for injury to realty *are* local, and must be brought in the *forum rei sitæ*. *Watt's Admr.* v. *Kinney*, 23 Wend. 485; *Eachus* v. *Trustees etc.*, 17 Ill. 535; *Mott* v. *Coddington*, 1 Robt. 267; *Watt's Admr.* v. *Kinney*, 6 Hill, 82; 2 East. 502; *Thompson* v. *Crocker*, 9 Pick. 59; *Daulson* v.

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Matthews et al. 4 Term, 503; *Bulwer's* case, 7 Coke, 60; *Mayor etc. of London* v. *Cole*, 7 Term R. 583; *Bordon* v. *Crocker*, 10 Pick. 383; *Livingston* v. *Jefferson*, 1 Brock. 203; *Genin* v. *Grier*, 10 Ohio, 209.

B. F. THOMPSON, *Attorney for Appellee*, cited: 3 Bouv. Inst. 71; Rev. Stat. 1874, 639, sec. 13; 1 Chit. Pl. 268; Stephen's Pl., Tyler's ed., 274; Gould's Pl. 105, sec. 107; 2 Bouv. Law Dic. 79; 2 Kent's Com., 11th ed., p. 602; Story's Con. of Laws, 5th ed., sec. 554.

SIBLEY, J., delivered the opinion of the court:

The only question to be determined in this case is whether the justice of the peace in Stark county had any authority to try the cause. Suit having been commenced before a justice in that county by Croft Pilgrim against Thomas Mellor, where both parties resided, to recover for an injury done by the defendant in erecting a dam upon his own premises, situated in the county of Stark, that so obstructed the natural flow of the water as to produce an injury to the adjoining land of the plaintiff lying in Bureau county. The cause was removed to the Circuit Court of Stark county, and there dismissed for want of jurisdiction in the justice to try the case.

An appeal was taken from that ruling to this court, and is here assigned for error.

That the action is local in its nature, and as a general rule in such cases, suit must be brought in the county where the land is situated, are propositions which admit of very little dispute.

But it is insisted by appellant that cases like the present one form an exception to the general rule. That is, where an act is done in one county which produces an injurious effect in another, the remedy may be enforced in either. We have been referred to a number of authorities in support of that position. Not many of them, though, are directly in point. The books, indeed, are quite barren of decided cases upon the precise question. It is true that most of the elementary writers concur in stating the law as settled in favor of the position assumed by appellant. 1 Chitty's Pl. 269; 3 Black's Com. 294, and note 4, Com. Dig., Art. 11–67; Com. Dig. 250, 251; Gould's Pl., 108.

This doctrine originated chiefly from the decision in Bulwer's case, 7 Coke, 63, although reference is there made to the ruling in the year-books in the Abbot of Stratford's case, where a similar question arose. The principle, however, in the former case is stated in broad and general terms, that "in all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, then the plaintiff may choose to bring his action in which of the counties he will."

This view of the law was sanctioned in the *Mayor of London* v. *Cole*, 7 Term R. 583, where Lawrence, Judge, says that "the rule in Bulwer's case gives a decisive answer to the application: it shows that where several material facts arise in different counties, the plaintiff may bring his action in either."

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In *Olephant* v. *Smith*, 3 Penn. 180, it is said "that every action founded upon a local cause shall be brought in the county where the cause of action arises. . . . The only exception to this rule is the erection of a nuisance in one county to the injury of lands in another. There the action may be brought in either"—and reference is made to Bac. Ab. 56, 57 and 58; Com. Dig. 250, 251. So in *Borden* v. *Crocker*, 10 Pick. 383, the rule in Bulwer's case is indorsed in the following emphatic language by the court: "The plaintiff may unquestionably maintain his action in either county—in Bristol, where the obstruction was raised, as well as in Plymouth, where the injury was sustained. The law to be collected from Bulwer's case is decisive upon this point. When one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he will bring his action."

Angell on Watercourses, 420, states the law to be, "when an injury has been caused by an act done in one county to land, etc., situate in another, the *venue* may be laid in either. The law to be collected from Bulwer's case is decisive upon this point. When one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he shall bring his action."

A single case has been referred to, and doubtless the only one that can be found by appellee, where the point has been expressly decided against the ruling in Bulwer's case.

In *Warren* v. *Webb*, 1 Taunt. 379, referred to, a nuisance had been created in the county of Surrey, by the defendant's permitting the water from his eaves trough to escape through the plaintiff's wall in that county, and suit was brought in Middlesex, where Lord Mansfield held it could not be maintained.

Also in *Mersey & Irwell Navigation Co.* v. *Douglass*, 2 East. 502, nothing was there decided except that the particular place in the county need not be correctly averred in the declaration. No reference was made to this exception to the rule in local actions. Nor is the case of *Thompson* v. *Crocker*, 9 Pick. 59, to the point; for in that case the action was commenced in the county of Plymouth, where the injury was sustained; and it was held that the suit was properly brought. What was said about that being the only place to bring the action was mere *dictum*, and afterward overruled in *Borden* v. *Crocker*.

The case of *Eachus* v. *Trustees of Illinois & Michigan Canal*, 17 Ill. 534, and many other cases of that character, were decided upon quite a different principle. There the land injured was situated in a foreign jurisdiction, and for that reason alone the courts refused to entertain the action. Angell, in his Treatise on Watercourses, sec. 421, remarks that "it is hardly necessary to point out the difference there is as regards actions and suits between the relation of *counties* in the same state, and the relation between two distinct and independent states."

The case alluded to where the exception to the rule in local

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actions of a character like the one before us, was repudiated in that of *Master* v. *Winnepiseogee Lake Co.*, 5 Foster, 525.

There it was held that the action could be maintained only in the county where the land was situated that sustained the injury. The authorities are reviewed in a very able opinion delivered by Chief-Justice Gilchrest, and the conclusion arrived at was that the rule established in Bulwer's case, and subsequently recognized and adopted by the courts and elementary writers, was "founded upon reasons which had long since ceased to exist," and therefore should be abrogated. We are unable to subscribe to the conclusion, or the reasons assigned for it.

Even if the reasons that led to the adoption of this rule have ceased to exist, it does not necessarily follow that the rule itself should be annulled. As, for instance, the reasons for selecting a jury to try the cause from the vicinage where the controversy arose has long since ceased to exist, but the practice of taking them from the body of the county where the crime was committed, or the suit is being tried, has continued as a wise one from the time of the year-books until the present day, without any very general desire to change it. Besides, in what respect has the reason ceased to exist which led to the establishment of this rule, since it was adopted? By a legal fiction the court in ancient times permitted a party to bring suit in what was termed transitory actions, in any county within the realm where the defendant could be found, by stating in the declaration where the cause of action arose, and adding under a *videlicet*, the county where the suit was brought. This was done for the purpose of facilitating the administration of justice; and was the reason any less forcible, or has it ceased to exist, for allowing a party to elicit, in cases like the present one, to sue the defendant in either county where he might be found, or, as in the case we are considering, be deprived of any remedy at all except in some Superior Court, that has the power to send its process out of the county?

If a man is required to answer for his own wrongful act, is there any good reason why he should not be made to respond in the county where he committed the deed which produced the result, as well as where the injury was sustained? It is no answer to say that the defendant had a perfect right to construct the dam on his own ground, and therefore he committed no wrongful act in the county of Stark, for which a suit would lie against him.

If every person is free to use his own property as he may desire, he cannot do so in such a way as to encroach upon the rights of his neighbor. Hence the appellee, in constructing this dam upon his own land, knowing at the same time that in the ordinary course of things it must cause the injurious flooding of appellant's premises, he was doing an act which he had no right to perform. For in that case he was making use of his land in such a manner as to interfere with the rights of adjoining proprietors.

Being unable to discover any valid reason why he should not be made to answer for that wrongful use in the county where the act

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was committed, the judgment of the Circuit Court will be reversed, and the cause remanded. *Judgment reversed and remanded.*

PILLSBURY, J., dissenting.

A justice of the peace derives his jurisdiction from the statute alone, and the statute has not conferred upon him the jurisdiction in actions for damages to real estate located in a county different from his territorial jurisdiction.

The opinion admits that the action is local, and the injury occurred in Bureau county. That being so, the justice cannot look to the common law to aid his jurisdiction, but is concluded by the statute.

MARY ORR *v.* MAGDALENA JASON, ADMINISTRATRIX OF THE ESTATE OF JOHN JASON, DECEASED.

INSTRUCTION—*As to preponderance of evidence*—A jury may be instructed that the preponderance of the evidence should be *satisfactory*.

SAME—*As to the effect of modification.*—Where the only effect of the modification of an instruction by the court was to mislead the jury, it was *held* a substantial error to change it.

SAME—*Where "not" is left out.—Held*, that where the negative "not" was evidently left out in an instruction, it was clearly erroneous, and sufficient to entitle a party to a reversal.

SAME—*When wrong as to the facts.—Held*, that where an instruction was wrong as to the facts in the case it was error.

EVIDENCE—*Circumstances tending to show payment.*—Where the witnesses for appellee were allowed to state that the deceased was prompt in the payment of debts, it was *held* proper. It is always allowable to show the necessity of the creditor and the ability of the debtor, as circumstances tending to show payment.

SAME.—A circumstance shedding light upon the intention of appellant and of the deceased as to whether there was a liquidation and a promise to pay, *held* admissible.

ALSO *Held*, that if there was actually a promise to pay a sum agreed upon and liquidated between the parties, it would not make it any the less a promise that the deceased made a will that the debt so promised should be paid.

APPEAL from Marshall County. Opinion filed March 20, 1878.

BARNES & MUIR, *Attorneys for Appellant*, cited: Greenl. Ev. 73, sec. 52, p. 58; secs. 55, 54; *Cuose* v. *Rutledge*, 81 Ill. 266: Phillips' Ev. 624, 625; 3 ib. 639; Rev. Stat. 1874, 488, 489; *Crabtree* v. *Reed*, 50 Ill. 206; *Miller* v. *Belthaser*, 78 Ill. 302, 305; *Miller* v. *Miller*, 16 Ill. 292; *Freeman* v. *Freeman*, 65 Ill. 106, 109, 110; *Frizell* v. *Cole*, 29 Ill. 465, 466, 467; *Straubher* v. *Muhler*, 80 Ill. 21, 24; *Rafferty* v. *The People*, 72 Ill. 45, 46; *Badger* v. *Paper Manuf. Co.*, 70 Ill. 302; *McRea* v. *McRea*, 3 Brad. N. Y. 199; *Hewitt* v. *Johnson*, 72 Ill. 513, 515; *Holmes* v. *Hale*, 71 Ill. 522, 553; *Hatch* v. *Marsh*, 71 Ill. 370, 374; *C. B. & Q. R. R. Co.* v. *Griffin*, 68 Ill. 499, 507; Rev. Stat. 1874, p. 676, sec. 19; *Thompson* v. *Reed*, 48 Ill. 118; *Humphrey* v. *Phillips*, 57 Ill. 132, 137.

BANGS, SHAW & EDWARDS, *Attorneys for Appellee*, cited: 3 Phillip's Ev. 505, 300, 381, 285, 457; *Ross* v. *Darby*, 4 Mumf. 428; 63 Ill. 227; 6 Casey (Penn. Stat.

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30), 473; 2 Wright (Penn.) 534; *Davis* v. *Goodenow*, 1 Williams (Vt.) 715; *Parker* v. *Johnson*, 25 Ga. 576; *Peak* v. *People*, 76 Ill. 289; *Long* v. *Hitchcock*, 9 Car. & P. 619; *Lauz* v. *Frey*, 7 Harris (19 Penn.) 369; 1 Starkie, 543; 5 Watts & Sergt. 357; 6 Gil. & Johns. 316.

LELAND, P. J., delivered the opinion of the court:

This was an action by Mary Orr, the wife of William T. Orr, against her mother, Magdalena Jason, as administratrix of the estate of her father, John Jason.

The suit was brought by appellant to recover $3,000 claimed to have been an amount agreed upon and fixed as compensation for some twelve and a half years' labor by appellant for her father, in his lifetime, after she became of age.

The defense was that she continued with her father after she became of age as before, and that the relation of debtor and creditor never existed. There was also a plea that the causes of action did not accrue within five years next preceding the commencement of the suit. (This should have been five years next preceding the death, etc. See sec. 19, p. 676, Rev. Stat. 1874.) Replications, 1st, that they did accrue, etc., and 2d, a promise by deceased within the five years, etc. Trial, and verdict for the defendant.

Jason, the deceased, was a Dane, and there was evidence tending to show that the appellant, during the twelve and a half years, performed the ordinary farm labor usually done by men. It was contended by appellant, with evidence tending to show it, that it was constant, and by appellee, supported by evidence to that effect, that it was occasional only, and that it was not unusual for females similarly situated, of Danish descent, to do such work occasionally.

There was evidence tending to show that appellant's father, during his last illness, said to her in the presence of witnesses, whom he desired to pay particular attention: "Mary, I want you to have $3,000 to pay you for your work, out of my property, and then come in equal shares with the rest." There was also evidence that an attempt had been made to prove this up as a nuncupative will, and that the question whether it was a will or not was then pending in the Circuit Court, on appeal from a determination of the County Court that it was not a will. There was evidence to the effect that the father was very low and near his end when the statement was said to have been made. It was also contended by appellant, and there was evidence tending to show it, that her father, a day or two after this, gave her $750 for her trouble nursing him during *her* sickness, and that it was not to be part payment of the $3,000, but a gift, or gratuity, in addition thereto. This is a sufficient statement of the controversy for the purposes of this opinion. We do not propose to say anything as to the weight of the evidence, as the case must be passed upon by another jury; but we will confine ourselves to the rulings of the court below, which we deem erroneous.

The first error assigned, to which our attention is directed, is that

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witnesses for appellee were allowed to state that the deceased was prompt in the payment of debts. We see no objection to this. It is always allowable to show the necessity of the creditor and the ability of the debtor, as circumstances tending to show payment, and there was evidence in the case tending to show that the father had paid Mary for her labor. We see no reason why promptness is not as proper to be shown as ability. The authorities cited by appellee we think in point. The only objection to the introduction of the supposed will is that the jury might fear that if the plaintiff got a verdict, she might also claim the same amount again under the will; that it was irrelevant, etc. We hardly think that the jury would consider that the payment of the amount as a debt would not amount to a payment of the legacy. We are disposed to think that the introduction of the will, and the proceedings to probate it, if such proceedings were with the consent of appellant — and we think there is evidence tending to show that she did consent thereto — was proper in determining whether the $3,000 was in the nature of a gratuity or bequest of that amount as her share out of the estate, instead of in addition to it. The mother testifies that the deceased said that he intended that Mary should have $3,000, if she, the mother, was willing, in either money or property, but that he did not say that she should have that and then come in equal shares with the rest. Considering the amount of the estate of the deceased, and that there were other children, this would seem full as just as that appellant should have $3,000, and not treat the $750 as a payment to that extent, but have it added to it, and then divide equally with the rest. As a circumstance shedding light upon the intention of appellant and of the deceased as to whether there was a liquidation at $3,000 and a promise to pay it, we see no objection to this evidence. If there was actually a promise to pay $3,000, as a sum agreed upon and liquidated between the parties, it would not make it any the less a promise that the deceased made a will that the debt so promised should be paid. If the paper was not a will, but a promise merely, then appellant might have asked the court to instruct to that effect for her. We think the general question to appellee: "Just state what the arrangement between you and your father was"—was too broad, as an answer to it, if permitted, would have allowed the appellee to have testified fully in relation to conversations or transactions about which the other interested witnesses had not spoken. It was the duty of counsel to have called the attention of the witness to the particular transaction or conversation mentioned by such other interested witnesses. We think that she might have been asked whether it was true as stated by the witness, that she was to have a dollar a day when she worked in the field, and nothing when she worked in the house? Whether it was true or not that her father treated her the same after as before she came of age? Whether it was true or not that her father always paid right up? Whether it was true or not that nothing was said as to how much she was to get until John became of age? etc. We are

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aware it is rather difficult sometimes to say what a "transaction," mentioned in the statute, is. In the case of *Donlevy* v. *Montgomery*, 66 Ill. 227, it was thought by the court below that when it was proved that Donlevy admitted a fact, that he might say that he did not make any such admission, and that he knew he did not, because the alleged admitted fact did not exist, but on the contrary it was otherwise, stating what the fact was. The ruling was considered improper, and that he should only have been permitted to deny that the conversation took place, and stop there, without stating the real facts, as that made him a witness as to the whole controversy, and not as to the conversation. It might plausibly be said that the real "transaction" testified about in this case was whether the father did liquidate the amount for the work, and promise to pay the $3,000, and that the interested witnesses were testifying to facts and circumstances tending to show that this could not be so. We think each one of the facts and circumstances tending to prove the main thing is the "transaction" about which appellant might speak, and that her attention should have been called to each of these, and not to the conclusion they tended to prove. She was permitted to say, and did say, that her father never paid her for her work; that there was an agreement that he was to pay her; that there was no arrangement by which she was not to get pay for work done in the house; that he never said he did not owe her; that nothing was ever said about settling up; that she never had any controversy about settlement. She also testified fully as to the liquidation and promise to pay $3,000. Indeed, she really did deny everything that the other interested witnesses said on the subject. So far as the rulings as to the evidence are concerned, we discover no substantial error; but we think some of the instructions are so erroneous as to require a reversal, and the submission of the question to another jury. There are errors to which we do not allude as to some of the instructions.

It is not necessary to examine them all critically. We do not consider it objectionable in a case like this that the jury should be instructed that the preponderance of the evidence should be *satisfactory*, and the cases cited by appellee sustain the position assumed. The modification of the seventh instruction asked by appellant was, we think, improper. The instruction, as asked, read as follows:

"If the jury believe from the evidence that John Jason, during his last sickness, promised to pay the plaintiff $3,000 for services said to have been rendered, and plaintiff assented to said sum, then in law it can make no difference in its legal effect in this case, that at the same time Jason may have or did call the attention of other parties as witnesses to said promise, and repeated the same, if the evidence shows that he did so in the form of a will or request that the same should be paid out of his estate, and that the plaintiff may have taken steps to establish the same as an oral will, as the real question in this case and on this point is whether or not the said John Jason did promise to pay the said sum of $3,000 in consideration and as a compensation for the services rendered by her."

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This instruction was a clear and accurate statement of the law, and it should have been given unchanged. The court, however, so changed it as to render it less clear, and also made it inaccurate as a legal proposition by inserting between the words "did so" and "in the" the expression, "*and did not intend to make a devise or bequest*," and also, after the words "oral will," this expression: "*And if, in fact, he did not intend his declaration as a will.*"

This was calculated to create the impression with the jury that, although there might be a distinct promise to pay the $3,000 for the labor, the plaintiff could not recover if the deceased at the same time intended to direct by said last will and testament that the debt so promised should be paid out of his estate, or, in other words, that as there was offered in evidence what purported to be a nuncupative will, if the jury thought it really was a will, then the plaintiff could not recover on the promise to pay the $3,000, though it was clearly proved.

The plaintiff was entitled to the instruction as asked, and if the only effect of the modification was to mislead the jury, it was a substantial error to change it.

The qualifications to appellant's eighth instruction should not have been made. The substance of the change was this: The instruction stated, among other things, that if the deceased said that plaintiff was to have $3,000, and asked plaintiff if she was satisfied, and she said she was, the estate would be liable, etc. The court added the words, applying them to appellant, "and accepted said promise and agreed to take said sum as payment." The instruction was accurate as asked, and the amendment was calculated to impress the jury with the idea that a mere statement by appellant that she was satisfied was not sufficient, that is, that she should also have added that she accepted the promise and agreed to take the $3,000 as payment. The ninth, which was on the subject of the promise to pay the $3,000, and as to whether it was a gratuity or a promise to take the indebtedness out of the statute of limitations, was modified by the court by adding these words at the end of it: "If you believe, from the evidence, the deceased owed the plaintiff what he promised to pay, or any part thereof, in such case the jury should find what is due plaintiff, if anything, from all the evidence as laid down in these instructions." The language is not entirely clear. It seems to us that the idea intended was that, though you may believe the promise was for $3,000, you should not find for that amount, but should find from all the evidence according to the principles of the instruction taken as a whole what was due, as though there were no promise to pay $3,000, that is, that the promise to pay $3,000 would only include what was actually due, if less than that, in the judgment of the jury, from all the evidence before them. It may, perhaps, be said that if this qualification was wrong it did no harm on the trial below, if it might on another, because the jury did not find anything for plaintiff, and therefore there was no lessening of the $3,000 to a smaller sum, as they were directed they might do. The instruction was

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wrong as to the facts in this case, because there never had been, according to the evidence, any adjustment or liquidation of an amount, and the promise of $3,000, if made, was both a liquidation and promise to pay for an unliquidated claim for twelve and a half years' work. If it was meant to say $3,000, less payments, if any, it should have been clearly so stated. Exception is taken by appellant to the giving the first instruction for the appellee, as well as to others. We will only consider the first, as we deem that it is clearly defective. It would extend this opinion to too great length to examine all the objections to instructions, and state whether they are well or ill founded.

If the objections made are important, appellee's counsel will guard against the errors on another trial.

The first instruction given for appellee is as follows: The jury should consider with care and caution any casual conversations, if any, not had in relation to the matter in dispute, and tending to adjust or determine the rights of the parties in relation to the matters under consideration in this case; such conversations as were had, if any, with third persons having nothing to do with fixing or adjusting the rights of the parties as to the matters in controversy.

The criticisms of the appellant's counsel as to this instruction being obscure and not sensible, is well enough. To those conversant with the mistakes incident to the hurry of trials in the Circuit Court it is apparent that the word "not" has been omitted between the words "and" and "tending." The word may have been in the mind and not placed on the paper by the writer, or the writer may have thought the "not" before the word "had" should be applied to the "tending." Jurors, however, would hardly know what was meant. Treating the negative as applicable to the "tending," etc., we think the giving the instruction was clearly erroneous, and so much so as to entitle appellant to a reversal in this cause, although we might imagine a state of case where there could properly be an affirmance, notwithstanding the giving it. The all important thing for appellant to establish was whether her father promised to pay her the $3,000 for her services. The evidence as to this consisted in that of those who were present when it was made. They say the father did make the promise, and called upon them as witnesses to remember it. The appellee herself says there was talk by her husband on the subject. She understood him, however, that the $3,000 was to be all appellant was to have out of the estate. The witnesses at whom this instruction was aimed were Philip Martin and Martin Degner. It was their evidence that was to be considered with care and caution. It was their evidence which the court declared was to that of persons listening to casual conversations. It was the declaration of the deceased John Jason, to them, which the court actually decided to be casual instead of leaving it to the jury to determine whether it was so or not. What was this evidence? Martin says: "I heard Jesse Bane ask Jason if he had some money to loan, and if he could let him have some. Jason said he would not, that he

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owed Mary $3,000, and wanted to pay her." Witness also stated, that in another conversation with Jason at another time on Mr. Orr's farm, Jason, speaking of an adjoining eighty acres, said: "Orr ought to buy it; I owe his wife $3,000, and could pay for it." Degner says he heard the talk with Bane. Bane wanted to borrow money. Jason said he could not let him have it; that he owed Mary $3,000, and wanted to pay it; that she had worked like a man for twelve and a half years; that he owed her $3,000, and must pay her off. He also says that they conversed in German, after the others left, about Jason's affairs generally, and that Jason repeated the statement about the $3,000. Bane said it is true that he did not recollect about the $3,000, and that he thought he would if such conversation had taken place.

The cases cited by appellant from our own reports are such as to require us to reverse for the giving the appellee's first instruction. They are in point, and not only binding as authority, but they properly define the duties and powers of judges and jurors. *Frizzell* v. *Cole*, 29 Ill. 465; *Rafferty* v. *The People, etc.*, 72 Ill. 37; *Straubher et al.* v. *Mohler*, 80 Ill. 21.

For the foregoing and other reasons which might be given, we think the judgment should be reversed and the cause submitted to another jury. *Judgment reversed and remanded.*

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* CALVIN BOGER.

EVIDENCE—*Admissibility of, as to why a billy was used.*—Where the plaintiff was claiming exemplary damages of the railroad company for the willful misconduct of one of its brakemen, and among the assumed causes was the fact that the brakeman had a billy and made use of it in expelling the appellee from the train, it was *held* that in mitigation of such damages it was allowable for the company to prove the reason why the brakeman became armed with this weapon.

SAME—*Jumping on train after expulsion.*—Where the proof showed that at a regular station of the company appellee was put off by the brakeman because he had no ticket, and for the further reason that he denied having any money to pay his fare, and that he again jumped on the train as it was moving out of the station, knowing that by the rules of the company he had no right to enter its cars without having first procured a ticket, it was *held* that it would be allowing a party to take advantage of his own wrongful act to obtain a recovery in such case simply for being expelled at a place elsewhere than a regular station.

EXEMPLARY DAMAGES.—Where a brakeman believed that a party, attempting to get on the train without a ticket, was a confidence man, and he acted in good faith in forcibly ejecting him from the train, the company should not be punished by exemplary damages for the act.

INSTRUCTION—*Mistake of witness in testimony.*—An instruction which told the jury that if they believed the witness Farnham had sworn falsely to any matter material in the case, the jury might disregard his testimony entirely except where it was corroborated by other evidence in the case, was *held* clearly erroneous because it completely ignored the fact whether such false statement

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was intentional or not on the part of the witness. A mere mistake on the part of a witness in his testimony should not invalidate his whole evidence so as to require any discussion respecting it.

Appeal from City Court of Aurora. Opinion filed March 20, 1878.

Chas. Wheaton, *Attorney for Appellant*, cited: *Chittenden* v. *Evans*, 41 Ill. 253; *City of Chicago* v. *Smith*, 48 Ill. 108; *C. & A. R. R. Co.* v. *Buttolf*, 66 Ill. 348; *Crabtree* v. *Hagenbaugh*, 25 Ill. 240; *Pollard* v. *The People*, 69 Ill. 149; *Burman* v. *The People*, 15 Ill. 512; *Holmes* v. *Hall*, 71 Ill. 555; *Peak* v. *The People*, 76 Ill. 289; *City of Decatur* v. *Fisher*, 53 Ill. 407, etc.

Little & White, *Attorneys for Appellee*, cited: 2 Greenl. Evidence, sec. 272; *Reed* v. *Bias*, 8 Watts and Serg. 189; *Conrad* v. *Pacific Ins. Co.*, 5 Peters, 273; also, *Gray et al.* v. *Waterman*, 40 Ill. 523; 51 Ill. 219; 67 Ill. 358.

Sibley, J., delivered the opinion of the court:

The appellee brought this suit in the City Court of Aurora to recover damages of the Chicago, Burlington & Quincy Railroad Company for having been put off from one of the company's fast through trains running from Chicago to Omaha. That he was expelled from the cars at the Great Eastern Crossing in Chicago, there is no dispute. But the question on the trial in the City Court was as to the right and manner of expulsion. Only two witnesses testified respecting the main facts — the plaintiff in the cause and the brakeman on the train that expelled him.

As usual in such cases, they differ widely in their statements as to what took place at the time. Boger, the appellee, testified that he walked slowly up State street in Chicago to where the train crossed the street and hopped on to one of the cars and rode over the bridge, when "that specimen of a man," alluding to the brakeman in not very courteous terms, "came up and said, 'Where are you going?' and asked if I had a ticket. I said that I had not. He then inquired if I had any money, and I told him that I had money to pay my fare wherever I went. It was near the Great Eastern Crossing. He then told me that I must get off; they had had enough of 'dead beats' on that train." When the train stopped at that station the witness got off and started for the ticket office to procure a ticket, but for want of time did not get one, and when the train moved out got on to it again, and while on the steps of one of the cars the brakeman repeated the order to "get off," accompanying it with some rough and abusive language. Upon his refusing to comply with the request, the brakeman struck him with a slung-shot, and kicked him several times; that he took hold of the brakeman's foot, having grabbed him after being struck, and would have pulled the brakeman off the train if he could, but was himself kicked from the train while it was moving at a rate of speed from eight to ten miles an hour.

Farnham, the brakeman, testified that the appellee jumped on the train near the rear car as it was crossing State street. Witness then asked him where he was going; he answered that he was going

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west; inquired if he had a ticket; he replied that he had not, and had no money. Witness then told him that he must get off at the next stopping place. As the train stopped at the Great Eastern Crossing, a regular station of the company's road, appellee got off. But when the train started to move out he jumped back on, saying, "damned if he was not going farther than that." Witness again told him that he must get off, and he said that he would not get off. "I told him that I would help him off. I took him by the collar, he grabbed me by the arm. Seeing that he was going to resist me, I kicked him twice. At the time he jumped off he pulled me to the bottom of the steps. He ran along side of the train thirty or forty feet, trying to pull me off from it. To save myself from being pulled off I struck him with a billy; it is about six inches long and has a chunk of lead in it. He soon let go and fell to the ground."

The first error complained of which we propose to notice is that of the refusal of the court to permit the witness, Farnham, to explain the reason why he carried the billy, or slung-shot, on that occasion. The appellant offered to prove by the witness that a short time before he had had trouble with roughs and confidence men jumping on the train as it was passing out of the city, where he had been attacked by them, and that he carried the billy for his personal protection against any future assault.

We think this evidence should have been admitted to the jury. The plaintiff was claiming exemplary damages of the railroad company for the willful misconduct of one of its brakemen. Among the assumed causes was the fact that the brakeman had a billy and made use of it in expelling the appellee from the train. In mitigation of such damages it was allowable for the company to prove the reason why the brakeman became armed with this weapon. If he had procured it for the express purpose of using it upon the appellee, the malice of the act might be considered more apparent than if he was simply carrying it for another and different purpose. The first instruction given by the court below for the plaintiff, which informed the jury that the railroad company had no right to expel the appellee from its train except at a regular station, announced a rule of law generally correct, but was not entirely applicable to the evidence in the case. The proof showed that the Great Eastern Crossing was a regular station of the company, and that appellee was there put off by the brakeman because he had no ticket, and for the further reason, the brakeman says, he denied having any money to pay his fare. Now if, as both parties state, he again jumped on the train as it was moving out of the station, knowing that by the rules of the company he had no right to enter its cars without having first procured a ticket, was he in all respects entitled to the same consideration as if he had not been once expelled for neglecting to comply with them. Not that he could be thrust off while the train was in motion, or more force used in expelling him the second time than was necessary to accomplish the purpose. But the proposition is, should he in such case be carried to the next station, or must the train back up to the

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place where the expulsion occurred, before he could again be put off? If this is the law, how easy would it be for an evil-disposed person to pass from place to place on a train of cars until in this way he arrived at his destination, or to prevent the train from proceeding at all, by causing it to back up to the station where he had been once put off every time he might be disposed to repeat the experiment. We do not understand the law to be settled in this way. It would be allowing a party to take advantage of his own wrongful act to obtain a recovery in such case simply for being expelled at a place elsewhere than a regular station. If the rule of the company was a reasonable one, and appellee, after having once been put off the train for its non-observance, still persisted in a willful attempt to violate it by again jumping on, he certainly occupied quite a different relation to the railroad company from that of a person who might enter its cars upon a train under a mistaken notion that he had a perfect right to do so. While these great corporations, which to a large extent are controlling the commerce and the travel of the country, and should, therefore, be held to a strict compliance with the law, yet there are other corresponding rights on their part to be observed by individuals, that if courts and juries fail to recognize, our system of jurisprudence will soon cease to command the respect of every thoughtful and unprejudiced mind.

The fourth instruction given by the court for the appellee was as follows:

"4th. The jury are instructed that if they believe, from the evidence, plaintiff was put off the said car of the defendant at a place not a regular station, or between stations, by the willful and wrongful act of the defendant, then the jury, in fixing the amount of damages, may consider not only the annoyance, vexation, delay and risk to which the plaintiff was subjected, if any, shown by the proof, but also the indignity done him by the mere fact of expulsion. And it would make no difference whether the said brakeman acted in good faith or not, if he acted willfully."

This instruction informed the jury that if they found the plaintiff was put off the defendant's train at a place other than a regular station, then it would be proper for them to assess damages against the railroad company for the annoyance and vexation not only, but also for any indignity done the plaintiff by reason of the expulsion, whether the brakeman acted in *good faith* or not, if he acted willfully. In the case of the *T. P. & W. R. R. Co.* v. *Patterson*, 43 Ill. 304, where the plaintiff had been put off the defendant's cars elsewhere than at a regular station, the court says: "The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation." In that case the plaintiff Patterson was ejected from the cars in good faith by the conductor of the train at a place other than a regular station for the reason that he had failed to procure a ticket before entering, according to the regulations of the railroad company, and it was there held he could only be compensated for any actual

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damages that he may have sustained by the expulsion; and numerous authorities are referred to in support of the rule of law.

That the railroad company had a right to establish the rule requiring passengers to procure their tickets before entering the cars is not to be disputed, and that the brakeman in this case was directed by the officers of the company to require this rule to be enforced, stands uncontradicted by the evidence. Still the court said to the jury, that although acting upon these instructions in perfect *good faith*, yet, if willfully, that is, with an obstinate determination to carry into effect his directions, then the company was liable to pay for the act, if wrongful, more than a fair compensation for the injury sustained. *Good faith* means entirely the opposite to wanton and criminal conduct; then, in such case, according to the doctrine in the *T. P. & W. R. R. Co.* v. *Patterson*, no exemplary damages could be recovered.

If at the place where Boger jumped on to the train the brakeman had previously (as it was offered to be proven) been troubled with roughs and confidence men trying to steal a ride, and he sincerely believed this negro, who had once been put off at a regular station, returning again with an oath that he was "going further" (which remark is not denied), was one of that class of persons, acted in good faith in forcibly ejecting him from the train, is the company to be punished by exemplary damages for the act? The proposition needs only to be stated to render a refutation of it quite unnecessary.

The fifth instruction given for the plaintiff was clearly erroneous in telling the jury that if they believed the witness Farnham had sworn falsely to any matter material in the case, the jury might disregard his testimony entirely except where it was corroborated by other evidence in the case. It completely ignored the fact whether such false statement was intentional or not on the part of the witness. If the rule was not sufficiently settled that a mere mistake on the part of a witness in his testimony should not invalidate his whole evidence as to require any discussion respecting it, a single quotation from the case of the *City of Chicago* v. *Smith*, 48 Ill. 108, where it is said "the maxim *falsus in uno falsus in omnibus* should only be applied in cases where a witness willfully and knowingly gives false testimony," is quite enough to dispose of the question.

We discover no reason for the court's modification of the defendant's instructions one and two by adding *when the* conductor *should call for the fare.* It was competent for the railroad company to adopt the rule that no one could enter the cars on this class of trains without first exhibiting a ticket, and it had the right to empower the brakeman to see that this rule was observed, and to execute it in a reasonable manner without consulting the conductor of the train. They both received their authority from the same source, and either might, in compliance with the orders of their principal, act independent of the other; as is shown by the evidence in this case, the brakeman was directed by the division superintendent. Hence no

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reason is perceived why the brakeman should wait for the conductor before executing his orders.

Whether this regulation had been sufficiently made known to require the plaintiff without notice to observe it, was a question of fact for the jury to determine, and in that respect it was proper to have allowed the witness Farnham to answer the question as to what had been the usage of the company in regard to requiring passengers to show their tickets before entering the cars.

The judgment will be reversed and the cause remanded for a new trial. *Judgment reversed.*

EDMUND B. KENT, ADM'R, ETC., *v.* J. V. MASON, EX'R., ETC.

DEBT — *Payment of, without surrendering evidence of.*— The fact that a person on one, or even more occasions, receives payment of a debt without surrendering the evidence of indebtedness, upon satisfactory reasons given at the time for not so doing, cannot be converted into a circumstance tending to show that any other notes, still remaining in his possession, have been paid or discharged by the maker of them.

INTERROGATORY — *Leading — stating conclusion in answer.*—Where an interrogatory, besides being leading, asked the witness to state his conclusions from certain transactions between him and others, instead of relating the facts that took place, and allowing the jury to draw their own conclusions, it was *held* faulty.

SAME—*Objections to*—Objections to interrogatories and answers should be made and disposed of before the commencement of the trial in order to make the exception available, and such objections should be pointed out and excepted to on a motion to suppress, before the trial is commenced.

EVIDENCE—*When memorandum not admissible*—A witness may refer to a memorandum made by him to refresh his recollection, but the memorandum itself is not admissible in evidence, except in cases where the witness, at the time of testifying, has no recollection of what took place, further than that he accurately reduced the whole transaction to writing.

RES GESTÆ.—When A was asked what reply B made when C presented certain notes to him for payment, and A testified that he went with C, who presented the notes and demanded payment, and C continued to retain the possession of the notes, it was *held* that when C presented the notes to B, demanding their payment, what was then said and done by the parties should have been admitted as a part of *res gestæ*.

APPEAL FROM WARREN COUNTY. Opinion Filed March 20, 1878.

H. A. INGELOW, *Attorney for Apellant*, cited: *Kent* v. *Mason*, 79 Ill. 540; *C. B. & Q. R. R. Co.* v. *Lee*, 60 Ill. 501; Greenl. on Ev. sec. 434; *Cutright* v. *Sanford*, 81 Ill. 240; *Stowell* v. *Beagle*, 79 Ill. 525; *Thompson* v. *Hoagland et al.* 65 Ill. 310.

STEWART & PHELPS, *Attorneys for Appellee*, cited: *Kent, adm'r*, v. *Mason, ex'r*, 79 Ill. 540; Greenl. on Ev. p. 282, sec. 200; *Com.* v. *Knapp*, 9 Pick. 507, 508; *Frazier* v. *Zimmerly*, 25 Ill. 202; *Winne* v. *Hammond*, 37 Ill. 99; *Dont* v. *Horn*, 20 Ill. 213; *Duffield* v. *Delancey*, 36 Ill. 258; *Halsey* v. *Brooks et al.*, 20 Ill. 116; *Harris et al.* v. *Miner*, 28 Ill. 135; *Baxter* v. *The People*, 3 Gil. 368; *Stout* v. *McAdam*, 2 Scam. 67–69; *Denman* v. *Bloomer*, 11 Ill. 177; *C. B. & Q. R. R. Co.* v. *George*, 19 Ill. 519; *Pfund* v. *Zimmerman*, 29 Ill. 271; *Morgan* v. *Ryerson*, 20 Ill.

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343; *Milliken* v. *Taylor*, 53 Ill. 508; *City of Chicago* v. *Garrison*, 52 Ill. 515; *Voltz* v. *Stephani*, 46 Ill. 54; *Baker* v. *Robinson*, 49 Ill. 299; *City of Chicago* v. *Smith*, 48 Ill. 107; *Crain* v. *Wright*, 46 Ill. 107; *McCarthey* v. *Mooney*, 46 Ill. 247; *Keith* v. *Fink*, 47 Ill. 272; *Hope Ins. Co.* v. *Lonergan*, 48 Ill. 49; *Schwarz* v. *Schwarz*, 26 Ill. 97; *Hall* v. *Groufe*, 52 Ill. 421; 49 Ill. 266, 451; 41 Ill. 242; 41 Ill. 80; *Coursen* v. *Ely*, 37 Ill. 338; *Root* v. *Curtis*, 38 Ill. 192; *Leigh* v. *Hodges*, 3 Scam. 15; *Gillett* v. *Sweat*, 1 Gil. 475; *Elam* v. *Badger*, 23 Ill. 498; *Dishon* v. *Shorr*, 19 Ill. 59; *Shultz* v. *Lepage*, 21 Ill. 160; *Boynton* v. *Phelps*, 52 Ill. 160.

SIBLEY, J., delivered the opinion of the court:

This was an action commenced in the Probate Court of Warren county in May, 1872, to recover upon two promissory notes executed by Jeremiah Mason, in his lifetime, to Sylvester S. Gould, deceased. One for the sum of $1,200, dated January 9, 1860, payable in two years after date, and the other for $400, May 24, 1860, due in one year from the date of it.

The cause was tried in the Probate Court December, 1874, when a verdict was rendered in favor of the plaintiff for the amount due on the notes. An appeal was taken from the judgment rendered upon that verdict, to the Circuit Court of Warren county, and a trial was there had before a jury, which resulted in a verdict for the defendant in that court. The case was appealed to the Supreme court, where that judgment was reversed; and the cause was remanded, and again, in September, 1877, tried in the Circuit Court with the same result.

To reverse this judgment, Gould's administrator has appealed to this court, and assigned several errors for setting aside the verdict of the jury, and the judgment of the Circuit Court.

Mason, in his lifetime, executed a deed of trust on the S. E. ¼ of Sec. 17, T. 10 N., R. 4 E., to Zeno E. Spring, as trustee, to secure the payment of the $1,200 note. The $400 note was given without any security. At the time of the execution of the deed of trust to Spring, the land described in it was incumbered by judgments and other liens, among which was a deed of trust dated May 26, 1859, executed by Mason to Jacob D. Hand as trustee, to secure the payment of a note to William V. Kellogg for $1,437. Another, executed by Mason to Hand, as trustee, to secure a note payable to Sylvester Reed for $732.65, dated February 19, 1859. These deeds of trust covered also the S. W. ¼ of Sec. 2, T. 9 N., R. 4 E. in Knox county, on which tract there were other incumbrances. The trustee in the last two deeds of trust, after the notes which they were given to secure became due, sold the lands described in them. The S. W. ¼ of Sec. 2, except 34 acres, to Quincy A. Drum, for the sum of $2,000, and the S. E. ¼ of Sec. 17 to Leander Douglas (the attorney of Mason), for $925. On a settlement afterward made between Drum, Douglas, and Mason and wife, in respect to homestead exemption, and dower of Mrs. Mason, several conveyances were interchanged to and by each of the parties engaged in the arrangement.

The defense set up was that the notes sued on were either owned

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by Drum, or that he was acting as the agent of Gould, and that they were taken into account and paid to Drum in the settlement and interchange of deeds by him, Douglas, and Mason and wife.

These notes were never indorsed, but remained in Gould's possession, and were found after his death — which occurred in 1870 — in a desk, together with the deed of trust to Spring, which had not been released, among his other papers.

For the purpose of showing that these notes had been paid, and not surrendered by Gould to Mason, the court permitted the appellee, against the objection of appellant, to read to the jury, in the deposition of William H. Kellogg, that a certificate of deposit, or receipt given by him to Gould for $1,200 in the fall of 1870, was soon after that paid by him to Gould, without the latter's surrendering up to the former the certificate of deposit or receipt at the time of payment; and the reason assigned was that Gould said "his woman had got hold of some of his papers and notes and had left; that he could not find the receipt." Also that the witness paid a note of his for two or three hundred dollars to Gould that could not be found. On the first trial in the Circuit Court the appellant asked the court to instruct the jury as follows:

"9th. The fact, if proven, that the witness Kellogg was indebted to Gould upon a receipt or certificate of deposit for money loaned, and that Kellogg paid the same to Gould, and that Gould did not deliver it up to Kellogg, furnishes no evidence whatever that the notes, or either of them, in this case, were paid, and further, it is not evidence of, and should not be considered by the jury, as tending to prove or establish any reason whatever why the note secured by the trust deed to Spring was not surrendered or delivered up if the same was paid," which the court refused to do. When the case went to the Supreme Court this refusal was assigned for error, and that court, in passing upon the subject, says: "As to the instructions, we are of opinion that the seventh and ninth, asked by the appellant, should have been given." 79 Ill. 540. Why the Circuit Court admitted this evidence after the Supreme Court had really decided the question of its relevancy, may be a matter of conjecture. We think that the opinion expressed by the Supreme Court is more in harmony with the law of evidence than the ruling of the circuit judge. Is the fact that a person on one, or even more occasions, receives payment of a debt without surrendering the evidence of indebtedness, upon satisfactory reasons given at the time for not so doing, to be converted into a circumstance tending to show that any other notes, still remaining in his possession, have been paid or discharged by the maker of them? Clearly not. For in that case a man would be precluded from deviating in any transactions with one person out of the usual course of business, no matter what the circumstances were, lest it should be construed into proof that he had done, or intended so to act, with all others.

Complaint is made because the court allowed the appellee to read to the jury interrogatory fourteen, and answer, in the deposition of the witness Leander Douglas.

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The interrogatory to the witness inquiring "whether the parting of Mason with the 240 acres of land did or did not free him from the indebtedness with which the land was incumbered." Besides being leading, it was faulty in asking the witness to state his conclusions from certain transactions between him, Drum and the Masons, instead of relating the facts that took place, and allowing the jury to draw their own conclusions. But this, like many other of the interrogatories and answers objected to, should have been made and disposed of before the commencement of the trial in order to have made the exception available. For such objections as can be cured by retaking the deposition of the witness should be pointed and excepted to on a motion to suppress, before the trial is commenced, which does not appear to have been done in this case. *Corgan et al.* v. *Anderson*, 30 Ill. 95; *Cooke* v. *Orne*, 37 ib. 186. The admission of the pass-book of the witness Saylor to the jury was irregular. He had testified that from memory he recollected the conversation between him and the witness Cover, independent of the memorandum made in his pass-book and read over to Cover. Saylor, at the request of Mason's representatives, went to Cover, who was engaged as sheriff in the matter of setting off the homestead to the Masons, for the purpose of gathering up all the statements he could in relation to the settlement of these notes, and furnishing whatever evidence he was able to aid the Masons in their defense to this action. Cover having no interest in the result, stated on the trial that he knew nothing about the settlement of the notes in controversy by Drum. Saylor's memorandum was introduced to impeach the witness Cover by showing that at one time he had made a different statement to Saylor. That a witness may refer to a memorandum made by him to refresh his recollection, is a familiar principle. But the memorandum itself is not admissible in evidence, except in cases where the witness, at the time of testifying, has no recollection of what took place, further than that he accurately reduced the whole transaction to writing. 1 Greenl. on Ev. 437.

We also think that the witness Spring should have been permitted to answer the question as to what reply Drum made when Gould presented these notes to him for payment. The defense set up was that the notes had been paid or settled for by Drum, either as the agent of Gould, or as the owner of them at the time the interchange of deeds took place between him, Douglas and the Masons, in 1862.

About 1864, or soon after Mason got his 80 acres back under the arrangement spoken of by the witness, Spring testified that he went with Gould, who presented the notes in controversy to Drum, and demanded payment of them, which was refused.

Gould had then, and continued to retain the possession of the notes; and when he presented them to Drum, demanding their payment, what was then said and done by the parties should have been admitted as a part of *res gestæ*.

For the reasons given, the judgment will be reversed and the cause remanded. *Judgment reversed.*

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The Chicago, Burlington & Quincy Railroad Company *v.* Chloe M. Sykes, Admx., Etc.

Instruction—*Relative to passing under a car by direction of the conductor.*—Where the jury were instructed, in substance, that if the train was negligently left across the street, that it was impossible for the deceased to reach the passenger train in time without going under or over the freight train, that the conductor called to deceased, and said, "Come on under, Mr. Sykes; you will have plenty of time," that deceased, relying upon this direction, attempted to go under, using such care and diligence as an ordinary, careful and prudent man would use under all the circumstances, that while he was passing under, using all possible care, caution and diligence, the train suddenly started, without ringing the bell or sounding the whistle, and ran over the foot of deceased and caused his death, the defendant would be guilty, it was *held* properly refused.

Same—*As to question of fact.*—An instruction, *in substance*, that where a person of ordinary prudence might be induced to go under a standing train, with engine on and steam up, by request of the conductor, it was a question of fact for the jury whether it was ordinary prudence to do so under the invitation; *held* good.

Same—*As to gross negligence in crawling under car.*—An instruction which goes to the extent that the crawling under the car was gross negligence on the part of the deceased, though he was invited to do so by the conductor, that is, of making it negligence of deceased to prevent a recovery to pass under a freight car with engine attached and steam up, under any circumstances; *held* properly refused.

Appeal from Warren County.

William C. Norcross, *Attorney for Appellant*, cited: *C. B. & Q. R. R. Co.* v. *Lee, admx.*, 68 Ill. 586; *C. B. & Q. R. R. Co.* v. *Van Patten*, 64 Ill. 511; *C. B. & Q. R. R. Co.* v. *Dewey*, 26 Ill. 255; *I. C. R. R. Co.* v. *Baches*, 55 Ill. 385; *C. B. & Q. R. R. Co.* v. *Dunn*, 52 Ill. 454; *Keokuk Packet Co.* v. *Henry*, 50 Ill. 269; *T. P. & W. R. R. Co.* v. *Riley*, 57 Ill. 514; *O. & M. Ry. Co.* v. *Stratton*, 78 Ill. 88; *C. & A. R. R. Co.* v. *Gretzner*, 46 Ill. 82, 83, 85; Storey on Agency, 156–7, sec. 135; 1 Greenl. on Ev., 129–135, secs. 113 and 114; 1 Wharton on Ev., 252, sec. 267; *Adams Express Co.* v. *Jones*, 53 Ill. 463; *Clement* v. *Bushway*, 25 Ill. 200; *Boren* v. *Bartleson*, 39 Ill. 45; *Gibson* v. *Webster*, 44 Ill. 483; *Scott* v. *Plumb et al.*, 2 Gilm., 595; *Lowrie* v. *Orr*, 1 Gilm., 70; *Keogh* v. *Hite*, 12 Ill. 99; *Baker* v. *Pritchett*, 16 Ill. 66; *Miller* v. *Hanners*. 51 Ill. 175; *Chase* v. *Debolt*, 2 Gilm., 371; *Higgins* v. *Lee*, 16 Ill. 495; *Gordon* v. *Crooks*, 11 Ill. 142; *Paulin* v. *Howser*, 63 Ill. 312; *Brown* v. *Graham*, 24 Ill. 628; *Lane* v. *Bryant*, 9 Gray, 245; *Robinson* v. *R. R. Co.*, 7 Gray, 92; *Bank* v. *Stewart*, 37 Maine, 519; 1 Wharton on Ev., p. 252, secs. 265, 266, 267.

In reply:

Village of Kewanee v. *Depew*, 80 Ill. 119; *I. C. R. R. Co.* v. *Chambers*, 71 Ill. 519; *I. C. R. R. Co.* v. *Hall*, 72 Ill. 222; *Snyder* v. *H. & St. Jo. R. R. Co.*, 60 Mo. 413; *The Sterling Bridge Co.* v. *Pearl*, 80 Ill. 251; *I. C. R. R. Co.* v. *Goddard, admx.*, 72 Ill. 567; *St. L. & S. E. R. R. Co.* v. *Britz*, 72 Ill. 257; *T. W. & W. R. R. Co.* v. *Barlow*, 71 Ill. 640; *I. C. R. R. Co.* v. *Godfrey*, 71 Ill. 500; *C. & A. R. R.* v. *Murry*, 71 Ill. 601; *C. B. & Q.* v. *Dewey*, 26 Ill. 258; *R. R. Co.* v. *Gladman*, 15 Wall., 408; *G. W. R. R.* v. *Willis*, 18 Common Bench, 748; 3 Blackf. 436; Paley on Ev., 207 (1); *Allen* v. *Denston*, 8 C. & P. 706; *Stiles* v. *The Western R. R.*, 8 Met. 46; *Cooley* v. *Norton*, 4 Cush. 93; Ang. & Ames on Corp., 10 ed., p. 334, sec. 309; *Treadway* v. *The S. C. & St. P. R. R.*, 8 Am. Rail-

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way Rep. 415; *Boester* v. *Byme*, 72 Ill., 466; *C. B. & Q. R. R. Co.* v. *Lee*, 68 Ill. 586; *Keokuk Packet Co.* v. *Henry*, 50 Ill. 269.

Stewart & Phelps, *Attorneys for Appellee*, cited: *I. & St. L. R. R. Co.* v. *Stables*, 62 Ill. 315; *Morgan* v. *Ryerson*, 20 Ill. 343; *Milliken* v. *Taylor*, 53 Ill. 508; *City of Chicago* v. *Garrison*, 52 Ill. 516; *Voltz* v. *Stephani*, 46 Ill. 54; *Bagley* v. *McClure*, ib. 381; *Baker* v. *Robinson*, 49 Ill. 299; *City of Chicago* v. *Smith*, 48 Ill. 107; *Crain* v. *Wright*, 46 Ill. 107; *McCarthy* v. *Mooney*, 46 Ill. 247; *Keith* v. *Fink*, 47 Ill. 272; *Hope Ins. Co.* v. *Lonergran*, 48 Ill. 49; *T. W. & W. R. Co.* v. *Spencer*, 66 Ill. 525; *Same* v. *Triplett*, 38 Ill. 489; *C. & N. W. R. R. Co.* v. *Sweeney*, 52 Ill. 331; *I. C. R. R. Co.* v. *Hammer*, 72 Ill. 321; *T. W. & W. Ry. Co.* v. *O'Connor, admr.*, 77 Ill. 391; *I. C. R. R. Co.* v. *Hammer*, 72 Ill. 350; *T. W. & W. R. Co.* v. *Miller*, 76 Ill. 278; *C. B. & Q. R. R. Co.* v. *Stumps*, 69 Ill. 409: *R. R. I. & St. L. R. R.* v. *Linn*, 67 Ill. 110, 112; *C. B. & Q. R. R. Co.* v. *Van Patten*, 64 Ill. 516; *I. C. R. R. Co.* v. *Moffitt*, 67 Ill. 434; *R. R. I. & St. L. R. R. Co.* v. *Hillmer*, 72 Ill. 239; *C. B. & Q. R. R. Co.* v. *Triplett*, 38 Ill. 484; *T. W. & W. Ry. Co.* v. *McGinnis*, 71 Ill. 349; *I. C. R. Co.* v. *Cragin, admr.*, 71 Ill. 177; *Frasier* v. *Zimmerly*, 25 Ill. 202; *Dart et al.* v. *Horn*, 20 Ill. 213; *Duffield* v. *Delancy*, 36 Ill. 258; *Winne* v. *Hammond*, 37 Ill. 99; *Stout* v. *McAdams*, 2 Scam. 67-69; *Baxter* v. *The People*, 3 Gil. 368; *Hill* v. *Ward*, 2 Gil. 285; *Denman* v. *Bloomer*, 11 Ill. 177; *Coughlin* v. *The People*, 18 Ill. 266; *Harris et al.* v. *Miner*, 28 Ill. 135; *C. B. & Q. R. R. Co.* v. *George*, 19 Ill. 518; *Halsey* v. *Brooks et al.* 20 Ill. 116; *Co. Court Calhoun Co., use, et al.*, v. *Buck et al.*, 27 Ill. 443; *Pfund et al.* v. *Zimmerman*, 29 Ill. 271; *Trustees, etc.*, v. *McCormick & Bros.*, 41 Ill. 323; *Hesing* v. *McCloskey*, 37 Ill. 341; *McKichan* v. *McBean*, 45 Ill. 239; *Underwood* v. *White*, 45 Ill. 437; *Freeman* v. *Linsley*, 50 Ill. 497; *Calhoun* v. *O'Neal*, 53 Ill. 354; *Leigh* v. *Hodges*, 3 Scam. 15; *Dishon* v. *Shorr*, 19 Ill. 63; *Pahlman* v. *King*, 49 Ill. 296; *Hall* v. *Graff*, 52 Ill. 42; *Watson* v. *Wolverston*, 41 Ill. 242; *Bagley* v. *Manchester S. and L. Ry. Co.*, Law Rep., 8 C. P. 153; *Cosgrove* v. *Ogden*, 49 N. Y. (4 Sick.) 255; *Anderson* v. *R. W. & O. R. R. Co.*, 54 N. N., 340, and cases cited.

Leland, P. J., delivered the opinion of the court:

This was an action brought in Warren county by appellee, as administratrix of Francis M. Sykes, deceased, against appellant, to recover damages for the death of the deceased, who was injured in May, 1876, while attempting to pass under one of the cars of a freight train at Knoxville, in Knox county, in order to take passage upon a passenger train. There was a verdict for plaintiff of $4,250. The wheel of the freight car passed over the foot of the deceased, and the death resulted from tetanus, or lock-jaw, some eight days after the injury. The deceased had been station agent for the company for several years, but at the time of his injury he had ceased to be, and his son, Loren Sykes, had succeeded him. At the time deceased attempted to pass under the freight train the engine was attached and the steam was up, and the train in a condition to start at any moment when it was desired to cause it to move, and, according to the evidence of some witnesses, liable to be moved by the escape of steam into the cylinder without any agency of the engineer. The two trains were standing lengthwise east and west, the passenger train north of the station, on the main track, the freight south of it,

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on a side track. The street running north and south, along which it was necessary for deceased to go to pass from the depot to his home, was obstructed by the freight train which stood across it. The deceased was at the depot and was going to take the passenger train to go fishing. Desiring to go home to get his boots, he passed under the freight train to go home, came back with his boots and attempted to again pass under the train, because it was so far to go around that he might miss the passenger train. He attempted to crawl under a freight car at or near the sidewalk, with his boots in his hands, and while making such attempt the freight train started and he was injured.

That under ordinary circumstances, and without any encouragement from the servants of the company that it might be safely done, such conduct of the deceased would be gross negligence to prevent a recovery would seem to admit of no doubt. *Ch. & Mo. R. Co.* v. *Coss*, 73 Ill. 394; *C. B. & Q. R. R. Co.* v. *Davey*, 26 Ill. 255, and the court below so instructed. There was, however, evidence tending to show that the conductor of the freight train said to the deceased, before he attempted, on his return with the boots, to pass under the car, "Come on, Mr. Sykes; you will have plenty of time." This was positively denied by the conductor, who says he did not see Sykes till he was under the car, and that he then said, "Hurry up, Mr. Sykes," and to the brakeman, "Grab him, boys," and there was other evidence to the effect that there was no invitation or request by any one. One witness says the words, "Come on," "Hurry out," "Grab him," "Catch him," or the like.

As we have concluded that the judgment must be reversed for errors in the instructions, we do not deem it necessary to determine whether, giving the appellee the benefit of all conclusions of fact in her favor about which the evidence conflicts, it is a case where there can be no recovery, on account of negligence on the part of the deceased, though this position is strongly urged by appellant's counsel. We will not go to the length of saying that there might not be a case where a man of ordinary prudence might be disposed to so act under such advice of a conductor, who might be supposed to be able to control the train. We can, however, readily imagine that a man of ordinary prudence might not be willing to accept an invitation of the kind, and that he might think it a reckless, careless thing for even a conductor of a freight train, which was ready to start, to give such advice, under somewhat similar circumstances. There may be a different state of facts on another trial, when it will be for the jury to say whether there was due care on the part of the deceased, or whether he was negligent in accepting the invitation or assurance of safety, and acting under it, taking into account the danger of missing the passenger train, the consequences of not making the contemplated journey on that train, the age, activity and bulk of the deceased, his knowledge or want of knowledge in relation to the operating and control of locomotives and trains, and all the other surrounding circumstances in evidence.

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There were a great many objections by appellant's counsel, on the trial, to the admission and exclusion of evidence. We have not deemed it necessary to examine these questions very carefully and thoroughly, as they are of a kind not likely to occur on another trial, and as most of them seem unnecessary and unreasonable.

Exception is taken to the giving the first instruction on the part of the appellee. This instruction is very long, and contains statements which might have been properly omitted. We do not deem it necessary to set it out at length in this opinion. The substance of it is that if the train was negligently left across the street, that it was impossible for the deceased to reach the passenger train in time without going under or over the freight train, that the conductor called to deceased, and said, "Come on under, Mr. Sykes; you will have plenty of time," that deceased, relying upon this direction, attempted to go under, using such care and diligence as an ordinary, careful and prudent man would use under all the circumstances, that while he was passing under, using all possible care, caution and diligence, the train suddenly started, without ringing the bell or sounding the whistle, and ran over the foot of deceased and caused his death, the defendant would be guilty. The instruction was liable to be misunderstood by the jury, and it seems to us that such is its meaning, that if the deceased exercised reasonable care, while passing under the car, it would excuse him, though it might have been grossly negligent for him to have accepted the invitation to go under, that is, that he had the absolute right to go under because of the invitation, but that he should exercise care while on the route under.

All the facts stated in this instruction might be true, and still deceased might be very negligent. We do not consider the objection that facts are assumed by the court to be well taken. The expression, "If they believe from the evidence," can well be said to relate to all the statements of fact, nor that the instruction is bad because it recognizes the ability of the conductor to bind the defendant by words uttered not within his agency. We do not consider it entirely outside of his line of duty as a conductor to give such a direction to one endeavoring to get past his train to take a passenger train.

Exception was also taken to the refusal to give, and to the giving as qualified instead of as asked, of some of the instructions asked for by appellant.

The first seven in numerical order were given as asked, except that the word "uninvited" was inserted in the third. The eighth was refused and exception taken. This should have been given, unless refused as a repetition of one given, as might have been supposed to be the case in the haste of the trial.

We have looked through those given for appellant carefully, and find no one among them the same in principle as this, though others may be, in some respects, like it as to some of the ideas. The eighth is as follows: 8. "The jury are instructed that it is the rule of law that it is the duty of every man, no matter in what he may be engaged, or in whatever circumstances he may be placed, to use ordi-

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nary care for his own protection, and if the jury believe from the evidence in this cause that a man using ordinary prudence and care would not crawl under a freight train to which he knew, or had by the use of ordinary care and prudence the means of knowing, a locomotive engine, with steam up and liable to start at any moment, was attached, even if told by the conductor in charge of such train to come under the same, as he (conductor) was holding train for him; and, therefore, even if the jury believe that under such circumstances deceased did crawl under a freight train and receive an injury that thereby resulted in his death, that then it will be the duty of the jury to find a verdict in favor of the defendant."

We do not perceive any objection whatever to this instruction. It contains a clear, concise and accurate statement of the law, as we understand it to be. If it was not ordinary care and prudence for the deceased, though invited, to crawl under that freight car, in such close proximity to the wheels, knowing that a locomotive engine, with steam up and liable to start at any moment, was attached, he certainly could not recover. The conductor and the deceased might both be grossly negligent, the former for extending the invitation and the latter for accepting it, and if both were grossly negligent, or equally in fault, surely appellee could not recover on the ground that the deceased had a right to perform that which he well knew to be a dangerous act, simply because invited. Authority is not necessary. The principle of this instruction has been so often settled by our Supreme Court. We do not desire to be understood that a person of ordinary prudence might never be induced to go under a standing train, with engine on and steam up, by such request, but it was a question of fact for the jury whether it was ordinary prudence to do so in this case under the invitation, and that is all this instruction claimed.

There does not seem to us to be any serious objection to the qualification of the ninth, on the subject of damages. It might have been better to use the words of the statute, "such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting," etc., instead of the words, "any such pecuniary damages (if any) as result from such death to the widow and next of kin." The idea seems to be, in substance, the same in the latter words as in the former. The insertion of the words, "if such is the proof," was proper enough in the tenth. The insertion of the word "uninvited" in the third was well enough. As the instruction stood when asked it made the act of the deceased in going under the cars gross negligence, without the invitation being taken into account as a fact to be considered by the jury in extenuation of the conduct of the deceased. As heretofore mentioned, we are disposed to consider the invitation as a circumstance to be taken into account, among others, in determining whether deceased exercised care and caution. "Uninvited," we think, under the evidence, means by the conductor, and not by some bystanders or irresponsible person, as intimated in the

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brief of appellant. The words, "and proper for the consideration," added to the fourteenth, did not injure it, in our estimation.

The fifteenth, and which was refused, was as follows: 15. The jury are instructed that even though they should believe from the evidence that the bell was not rung and that the whistle was not sounded on locomotive engine attached to freight train under which deceased was hurt, and if the jury should further believe from the evidence that said freight train blockaded the sidewalk more than thirty minutes, and should further believe from the evidence that the conductor, Anderson, in charge of said freight train, did say to the deceased, prior to his starting under said freight train, "Come on, Mr. Sykes; you have plenty of time," or words of that import, that even then the jury would not be compelled to find a verdict in favor of the plaintiff in the case, but the jury may find a verdict in favor of the defendant.

This was improperly refused, for reasons heretofore stated. All these facts mentioned may exist and still the jury would not be compelled to find for the plaintiff. Indeed, they may all exist and a verdict for the defendant still be right and proper. The converse or affirmative of it should not have been given on the other side as sufficient to authorize a verdict for plaintiff.

We are not disposed to consider the refusal of thirteenth and sixteenth as erroneous. They go to the extent that the crawling under the car was gross negligence on the part of the deceased, though he was invited to do so by the conductor, that is, of making it negligence of deceased to prevent a recovery to pass under a freight car with engine attached and steam up, under any circumstances.

In our opinion the court below should have granted a new trial.

For the reasons aforesaid the judgment is reversed and the cause remanded. *Judgment reversed and remanded.*

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APPELLATE COURT OF ILLINOIS.

EDWARD BANNON, IMPLEADED, ETC., *v.* THE PEOPLE OF THE STATE OF ILLINOIS *et al.*

JUDGMENT NOTE—*Confession before due destroys jurisdiction.*—Where it appears from the record that the note could not have been due, then the record shows that the attorney, in fact, had no power to enter the appearance of the defendant, and, having no power, the court failed to acquire jurisdiction of the person of the defendant.

SAME—*Execution.*—The court properly refused to allow the execution of appellant to share in the distribution of the funds in hands of the sheriff.

SAME—*What the record must show.*—In such case, before such finding can be impeached, or the jurisdiction destroyed, the record must show affirmatively that such finding cannot be true.

WARRANT OF ATTORNEY—*As part of record in collateral proceeding.*—The warrant of attorney referred to in the judgment order can be introduced in evidence in a collateral proceeding as a part of the record for the purpose of overthrowing the jurisdiction of the court. But when the warrant conferred no power to enter the appearance of the defendant, the judgment has been *held* void.

JUDGMENT—*Right to assail validity of—means of enforcing.*—The law gives any party the right to assail the validity of a judgment for the want of jurisdiction in the court rendering it when it is sought to deprive him of any property rights by enforcing such judgment against him, and it would outrage every principle of justice to hold that, while the law gave him such right, it at the same time deprived him of all means of enforcing it.

SAME—*Setting aside judgment after the lapse of a term.*—It was *held* that the court erred in setting aside the judgment after the lapse of a term, when the parties to the judgment were satisfied with it, and did not solicit the action of the court in that regard.

JURISDICTION—*Validity of judgments depending upon the question of jurisdiction.*—Where a court has jurisdiction of the subject-matter and of the person, the judgment is binding and conclusive and cannot be questioned in any collateral proceeding, however erroneous it may be. On the contrary, if such jurisdiction in either particular be wanting, the judgment is a nullity and can be attacked by any one affected by it in any and all proceedings, either direct or collateral.

SAME—*In collateral proceeding.*—The authorities are not harmonious as to how and when the jurisdiction can be overthrown in a collateral proceeding, yet the doctrine is fully admitted that the question of jurisdiction is open to inquiry collaterally by any one against whom such judgment is used.

SAME—*Presumption of jurisdiction.*—Where there is no special finding of the court, the presumption of jurisdiction must be consistent with the record, for the court will be presumed to act upon and acquire jurisdiction from the facts alone as they appear in the record, and if these are insufficient to confer such jurisdiction, the presumption will be overcome and the judgment *held* void.

SAME—*Where the court adjudges that it has jurisdiction of the person.*—Where the court adjudges that it has jurisdiction of the person, it is not enough to destroy it that the record itself is insufficient to support such finding, for it will be presumed that the court heard other evidence not necessary to be preserved in the record, or that it acquired jurisdiction in some other manner than that stated.

APPEAL FROM WILL COUNTY. Opinion filed March 20, 1878.

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HALEY & O'DONNELL, *Attorneys for Appellants*, cited: Where a judgment by confession is obtained in open court, the note and power of attorney are not a part of the record. *Maher* v. *Howe*, 12 Ill. 379; Freeman on Judgments, sec. 78–79; *Starburg* v. *Eaton*, 47 Mai. 596; *Storer* v. *White*, 7 Mass. 448; *Pierce* v. *Adams*, 8 Mass. 383; *Hodges* v. *Ashurst*, 2 Ala. 301; *Cory* v. *Russell*, 3 Gil. 366; *Edwards and Wife* v. *Patterson*, 5 Gil. 126; *McDonald* v. *Arnout*, 14 Ill. 58; *Smith* v. *Wilson*, 26 Ill. 186. In a collateral proceeding where the validity of a judgment is questioned, it must be by the record of the judgment itself; evidence *de hors* the record is not admissible. *Thomas* v. *Morris*, 57 Ill. 333; Freeman on Judgments, secs. 124–171; *Gossett* v. *Howard*, 10 Q. B. 453; *Withers* v. *Patterson*, 27 Tex. 491; *Holmes* v. *Campbell*, 12 Minn. 221; *Spaulding* v. *Baldwin*, 31 Ind. 376; *Evans* v. *Ashby*, 22 Ind. 15; *Butcher* v. *Bank of Brownsville*, 2 Kan. 70; *Reynolds* v. *Stansburg*, 20 Conn. 344; *Riggs* v. *Cook*, 4 Gil. 348–9; *Voorhees* v. *Bank of the U. S.*, 10 Peters, 449. All presumptions are in favor of the validity of judgments of courts of general and superior jurisdiction. Freeman on Judgments, sec. 124; *Osgood* v. *Blackmore*, 59 Ill. 261; *Bush* v. *Hanson*, 70 Ill. 480; *Martin* v. *Judd*, 60 Ill. 78. Where the appearance of the defendant is entered by an attorney the court will presume that the attorney had authority, and in a collateral proceeding such presumption is conclusive. Freeman on Judgments, sec. 128; *Harshy* v. *Blackmarr*, 20 Iowa, 161; *Jackson* v. *Stewart*, 6 Johns. 34; *Brown* v. *Nichols*, 47 N. Y. (3 Hand,) 26; *Hamilton* v. *Wright*, 32 N. Y. (10 Tiff.) 502; *Proprietors* v. *Bishop*, 2 Vt. 231; *Post* v. *Haight*, 1 Howard, 171; *Hillsbury* v. *Dugan*, 9 Ohio, 117; *Hays* v. *Shattuck*, 21 Cal. 151; *Williams* v. *Butler*, 35 Ill. 544; *Osburn* v. *Bank of the U. S.*, 9 Wheaton, 738. And in the absence of fraud or collusion in the case, the court will proceed and leave the party who may be injured by an unauthorized appearance to his remedy by action. *Tally* v. *Reynolds*, 1 Ark. 99; *State* v. *Carothers*, 1 Green (Ia.) 464; *Beckley* v. *Newcomb*, 24 N. H. 359; *Bogardus* v. *Livingston*, 2 Shilt. 236; *Conray* v. *Brenham*, 1 La. An. 397; *Dobbins* v. *Dupree*, 39 Ga. 394.

FLANDERS, BROWN & MEERS, HOUSE, HILL & DIBELL, AND HAGAR & FLANDERS, *Attorneys for Appellees*, cited: *White* v. *Jones*, 38 Ill. 163; *Blackmore* v. *Osgood*, 59 Ill. 261; *Chase* v. *Dana*, 44 Ill. 262; Rev. Stat. 1874, ch. 38, sec. 453, p. 413; *Gillespie* v. *Rout*, 39 Ill. 247; *Robinson* v. *Chesseldine*, 4 Scam. 333; *Watson* v. *Reissig*, 24 Ill. 281; *Mason* v. *Thomas*, 24 Ill. 285; Taylor's Landlord and Tenant (6th ed.), secs. 598, 594; Coke upon Littleton, 47 *b*; *Rex* v. *Colton*, Park, 120; *Eaton* v. *Southby*, Willes, 136; *Hamilton* v. *Reedy*, 3 McCord, 40.

PILLSBURY, J., delivered the opinion of the court:

Appeal from Will Circuit Court by Edward Bannon from an order of said court quashing execution in his favor against Michael E. Bannon and setting aside the judgment upon which such execution was issued. In the case of the People against said Michael E. Bannon, the state's attorney of Will county moved the court for a rule upon the sheriff to show cause why he did not apply moneys in his hands arising from the sale of personal property of the defendant to the payment of the execution in his hands in favor of the people. The rule was entered and the sheriff for return thereto answered that he held several executions against the defendant, Michael E. Bannon, giving date when each was received by him the second one of which in point of time received by him, was for $1,837, in favor of appel-

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lant, Edward Bannon, that from the sale of personal property of said defendant, in executions he had realized the sum of $757.65 above costs and expenses, and asked the advice of the court as to the proper distribution thereof, as there were conflicting interests among the several execution creditors.

The several execution creditors were notified of the rule and answer, and they appeared in court and contested the validity of the judgment and execution of the appellant upon the ground that the same were void, the court having no jurisdiction over the defendant, Michael E. Bannon, at time of rendering the judgment.

The court quashed the execution, set aside the judgment as void, and ordered the sheriff to make distribution without regard to the execution of appellant. From this order Edward Bannon appealed. This judgment was entered September 12, 1877, in the Circuit Court of Will county during the June term.

The proceedings herein were had at the October term of said court. On the hearing, the contesting creditors gave in evidence, against the objections of appellant, the note and warrant of attorney, declaration, cognovit and judgment in case of *Edward Bannon* v. *Michael E. Bannon*. The note bears date September 10, 1877, and due one day after date. The warrant of attorney is of the same date, and empowers James R. Flanders, or any attorney of any court of record, to enter the appearance of defendant and waive service of process either in term time or vacation, and confess a judgment in favor of Edward Bannon for the sum named in said note, or for so much as may appear to be due according to the tenor and effect of said note, with interest, costs and attorney's fees, and to file cognovit for the amount, with agreement waiving errors, etc.

The general principles of the law relative to the validity of judgments depending upon the question of jurisdiction in the court rendering them, are undoubtedly well understood. Where a court has jurisdiction of the subject-matter and of the person, the judgment is binding and conclusive and cannot be questioned in any collateral proceeding, however erroneous it may be. On the contrary, if such jurisdiction in either particular be wanting, the judgment is a nullity and can be attacked by any one affected by it in any and all proceedings, either direct or collateral.

The application of this doctrine of jurisdiction to cases as they arise is not always as easy as the annunciation of the doctrine itself; indeed, an examination of the authorities will show that frequently it becomes a very difficult question to determine whether the court had or had not jurisdiction in a given case. It results therefrom that the authorities are not harmonious as to how and when the jurisdiction can be overthrown in a collateral proceeding, yet we think that the doctrine is fully admitted in our state at least, that the question of jurisdiction is open to inquiry collaterally by any one against whom such judgment is used.

THORNTON, J., speaking for the court in *Haywood* v. *Collins*, 60 Ill. 328, upon this point says: "That the validity of a judgment may

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be questioned in a collateral proceeding has often been decided by this court."

In *Goudy* v. *Hall*, 30 Ill. 109, it was decided that the decree of a county court authorizing the sale of land was absolutely void if the notice required by the statute had not been given; and that its validity might be inquired into when the record was offered in an ejectment suit.

In *Miller* v. *Hardy*, 40 Ill. 448, the court said if there was not jurisdiction to render the judgment offered in evidence in defense, then all the proceedings were *coram non judice* and they may be attacked collaterally in an action of ejectment.

In *Campbell* v. *McCahan*, 41 Ill. 45, it is said that there must be jurisdiction of both the subject-matter and of the person to give validity to judgments; and if jurisdiction is not acquired the judgment is void and may be resisted successfully either in a direct or collateral proceeding. To the same effect is the case of *White* v. *Jones*, 38 Ill. 160. In *Clark* v. *Thompson*, 47 Ill. 26, it was held that the presumption in favor of the jurisdiction even of a court of general jurisdiction may be rebutted in all collateral proceedings; and when there is no finding of the court, the presumption will be that it acted upon the summons and return which do appear in the record.

In *Huls* v. *Buntin*, 47 Ill. 396, the suit was ejectment and the defendant claimed title by virtue of a sale by an administratrix under a decree of court. It was held that if the court did not have jurisdiction, the decree was not binding and could be attacked collaterally.

I have quoted at some length from this case to show what construction the Supreme Court placed upon its former opinions, in view of the reliance placed upon the case of *Searle* v. *Galbraith*, 73 Ill. 269, by appellant.

A suit in ejectment by Searle to recover land sold by his conservator under decree of court had been prosecuted to judgment in favor of Searle. The judgment was set aside under the statute, and pendind second trial Galbraith filed a bill enjoining the ejectment suit and asking that Sampson, the conservator of Searle, should make and deliver a deed in conformity with the decree and sale. The decree upon which the sale was made recited that the court found that Searle had been ascertained by a jury to be an insane person, according to the statute, and that Sampson had been appointed his conservator. The case states "that on the hearing below, Searle gave evidence tending to show that he was not served with notice of the proceedings in the county court declaring him insane; and the question arises whether he can be allowed to contradict the findings of the decree, so far as it relates to the appointment of Sampson as his conservator. We do not regard the question as an open one with us, and shall therefore refer to but few authorities. In *Fitzgibbon* v. *Lake*, 29 Ill. 165, the record of a guardian's sale was offered in evidence by the defendant in an action of ejectment. It was urged by

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the counsel for the appellants, who were plaintiffs in the court below, that there were two testamentary guardians appointed, whereas the record showed but one acting. The court said: 'The next objection is, that the petitioner could not, alone, without joining the other guardian named in the will, properly institute that proceeding. Whether the petitioner was the guardian and had authority to institute the proceeding was for that court to determine when it heard the petition. It decided he was by granting the order and we cannot reverse that decision here.'

Goudy v. *Hall*, 30 Ill. 109, and subsequent cases of like character, only hold that the finding of the court on the question of jurisdiction is not conclusive, when the record itself shows it is not true. The distinction between the two classes of cases is clearly pointed out in *Osgood* v. *Blackmore*, 59 Ill. 265. It is there said: 'And where the record shows or the court finds the jurisdictional fact, the record cannot be contradicted or questioned in a collateral proceeding. It is true that if by an inspection of the whole record, it is seen there could not have been jurisdiction of the person, then the *prima facie* case would be overcome. But when the court has adjudged there was jurisdiction of the person, we cannot look beyond the record or receive evidence outside of it, to disprove the finding. In this respect the question can alone be tried by the record.'"

We do not understand from this decision that the court intends to or does overrule all the former cases upon this question of attacking the jurisdiction, but on the contrary, upholds them and sharply draws the distinction between the cases where the court specially finds that it has jurisdiction and those where there is no such finding. This case does not hold that the finding itself is absolutely conclusive, but limits the inquiry to an inspection of the whole record, excluding all evidence *dehors* the record to impeach it. To the same effect is the case of *Harris* v. *Lester*, 80 Ill. 307, and *Barnett* v. *Wolf*, 70 Ill. 76.

The rule deducible from all the authorities upon this point appears to be that where there is no special finding of the court, the presumption of jurisdiction must be consistent with the record, for the court will be presumed to act upon and acquire jurisdiction from the facts alone as they appear in the record, and if these are insufficient to confer such jurisdiction, the presumption will be overcome and the judgment held void. *Clark* v. *Thompson*, 47 Ill. 26; *Haywood* v. *Collins*, 60 Ill. 328. On the contrary, where the court adjudges that it has jurisdiction of the person, it is not enough to destroy it that the record itself is insufficient to support such finding, for it will be presumed that the court heard other evidence not necessary to be preserved in the record, or that it acquired jurisdiction in some other manner than that stated.

In such case, before such finding can be impeached, or the jurisdiction destroyed, the record must show affirmatively that such finding cannot be true. *Osgood* v. *Blackmore*, 59 Ill. 261; *Miller* v. *Hardy*, 40 Ill. 448; *Harris* v. *Lester*, 80 Ill. 307; *Barnett* v. *Wolf*, 70 Ill. 76. What, then, constitutes the record into which the court

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will look to determine the jurisdiction when the judgment is offered in a collateral proceeding? Upon this point we shall refer to that class of cases only where judgments by confession have been involved and the question raised collaterally, for if we follow the course marked out by our Supreme Court we shall not go astray. In *White* v. *Jones*, 38 Ill. 162, the action was replevin, and defendant justified as sheriff under execution issued upon a judgment confessed; the plaintiff in replevin claiming as purchaser from execution debtor.

The note upon which judgment was confessed was made payable upon demand, and it, as also the warrant of attorney, bore date November 20. The warrant of attorney authorized confession of judgment at any time after the date thereof; and judgment was in fact confessed on the same day the warrant was dated. Execution was issued thereon and levy made upon which replevin was brought. After referring to the fact that the judgment had been reversed in a direct proceeding because it was prematurely confessed, the court said: "The confession being unauthorized at the time it was made, the question arises whether it was merely erroneous or absolutely void. As a rule, of general if not uniform application, a judgment is void for all purposes, unless the court had jurisdiction of the person of the defendant and of the subject-matter of the suit."

And jurisdiction is acquired by the actual service of process notifying the party to appear, by constructive notice, to appear as by publication, or by an entry of appearance by himself in person, or by attorney. In the last case the authority of the attorney to enter his appearance may be contested by the defendant, and if he shows a want of authority, it defeats the jurisdiction of the court. . . . If the court acquired jurisdiction of the defendants, it was by an entry of appearance, as there is no pretense of either actual or constructive service. And it appears from the power of attorney itself, that the attorney had no power to enter their appearance until after the expiration of the day on which the warrant was executed; and there can be no pretense from anything else appearing in this record, that there was any other legal authority. For the want of authority there was no appearance, and consequently no jurisdiction, and the judgment was void, and all subsequent proceedings under it were invalid and conferred no rights upon the plaintiff in that judgment. The execution consequently created no lien upon the goods.

Chase v. *Dana*, 44 Ill. 262, was ejectment, the defendant claiming title to the premises by a sale under an execution and a judgment confessed by virtue of a warrant of attorney executed by the plaintiff. The power of attorney, the note, judgment, execution and sheriff's deed were all read in evidence. The note was described in the power of attorney as bearing date April 24, 1846, and authorized a confession upon note of that date. The note upon which the judgment was confessed bore date April 24, 1856. The court say: "In this case the authority was to enter the appearance of the maker, and confess judgment upon a note bearing one date, while the appearance was entered and judgment entered on a note dated ten

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years afterward. This was manifestly not within the power delegated; and if there was no power to enter the appearance and confess the judgment, it is a nullity, and binds no one, either in a direct or collateral proceeding, but may be attacked at all times and in all courts, because the court must in some mode have jurisdiction of the defendant or it cannot act."

In both of these cases the court held the confessed judgments void, and no question is made that the warrant of attorney was not competent evidence to be considered in determining the jurisdiction of the court over the person of the defendant. It is, however, insisted that the confessions in these two cases were in vacation, and therefore the jurisdiction should affirmatively appear. The confession in *White* v. *Jones* was in vacation, but the case is silent in *Chase* v. *Dana* on that point. Even if it were so in regard to those cases, the confession in *Osgood* v. *Blackmore* was in term time, and attacked in an action of ejectment, and the same doctrine was held upon a full examination of the note and warrant of attorney, and it is not even intimated that the warrant of attorney was not sufficiently a part of the record to be given in evidence when the question of jurisdiction was in issue. In that case, the case of *Chase* v. *Dana* was relied upon, and no difference is made between the cases upon the point that one was confessed in term time and the other in vacation. In that case the note was payable in thirty days after written notice, with ten per cent interest per annum, while the warrant of attorney in other respects described the same note, but said that it was payable with ten per cent interest after it became due and payable, and it was urged that the note upon which the judgment was rendered was not the one referred to in the power of attorney.

The Supreme Court, after deciding that it sufficiently appeared that it was the same note, held that "had the power of attorney left it clear that the note produced was not that referred to in the warrant, then the power could not have been exercised."

It was also claimed in that case that as the record did not show that the written notice had been given thirty days before the confession was made, and as there was no finding of the court that such notice had been given, the court could not presume the proof was made.

The court, after again announcing the doctrine that all intendments will be indulged in favor of the jurisdiction of a court of general jurisdiction, and that the presumption is that the proof was made when there is nothing in the record to rebut such presumption, said: "Had the record stated that no proof was heard as to any notice having been given, then the presumption would have been rebutted, or, had it appeared from the record that the note was not, and could not have been, due, the record would have shown that the attorney, in fact, had no power to enter the appearance of the defendants, and, having no power, the court would have failed to acquire jurisdiction of the persons of the defendants, and the case would have been like *Chase* v. *Dana*, *supra*."

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When we consider that the objection was made to the introduction of the warrant of attorney on the trial of the ejectment case in the court below, on the specific ground that it was no part of the record of the cause, and that on the appeal the Supreme Court fully examined its provisions for the purpose of determining the question of jurisdiction, and held as the law of the case that the power could not have been exercised if the warrant of attorney had left it clear that the note introduced was not the one referred to in the warrant, the conclusion is irresistible that this case of *Osgood* v. *Blacknore* is a direct adjudication by the highest judicial tribunal in this state that the warrant of attorney referred to in the judgment order can be introduced in evidence in a collateral proceeding as a part of the record for the purpose of overthrowing the jurisdiction of the court. We have been unable to find a single case in our reports where the warrant of attorney has been excluded, when offered in a collateral proceeding to impeach the judgment, upon the ground that it was not competent, as being no part of the record. On the contrary, it appears to have been treated as the process by which the court obtained jurisdiction of the person of the defendant, and in every instance where the question has thus arisen, when the warrant conferred no power to enter the appearance of the defendant, the judgment has been held void. We can see no good reason why the warrant should not be competent evidence upon such question. The attorney who confesses the judgment does so by virtue of a special authority which is presented to the court and filed in the cause, and under its provisions alone he assumes to confer upon the court jurisdiction over the person of the defendant; and when such jurisdiction is in issue what better or more satisfactory evidence can be adduced than such special authority itself, signed and sealed by the defendant.

All the authorities concede that the law gives any party the right to assail the validity of a judgment for the want of jurisdiction in the court rendering it when it is sought to deprive him of any property rights by enforcing such judgment against him, and it would outrage every principle of justice to hold that, while the law gave him such right, it at the same time deprived him of all means of enforcing it.

Take the case at bar. These creditors were not parties to the judgment of *Edward Bannon* v. *Michael E. Bannon*. They could not except to the ruling of the court in entering the judgment upon this warrant of attorney and incorporate it in the record by tendering a bill of exceptions. But suppose it was preserved by bill of exceptions: we are aware of no rule of evidence that would make a bill of exceptions competent evidence in a collateral proceeding between different parties, when the subject-matter of the bill would not otherwise be admissible. Would the certificate of the judge that the warrant was the one upon which the judgment was confessed give it any greater weight or vitality as evidence than it would have if properly identified by any other competent evidence?

The cases of *Magher* v. *Haw*, 12 Ill. 279, and *Waterman* v. *Caton*,

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55 Ill. 94, do hold, as claimed by appellant, that the warrant of attorney is no part of the record. These, however, were direct proceedings to reverse, upon error, judgments entered by confession where the defendant himself was in a position to file bill of exceptions; and if these cases are to stand as authority in harmony with the other cases referred to, then the rule there announced must be limited to direct proceedings by appeal or writ of error.

In no other way can they be harmonized with *Osgood* v. *Blackmore* and *Chase* v. *Dana*.

We do not understand the judgment order in evidence in this case contains any special finding of jurisdiction. It merely recites the facts upon which the jurisdiction is based, the filing of the declaration and warrant of attorney, reciting that it authorizes any attorney of any court of record to appear in that court and waive service of process and confess judgment for the amount due upon the note annexed to the warrants, and the filing of the cognovit by C. P. Hendricks, confessing judgment upon the note declared on. The finding of the court is that the authority of the attorney was limited to a confession of what should be due upon the note, and is consistent with the warrant. There being no finding by the court that it had jurisdiction of the person of the defendant, and no pretense that the attorney had any other or different authority, the presumption must be that the court acted upon the warrant of attorney referred to in the judgment. *Clarke* v. *Thompson*, 47 Ill. 26; *Haywood* v. *Collins*, 60 Ill. 328; *Sweorengen* v. *Gulick*, 67 Ill. 208.

The warrant of attorney bears date September 10, 1877, and describes the note as of even date and due one day after the date thereof; the declaration declares upon the same note; the cognovit confesses judgment upon the note described in the declaration, and the judgment order recites that the authority to confess the judgment was limited to the amount due upon the note described in the warrant of attorney and declaration. This judgment was confessed September 12, 1877, consequently the note was not due, as it was entitled to days of grace. *Arnold* v. *Stock*, 81 Ill. 407.

If this record, then, upon its face, does not show that the court could not have acquired jurisdiction of the person, I shall never expect to find one that cannot stand the test. If it does appear therefrom that the note could not have been due, then, in the language of Walker, J., in *Osgood* v. *Blackmore*, the record does show that the attorney, in fact, had no power to enter the appearance of the defendant, and, having no power, the court failed to acquire jurisdiction of the person of the defendant, and the case is like *Chase* v. *Dana*, *supra*.

Our opinion, therefore, is that the court below decided correctly in refusing to allow the execution of appellant to share in the distribution of the funds in hands of the sheriff.

The general power of attorney from appellant to Hendricks, of date September 1, 1877, cannot avail to sustain the jurisdiction of the court. It was not by virtue of that authority that the appear-

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ance of appellant was entered, neither was it presented to the court for such purpose, nor does it purport to confer any authority to confess judgment.

We think, so far as the questions arising upon the assignment of cross errors are concerned, that the court committed no error in the rule for distribution.

The court, however, erred in setting aside the judgment after the lapse of a term, when the parties to the judgment were satisfied with it, and did not solicit the action of the court in that regard. The order of the court vacating the judgment must be reversed, but will be affirmed in all other respects. *Order reversed in part.*

NELSON MORRIS, IMPLEADED, ETC., *v.* MARY D. GLEASON, ADMX., ETC.

EVIDENCE — *Admissibility of.*—Where, in an action brought to recover damages for the death of a party by the explosion of a boiler, appellant desired to prove that there was no negligence on the part of the firm because its loss by the explosion was $20,000; this evidence was *held* properly excluded.

INSTRUCTION — *As to defective boiler.*—Where the evidence tended to show that the deceased was well aware that the boilers were defective, not merely because they leaked, but for the other reasons stated in the evidence, the omission in an instruction to mention the very important fact that deceased was not aware of the defects in the boiler which caused the explosion, *held* fatally defective. It should have contained the statement that there could be no recovery if the deceased knew of the defects which caused the explosion, and knowingly took the risk.

SAME.—The language in an instruction "that an employer cannot delegate to another person power as an agent, and thereby save himself from responsibility," is too broad, because it would include the deceased himself.

SAME — An assumption that defendant was responsible for damages resulting from defects not known to deceased, *held* objectionable.

APPEAL FROM HENRY COUNTY. Opinion filed March 20, 1878.

CHARLES K. LADD, *Attorney for Appellant*, cited: *Camp Pt. Mfg. Co.* v. *Ballou*, 71 Ill. 419; *T. W. & W. Ry. Co.* v. *Moore, Admx.*, 77 Ill. 221; *Sullivan's admr.* v. *Louisville Bridge Co.*, 9 Kentucky Court of Appeals, 81; *Ladd* v. *New Bedford R. R. Co.*, 20 Am. R. 332; Wood's Master and Servant, 758, 9; *Woodley* v. *Metropolitan Ry. Co.*, Am. Law Times for October, 1877; *Gibson* v. *Erie Ry. Co.*, 20 Am. R. 553; *Ford* v. *Fitchburg R. R. Co.*, 1 Amer. Law Times R. 502 S. C. 110 Mass.; Wharton on Negligence, sec. 214; *St. L. & S. E.* v. *Britz*, 72 Ill. 261; *Patterson* v. *P. & C. R. R. Co.*, 18 Am. R. 415; *Moss et al.* v. *Johnson*, 22 Ill. 633; *I. B. & W. R. R. Co.* v. *Flannigan*, 77 Ill. 365; *Lovenguth* v. *City of Bloomington*, 71 Ill. 238; *Gibson* v. *Erie Ry. Co.*, 64 N. Y. 449; 20 Am. R. 554; Bramwell, B. in *Williams* v. *Clough*, 3 H. and N. 258; *Wright* v. *N. Y. Cent. R. R.*, 25 N. Y. 566; *Mad River R. R. Co.* v. *Barber*, 5 Ohio St. 541; *Warner* v. *Erie Ry. Co.*, 39 N. Y. 468; Wood's Master and Servant, 903; *Stark* v. *McLaren*, 10 C. S. 3d series; *Kewanee* v. *Dupew*, 80 Ill. 119; *Keokuk Pkt. Co.* v. *Henry*, 50 Ill. 264; *C. B. & Q. R. R.* v. *Dunn*, 52 Ill. 451; Shearman and Redf. on Neg., sec. 320; *Ill. Cent. R. R.* v. *Houck*, 72 Ill. 286; *Chicago* v. *Major*, 18 Ill. 361; *C.*

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& A. R. R. v. *Mock*, 72 Ill. 141; *Dyer* v. *Talcott*, 16 Ill. 300; *G. & C. U. R. R. Co.* v. *Fay*, 16 Ill. 559; *Nolan* v. *Schickler*, 4 Cent. Law J. 263; *C. B. & Q. R. R.* v. *Harwood*, 80 Ill. 91; *C. & A. R. R.* v. *Murray*, 62 Ill. 329; *C. B. & Q. R. R.* v. *Van Patten*, 64 Ill. 511; *I. C. R. R.* v. *Maffit*, 67 Ill. 431; *Skelley* v. *Kahn*, 17 Ill. 170; *G. & C. U. R. R.* v. *Yarwood*, 17 Ill. 509; 72 Ill. 141; *Gibson* v. *Pacific R. R.*, 46 Mo. 163; *Paulmier* v. *The Erie R. R. Co.*, 34 N. J. 151; *Dewitt* v. *Pacific R. R.*, 50 Mo. 302; *Kroy* v. *C. R. I. & P. R. R. Co.*, 32 Iowa, 357; *Davis* v. *Detroit, etc. R. Co.*, 20 Mich. 105; *Thayer* v. *St. Louis, etc. R. Co.*, 22 Ind. 26; *Frazier* v. *Pa. R. Co.*, 38 Pa. St. 104; *Indianapolis, etc. R. Co.* v. *Lane*, 10 Ind. 556; *Greenleaf* v. *Ill. Cent. R. R.*, 33 Iowa, 52; *McMillan* v. *Saratoga, etc. R. Co.*, 20 Barb. 449; *McGlynn* v. *Broderick*, 31 Cal. 376; *Skipp* v. *Eastern, etc. R. Co.*, 9 Exch. 223; 3 Hurl & Norm, 258; *Seymour* v. *Maddox*, 16 Q. B. 326; *Combs* v. *N. Bedford Cord Co.*, 102 Mass. 586; *Wonder* v. *B. & O. R. R.*, 32 Md. 410; *Buzzell* v. *Manufg. Co.*, 48 Me. 121; *Dyner* v. *Leach*, 26 L. J. Exch. 221; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282; *Priestly* v. *Fowler*, 3 M. and W. 1; Wharton on Negligence, sec. 217; Shearman & Redf. on Neg., secs. 87 and 94; *T. W. & W. R. R. Co.* v. *Moore*, 77 Ill. 221.

CHARLES DUNHAM, *Attorney for Appellant*, cited: A single mistake in any instruction, however often and cogently corrected in the others, ought to reverse the judgment. *C. B. & Q. R. R. Co.* v. *Harwood*, 80 Ill. 88; *St. Louis & S. E. Ry. Co.* v. *Britz*, 72 Ill. 256; *T. W. & W. Ry. Co.* v. *Larmont*, 67 Ill. 68; *I. C. R. R. Co.* v. *Moffit*, 67 Ill. 431; *Baldwin* v. *Killian*, 63 Ill. 550; *C. B. & Q. R. R. Co.* v. *Lee*, 60 Ill. 502; *Same* v. *Payne*, 49 Ill. 499; *Ill. Cent. R. R. Co.* v. *Jewell*, 46 Ill. 99; *Moss* v. *Johnson*, 22 Ill. 633; Wharton on Neg., sec. 214, and cases here cited; Shearman & Redf. on Neg., secs. 94, 95. It does not require that the machinery shall be absolutely perfect, as it must be if there are no defects. Shearman & Redf. on Neg., secs. 87, 92; *C. C. & I. C. Ry. Co.* v. *Troesch*, 68 Ill. 545, 551; *C. B. & Q. R. R. Co.* v. *Gregory*, 58 Ill. 292; *C. & A. R. R. Co.* v. *Shannon*, 43 Ill. 338; *Schooner Norway* v. *Jensen*, 52 Ill. 273; *C. & N. W. Ry. Co.* v. *Donohue*, 75 Ill. 106–109; *T. W. & W. Ry. Co.* v. *Moore*, 77 Ill. 217–220; *I. C. R. R. Co.* v. *Jewell*, 49 Ill. 99; *I. B. & W. Ry. Co.* v. *Flanigan*, 77 Ill. 365.

WILLIAMS, MCKENZIE & CALKINS, *Attorneys for Appellee*, cited: Verdict against evidence, *Allen* v. *Smith*, 3 Scam. 97; *Weldon* v. *Francis*, 12 Ill. 460; *Bloomer* v. *Denman*, 11 Ill. 240; *French* v. *Lowrey*, 19 Ill. 158; *Cross* v. *Cary*, 25 Ill. 562; *Aurora Fire Ins. Co.* v. *Eddy*, 55 Ill. 213; *Walker* v. *Martin*, 59 Ill. 348; *McNellis* v. *Pulsifer*, 64 Ill. 494; *T. W. & W. R. R. Co.* v. *Moore, admr.*, 77 Ill. 219; *C. B. & Q. R. R. Co.* v. *Gregory*, 58 Ill. 274. Assumes risks. *Gibson* v. *Pacific R. R.*, 46 Mo. 163; Reported also 2 Am. Reports, 499; *Baxter* v. *Roberts*, 44 Cal. 187; *Gearderson* v. *Peterson*, 65 Ill. 193; *Gilson* v. *Pacific R. R.* 46 Mo. 163; *Hayden* v. *Mfg. Co.*, 29 Conn. 548; *Ryan* v. *Fowler*, 24 N. Y., 410; *Noyes* v. *Smith*, 28 Vt. 59. An employer is bound to furnish safe and suitable machinery, and keep the same in proper repair. *Wonder* v. *B. & O. R. R. Co.*, 3 Am. R. 144; *Wright* v. *N. Y. Cent.* 25 N. Y. (11 Smith) 563; *Ryan* v. *Fowler*, 24 N. Y. 413; *Keegan* v. *The Western R. R.*, 8 N. Y. (14 Seld.) 180; *Ill. Cent. R. R. Co.* v. *Welch*, 52 Ill. 183; *C. & N. W. Ry. Co.* v. *Taylor*, 69 Ill. 465; *C. C. & I. C. Ry. Co.* v. *Troesch*, 68 Ill. 551; *C. & A. R. R. Co.* v. *Shannon*, 43 Ill. 338–342; *Perry* v. *Marsh*, 25 Ala. 659; *Cayser* v. *Taylor*, 10 Gray (Mass.) 274; *Byron* v. *N. Y. State Print. Co.*, 26 Barb. (N. Y.) 39; *Hallower* v. *Henley*, 6 Cal. 209; *Sizer* v. *Syracuse*, 7 Lans. (N. Y.) 67; *Perry* v. *Ricketts*, 55 Ill. 234; *T. W. & W. Ry. Co.* v. *Fredericks*, 71 Ill. 294. An employer cannot delegate to another the responsibility of seeing things are kept in proper shape, and by so doing escape liability. *Corcoran*

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v. *Holbrook*, 59 N. Y. (14 Sickles) 517; *C. & N. W. Ry. Co.* v. *Smett*, 45 Ill. 202; *T. W. & W. Ry. Co.* v. *Ingraham*, 77 Ill. 312; *T. W. & W. Ry. Co.* v. *Moore*, 71 Ill. 224; *Laning* v. *N. Y. Cent. R. R.* 49 N. Y. (4 Sickles) 532. It is not necessary to bring actual knowledge home to the employer; it is his duty to find out. *T. P. & W. R. R.* v. *Conroy*, 51 Ill. 102; *Same* v. *Same*, 68 Ill. 60. An employer knowing hidden extra hazards is bound to disclose them to employes. *Baxter* v. *Roberts*, 44 Cal. 187; *Clarke* v. *Holmes*, 7 H. & N. 937; *Ft. Wayne R. R.* v. *Gildersleeve*, 33 Mich. 133; *Strahlendorf* v. *Rosenthahl*, 30 Wis. 697; *Spelman* v. *Fisher, etc.*, 56 Barb. N. Y. 151; *Fairbanks* v. *Haentzche*, 73 Ill. 236. The entire law and every conceivable phase of a cause cannot be put in every instruction, but if taken together they fairly state the law, and have no tendency to mislead the jury, that is all that can be required. *Gilchrist* v. *Gilchrist*, 76 Ill. 281; *Hardy* v. *Keeler*, 56 Ill. 152; *Graves* v. *Shæfelt*, 60 Ill. 462; *Daily* v. *Daily*, 64 Ill. 329; *Howard F. & M. Insurance Co.* v. *Cornick*, 24 Ill. 455; *Ill. Cent. R. R. Co.* v. *Swearingen*, 47 Ill. 206; *Springdale Cemetery Association* v. *Smith*, 24 Ill. 480; *C. B. & Q. R. R. Co.* v. *Dickson*, 63 Ill. 157; *Stobie* v. *Dills*, 62 Ill. 432; *Lettick* v. *Honnold*, 63 Ill. 335; *C. R. I. & P. R. R. Co.* v. *Herring*, 57 Ill. 59; *Stowell* v. *Beagle*, 79 Ill. 525. An engineer's employment is not such as requires him to know of defects in the boiler furnished him. *T. W. & W. R. R.* v. *Moore*, 77 Ill. 217.

LELAND, P. J., delivered the opinion of the court:

This was an action on the case by the administratrix of the estate of Geo. H. Gleason against Nelson Morris, Joseph C. Niles, Michael O'Neil and George McGuire.

The suit was dismissed as to all the defendants served except Morris.

The action was brought to recover damages on account of the death of said George H. Gleason, and there was a verdict and judgment for $5,000. The defendants against whom the suit was brought composed a firm operating a steam flouring mill at Kewanee, in Henry county. The deceased was employed as an engineer to run a steam-engine used in the mill. It is alleged in the declaration that while doing so with due care and diligence, in the full hope and belief that the engine and boiler were perfect and safe, the boiler exploded and killed him; that it was not perfect, but was unsafe, as defendants then and there well knew, and that the death was caused by the neglect and carelessness of defendants in not providing a sufficient, safe and suitable boiler. There was evidence tending to show that the boiler was unsafe and imperfect, to the knowledge of the defendants, and that their negligence may have caused the death as alleged. The main controversy in the case would seem to have been on the subject whether the deceased exercised proper care and caution, and also as to whether he was aware of the defects in the boiler to which the explosion should be attributed.

Appellee contended that although deceased might have known that the boilers were in a dangerously imperfect condition, and that he had acknowledged this to be so, that he thought so merely because the boilers leaked, and not because the material of which they were constructed was old, rotten and defective.

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Appellant contended that deceased was fully aware of all the causes of danger, if any, and that he knowingly took the risk of the dangerous employment.

The question whether the instructions were erroneous or not is the only one we propose to discuss. As we have come to the conclusion to reverse, we will say nothing as to the weight of the evidence, except to say that the case is one on the evidence in which instructions should be accurate.

There was but one question made as to the admission or exclusion of evidence. Appellant desired to prove that there was no negligence on the part of the firm because its loss by the explosion was $20,000. We agree with the court below in its ruling excluding the evidence.

There are, however, in our judgment some serious defects in the instructions, and we are of the opinion that, in a case of this kind, substantially defective instructions of an important character are not cured by others not containing the imperfection. *C. B. & Q. R. R. Co.* v. *Harwood*, 80 Ill. 88; *Camp Point Mnfg. Co.* v. *Ballou*, 71 Ill. 417; *T. W. & W. Ry. Co.* v. *Larmon*, 67 Ill. 68; *I. C. R. R. Co.* v. *Moffitt*, 67 Ill. 431; *Baldwin* v. *Killian*, 63 Ill. 550; *C. B. & Q. R. R. Co.* v. *Lee*, 60 Ill. 501; *C. B. & Q. R. R. Co.* v. *Payne*, 49 Ill. 499. The first instruction asked on the part of appellee and given is as follows:

The court instructs the jury that if they shall believe from the evidence that the defendant, Nelson Morris, was the owner, or part owner, of a steam-flouring mill, a part of the machinery of which was a steam boiler and engine, and that George H. Gleason was in the employ of said defendant as engineer, and that while in such employment as engineer the said George H. Gleason was killed by the explosion or blowing off of said boiler, and left next of kin, and that the plaintiff is the administratrix of said George H. Gleason.

And if the jury further believe from the evidence that the explosion or blowing off of said boiler was caused by defects of material or construction of said boiler, which was known to defendant or any of his partners, if he had any, and that said George H. Gleason was then and there in the exercise of ordinary care and prudence, and that the said explosion or blowing off was not caused wholly or in part by the fault of said George H. Gleason, then the jury should find for the plaintiff.

The first objection to this instruction is that it entirely omits to mention the very important fact that deceased was not aware of the defects in the boiler which caused the explosion.

The statement that deceased exercised ordinary care and prudence, and that the explosion was not caused by his fault, applies to another branch of the case: that is, that deceased used due care and diligence, and that his negligence did not materially contribute to cause the explosion. Now, although the explosion was not caused by the fault of the deceased, yet if he was aware that the boiler was defective in those particulars which caused it to explode, there could be

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no recovery, even though the deceased may have exercised the greatest care to prevent those causes from producing the effect, or to have kept out of reach of the injurious effect of the explosion.

It is said that he could not have exercised care, and that the explosion could not have been without his fault, if he was aware of the defects which caused the explosion. We do not understand this to be so at all. He may have well known all the defects, may have concluded to be careful as he could, and take the risk rather than seek employment elsewhere. He said that he expected most any day to get his head blown off by the boiler; that the fireman had left on account of the danger; but if his employers would give him the fireman's wages in addition to his own, he would fire and run the whole thing. With this and other evidence tending to show that he was well aware that the boilers were defective, not merely because they leaked, but for the other reasons stated in the evidence, the omission mentioned rendered this instruction fatally defective.

It is not necessary to cite authority to show that there could be no recovery if the deceased knew of the defects which caused the explosion, and knowingly took the risk. The instruction should have contained the statement, or some equivalent one, after the word Gleason in the last line, or elsewhere; and if deceased was not aware, or by the exercise of reasonable inquiry could not have ascertained the defect which caused the explosion, then the jury should find for plaintiff. We consider also that the defects known to the defendant or his partners, though they actually did produce the explosion, should have been of a character which they or either of them could, by exercising skill, have ascertained to be likely to produce the explosion. There might have been defects, and these might have produced the explosion, and these defects might have been known, and yet they may have been such as no amount of care and caution on the part of the firm would have disclosed to be dangerous, and to be guarded against as dangerous. There should have been after the words "partners, if he had any," or elsewhere, some such expression as "likely to cause an explosion," "rendering the boiler unsafe," or something to that effect. It is not necessary to cite authority to show that the employer is not an insurer of the employe against accidents from defective machinery. The rule is diligence, perhaps high, or the highest diligence; still there can be no liability without some neglect to do that which ought to be done to have the machinery safe.

This instruction makes liability without any neglect. *C. C. & I. C. R. W. Co.* v. *Treesch*, 68 Ill. 545.

The third instruction as applicable to the evidence is wrong, though the defect might not be discernible upon the face of the instruction without making such application to the evidence tending to show that the deceased was himself given the superintendence of the repairs of the boiler, with power to call upon Keeler to make such repairs as he, deceased, should direct to be made. If Keeler had been employed directly to make the repairs, and not to make

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them under the superintendence of the deceased, the instruction would have been well enough, except that there seems to be an assumption in it that the boiler was unsafe, and that the firm were responsible because of such unsafety. The objection urged, however, is that the jury may have considered the instruction a direction that although the charge and control of the repairs may have been given to the deceased himself, and Keeler requested by Niles to make repairs under the charge and direction of the deceased, that defendant could not thereby have been saved from responsibility.

We consider it quite clear that he might, from all injury which resulted from the want of care on the part of the deceased in properly discharging the duty of directing what repairs ought to be made. It may be true that Niles may have requested Keeler to make repairs when needed, and it may also be true that deceased was to determine when such repairs were needed to be made by Keeler. The language "that an employer cannot delegate to another person power as an agent, and thereby save himself from responsibility," is too broad, because it would include the deceased himself.

The fourth instruction of appellee is objected to mainly because it authorizes the jury to believe otherwise than from the evidence in the case. We have examined it carefully, and have concluded that it is substantially good and not defective for the reason alleged.

The fifth may be somewhat objectionable, because it contains an assumption that defendant was responsible for damages resulting from defects not known to deceased. Perhaps to make it entirely unobjectionable, the words "if any" should have been added after the word "responsibility" near the end of it. The object and intent of the instruction was, however, so plainly to define the rights and duties of the deceased that no harm could have been done by the supposed assumption of neglect on the defendants' part.

The objection of appellant to appellee's sixth instruction has some force in it, though Gleason may not have actually known of the defects in the boiler, which caused the explosion. Still the jury might say that a person with no more means of ascertaining the facts than those mentioned in the instruction ought, by the exercise of reasonable diligence, certainly to have discovered them. There ought to have been added, "or which with his means of knowledge would not have been ascertained by the exercise of reasonable diligence," or something to that effect.

The objection to the sixth does not apply to the seventh, which contains the substance of that omitted in the former in the following expression: "which he was not bound by reasonable prudence and care in his employment under the circumstances to have known."

If the seventh be correct, it does not cure the defect in the sixth, in our judgment.

The objections to the eighth, though strongly pressed, are met by the answer that it is a copy of one approved by the Supreme Court in the case of the *C. B. & Q. R. R. Co.* v. *Payne*, 59 Ill. 534, as the fifth given on the part of the appellee.

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The meaning of the instruction is that if it be a case for damages, then the damages should be such, etc. And the expression would be a better one to say, "If the jury believe from the evidence that the plaintiff is entitled to recover, then she should recover such damages," etc. This is really the idea intended, though not accurately expressed.

For the errors mentioned in the instructions we have concluded that there must be a reversal, and the judgment is reversed and the cause remanded. *Judgment reversed and remanded.*

THE CITY OF EL PASO ET AL. v. AARON CAUSEY.

NEGLIGENCE—*In falling down basement to store.*—Where the sidewalk and basement entrance were constructed in the best possible manner, and equal to any in the largest cities, and the walk was ten feet wide, even and smooth, and amply safe for any person who was not reckless regarding his own safety; and where appellee fell down the entrance to the basement and subsequently told various parties that his injury was the result of his own carelessness, it was *held* such negligence on the part of appellee that he could not recover.

APPEAL FROM WOODFORD COUNTY. Opinion filed March 20, 1878.

S. D. PUTERBAUGH, HOPKINS & MORRAN, AND CHITTY CASSELL & GIBSON, *Attorneys for Appellants.*

BARRERE & GRANT, *Attorneys for Appellee.*

PILLSBURY, J., delivered the opinion of the court:

In 1872 Shur, Tompkins & Co. erected a three-story brick building, with basement, on the southeast corner of block forty-two in the city of El Paso. The building extends about one hundred feet on each street, Front street on the south and Central street on the east.

The corner room was occupied by Shur, Tompkins and Company as a bank; the next west by Young & Tompkins as a dry goods store; then Tobias & Son, grocers; and the west one by W. A. Johnson, hardware dealer.

Under each of these rooms was a basement used for business purposes, eight feet deep below level of the sidewalk. The entrance to the basement under the store of Young & Tompkins was by a flight of steps, commencing at the edge of the stone flagging constituting the sidewalk, and running at right angles therewith directly to the door of the basement. The north line of the stone pavement was four inches north of the line of the street, and the south wall of the building was four feet from north line of street. This space between the sidewalk and the building was excavated to the depth of the basement along the entire south front of the building, making an area about three feet eight inches wide. Protecting this area was an iron fence over three feet high, extending from the door of the bank to the east line of the basement stairs, where it was connected

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with a newel post, eight inches in diameter, standing six inches from the inner edge of the sidewalk.

The entrance to the basement was six feet in width, and under the east window of the store.

The entrance to the store was by a double door in a recess four feet deep, the sides of which recess were glass. An iron platform, raised one step and four and one-half feet long, leads over the area from the pavement to the front-door step. On each side of this platform was the *terra cotta* figure of a lion, about four feet high, and extending from the building to line of the railing. From the west side of the store entrance the iron railing extends to the next entrance.

This sidewalk was ten feet in width, made of Joliet flagstone jointed and hammered.

The front windows of the store were each four feet four inches in width and eleven feet high, and contained three panes of glass each.

The proof is full and complete in this record that the sidewalk, area, entrances to basement and the stores, and the railing along the area were constructed in the very safest manner known to practical architects, and equal to any in the largest cities of this country, and that they were, at the time of the injury to appellee, in the best repair.

On the 1st day of November, 1875, the appellee, Causey, was passing along the sidewalk from the east with the intention of going into the store of Young & Tompkins to see a friend, and, as he says, mistaking the east window of the building for the door, he turned to the right around the newel post and stepped off the sidewalk into the cellar way, injuring himself quite seriously.

He brought this suit against Young and Tompkins and the city to recover damages for such injury.

He claims, as one ground of recovery against the city, that the city was joint owner of the building and therefore liable in that capacity for the excavation and the construction of the area and stairs.

It appears from the record that the city and some Masonic bodies desired to have halls in the upper story of the building for their respective uses, and an arrangement was made by which Shur, Tompkins and Company and P. H. Tompkins would erect the building to the center of the joists of the second floor, and the city and Masons were to complete the upper story and build the stairs leading thereto, put on the roof, and keep the same in repair; and were then to be the owners of such upper story.

There is no proof that the city had any interest in the land or the storerooms or any control over the building of the basement or the lower stories, as proprietor or part owner. We are all of the opinion that no liability attached to the city on the ground of ownership.

Does the case then show such negligence on the part of appellants

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as will render them liable for the injury sustained by appellee under all the evidence in this record?

It is a matter of common observation that in all our cities business blocks are built with basements below the level of the sidewalk, and frequently such basements are most valuable for business purposes; and it is not only convenient but absolutely necessary that entrances should be had to the same from the street in order to be available; and such entrances have ever been permitted by the authorities of all cities, and experience has shown that when properly constructed, so as not to encroach upon the traveled way, it is very rarely the case that one is injured therefrom.

In considering the degree of carelessness properly attributable to a city in allowing these entrances to private property from the street, we are not to judge of it from the fact of one accident, but rather what would have been the course of prudent persons prior to the accident. Would such a person consider that the sidewalk was unsafe to travel by reason of such entrance? Would a prudent man, considering the character of the entrance with reference to the use of the street as a public way for travel, come to the conclusion that such entrance was likely to cause an injury? *Chicago* v. *Starr*, 42 Ill. 174.

These are questions that should be calmly and without prejudice considered by the jury in determining whether the city is properly chargeable with negligence, and the degree thereof. Ibid.

The burden of proof in this case is upon the plaintiff to prove to the court and jury not only that the defendants below were negligent, but that at the time of the injury he was in the exercise of due care for his personal safety.

The evidence shows that this accident occurred in the early part of the evening when the lights were burning in the store of Young & Tompkins as usual, and appellee testifies that the light from the windows "struck me in the face and I stepped right down the cellar way," and "I supposed I was in front of the store door and turned to go in, and found I had mistaken the window for the door and stepped into the cellar way."

It is hard to understand how a reasonably prudent man in possession of all his faculties could, in passing along a stone pavement ten feet wide, with all the lights from the store shining through the doors and windows, mistake a window in full view and of the size of this for the entrance to a store door materially different in size, appearance and construction and protected by figures nearly four feet high.

The appellee was well acquainted with the sidewalk, entrance to the store and to the basement; besides, he knew where he was going and the way to properly go there; and there is no doubt, had he paid the least attention to his footsteps he would not have stepped down a flight of stairs when he should have done exactly the contrary in order to reach the raised iron platform leading across the area to the store entrance, especially when, as the proof clearly shows

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in this case, that at the time of the injury the light was so shining upon the stairs that the first two steps were plainly to be seen from the sidewalk. The circumstances in proof, instead of showing that the appellee was exercising due care for his personal safety, forces upon the mind a conclusion exactly the reverse.

We are not left, however, upon this point, to the inferences from the circumstances alone, for it is in evidence that appellee told various parties that his injury was the result of his own carelessness.

Dr. Adams testified, that on the 18th of February, after the injury, Causey came into his office and gave him a history of his injury, and detailed the circumstances. "Said he mistook the window for the door while his attention was being directed some other way; saw the brilliant light and thought it was the door; stated what attracted his attention, and, from my best recollection, he said it was a train that was passing at the time; might have been something else."

William Tucker swears "that the first time I saw Causey after the accident was when he first got about from his injuries;" met him on the platform of the T., P. & W. R'y at El Paso; the train from Peoria was just in; shook hands and asked him how he was getting along; spoke of his injury and said it was of his own carelessness that he got hurt; said he was not paying attention to where he was going, but was looking back."

Hannah King says: "That night heard Causey say that he carelessly walked into the stairway; said he saw the light in the window and thought it was the door and started for it; he said, 'what will my poor wife and children do, I was so careless as to fall down there, don't know why I did such a foolish thing.'"

W. A. Johnson says, "that at the time Causey fell in the stairway it was light enough so I could see the lions, the newel post, the hand rail, the two top steps and the third not so plainly, and could see Causey's feet on probably the fourth step. It was light enough on the pavement and the top step so any person could readily distinguish the entrance." "When I brought him out of the stairway saw no indication that he was not in his right mind." "Shortly after we placed him on the lounge he stated that it was by his own carelessness that he fell; said, 'oh how careless I was'; think he used this language twice."

H. C. Hubbard says: "On the night he was hurt I heard him remark once or twice, 'oh how careless a man can be'; heard him make the same remark next day in Peoria."

Jacob Zaines testified that the night he was injured he heard him say it was by his own carelessness that he fell into the basement.

W. R. Willis says he met Causey next spring in El Paso; in conversation with him he said, "it was my own carelessness"; Willis said, "you were acquainted with the entrance; I am astonished at it, you knowing the situation so well"; he said, "it was sheer carelessness in me."

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P. A. Simmons and Robert Robinson also testify to same statements of appellee.

These are the statements of disinterested witnesses, and we have no hesitation in giving them the fullest credit, notwithstanding the partial denial of appellee.

We can but believe from this positive evidence, in connection with all the other facts and circumstances in proof, that the carelessness of appellee was so great that his injury is directly chargeable to it rather than the negligence of appellants.

Cities are not insurers against accidents, nor are they required to so construct their sidewalks as to secure immunity from injury when used, but they fulfill their duty to the public in that regard when their walks are reasonably safe for persons exercising ordinary care and caution when using them. *City of Chicago* v. *McGiven*, 78 Ill. 347.

This sidewalk and basement entrance was constructed in the best possible manner and equal to any in the largest cities. The walk was ten feet wide, even and smooth, and amply safe for any person who was not reckless regarding his own safety.

We are of the opinion that the appellee cannot recover upon the case made in this record. He has only his own negligence to blame for his injury.

The judgment must be reversed and cause remanded.

Judgment reversed.

THE CITY OF JOLIET v. MATTHEW TUOHEY.

CITY COLLECTOR—*Suit to recover extra compensation for labor done.—Held* that under the statute the salary of appellee was fixed, and as he continued to act as city collector, he is prohibited by it from ever receiving any extra compensations over and above that provided.

SAME—Also *held* that he is bound to perform all the duties incident to the office for the compensation fixed, and the rule is the same even though additional duties should be imposed upon him by a statute or ordinance duly passed subsequent to his election and the time his compensation was fixed.

SAME.—Where he held himself out to the people as collector, received their money for taxes and retained his fees as such, he is estopped from denying his official character.

ULTRA VIRES—*Plea of.*—If the city did not possess the power to enact such an ordinance, then it is void for want of such power, and the city can interpose the plea of *ultra vires* as a perfect defense to the claim of appellee.

APPEAL FROM WILL COUNTY. Opinion filed March 20, 1878.

D. P. HENDRICKS AND C. A. HILL, *Attorneys for Appellant*, cited: Dillon on Munic. Cor., secs. 169, 172, 175; *City of Decatur* v. *Vermillion*, 77 Ill. 315; *Alexander Co.* v. *Myers*, 64 Ill. 37; *Mapes* v. *The People*, 69 Ill. 528; *State* v. *Sellers*, 7 Rich. Lew. 368; *State* v. *Mayberry*, 3 Strob. 144; Dillon on Munic. Cor., sec. 176, p. 211, note.

HALEY & O'DONNELL, *Attorneys for Appellee*, cited: *People ex rel. Hilton* v. *Supervisors*, 12 Wend. 257; *Bright* v. *Supervisors*, 18 Johns. 241; *White* v. *Polk*

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County, 17 Iowa, 413; *Doubleday* v. *Clerk etc.*, 2 Cowen, 533; *Pullman* v. *Mayor, etc. of N. Y.*, 54 Barb. 169; *People* v. *Swift*, 31 Cal. 26; *Meech* v. *City of Buffalo*, 29 N. Y. (2 Tiffany) 198; *Roun* v. *Cabot*, 28 Ga. 50; *Tucker* v. *Virginia*, 4 Nev. 20; *Miller* v. *Milwaukee*, 14 Wis. 642.

PILLSBURY, J., delivered the opinion of the court:

Appellee was elected city collector for the city of Joliet in March, 1874, and after qualifying, entered upon the duties of his office.

As such collector he received the general tax warrant for such city, and various warrants for the collection of special assessments for local improvements. These he held at time his term expired, which was, as he states in his testimony, July 5, 1875. February 4, 1875, the city council passed the following ordinance: "Be it ordained by the common council of the city of Joliet, that Matthew Tuohey, who was elected to the office of city collector at the annual municipal election held on the 3d day of March, 1874, for the ensuing year, and who qualified and gave bonds as such collector, be and he is hereby authorized, as such collector, to complete the collection of the warrants for the collection of the general city taxes for the year 1874, and all special assessments and taxes where the warrants for the collection thereof may come into his hands prior to the time and date of the legal qualification, the acceptance and approval of the bond, of his duly elected successor in office; and that said Tuohey shall have full power to levy and collect such general taxes, and special assessments and taxes, in accordance with the law for the collection of special assessments and taxes in and for said city."

Tuohey returned all such warrants after the election and qualification of his successor, from time to time making collections thereon until October 4, 1876, when the following ordinance was adopted by the city council:

"Be it ordained by the city council of the city of Joliet:

"SECTION 1. That Matthew Tuohey, late city collector, be and hereby is ordered and directed to immediately make return to the county treasurer, *ex-officio* county collector of the county of Will, and state of Illinois, the unsatisfied warrant in his hands for the collection of the revenue of the year 1874, and to make returns of all delinquent lands and lots, and pieces and parcels thereof, and the taxes remaining unpaid thereon, with directions to the said county treasurer, *ex-officio* county collector, to immediately advertise said delinquent lands, lots, and pieces and parcels of the same, as the law directs, and to apply to the county court of Will county, state of Illinois, at the next November term thereof, for judgment against the same in due form of law.

"SEC. 2. That said collector shall be entitled to a reasonable compensation for making the said delinquent list and returns to said county treasurer, *ex-officio* collector."

In accordance with the requirement of this ordinance, Tuohey made out such delinquent list, and filed the same with the county collector.

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He now brings this suit against the city of Joliet to recover for sixteen months' labor collecting taxes, at $60 per month, and for making delinquent lists in July, 1875, for city council, and to county collector in October, 1876, for which he charges in his bill of particulars the sum of $400. The common counts only were filed by him, to which the city pleaded the general issue and set-off. The plea of set-off was subsequently withdrawn, and the cause tried upon the general issue. Appellee recovered verdict and judgment for $800, and the city appeals.

The appellee claims that by an ordinance of the city he was required, as collector, to make report to the city council of the delinquent lands and personal taxes of 1874, which he did, and then by the above quoted ordinance of October 4, 1876, he was further required to make and file a delinquent list with the county collector; and as such was no part of his duty as city collector, he is entitled to recover extra compensation therefor.

He further claims that the collection of the taxes after July 5, 1875, was no part of his duty, and therefore he is entitled to recover a reasonable compensation for the sixteen months he was engaged in collecting such taxes. Upon these two grounds he bases his right to recover.

On the 17th day of February, 1874, the city council passed an ordinance fixing the salaries of city officers, in which it was provided: "That the collector receive two per cent on all moneys actually collected."

The report of appellee to the city council of general taxes and special assessments collected and delinquent, shows that this model tax gatherer not only retained the two per cent upon what he collected, but in every case charged his commission upon the face amount of the warrant.

For instance: the general tax warrant amounted to $85,667.08, of which he returned $21,033.92 as delinquent, and yet credits himself, and retains the fees for collection, on the whole amount of the warrant, the fees amounting to $1,713.34.

Again, warrant No. 10, for constructing sewer on Chicago and Jefferson streets, was for $8,872, which he charges himself with, and credits himself with amount of delinquent list uncollected, $8,691, and by fees for collection $177.44.

He managed to collect on this warrant $181, and charged the city $177.44 for it, and retained his fees out of general taxes in his hands.

Warrant No. 8, for opening Bass street, amounted to $3,075.15. Before Tuohey collected any of it the whole assessment was dismissed by city council, yet he charged the city $61.50 as collector's fees, and retained it out of general funds.

The aggregate of warrants received by him as collector was $99,631.93, upon which he charged and received two per cent, amounting to $1,992.63, at the same time returning as delinquent, abated and dismissed, the sum of $33,701.56.

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This summary shows that he has already received $674 more than he was entitled to under the provisions of the ordinance fixing his salary, and yet he comes into a court of law and asks that he may have another chance at the city treasury.

Under such circumstances, the claim of the appellee does not appeal very strongly to the favorable consideration of a court of justice.

He is entitled to the cold steel of the law — nothing more.

The only authority of appellee to retain the warrants and proceed with the collection of the taxes after his term expired, was the ordinance of February 4, 1875.

We shall not stop to inquire whether the city council had the power to pass the ordinance in question.

If it did, the ordinance can have the effect only of extending the time for the performance of those duties which he should have done during his term of office. It does not purport to change the powers, duties or compensation of the collector.

If the city did not possess the power to enact such an ordinance, then it is void for want of such power, and the city can interpose the plea of *ultra vires* as a perfect defense to the claim of appellee. Dillon on Municipal Cor., sec. 381.

The appellee, however, relies upon the doctrine, as he must necessarily do, that the city council had the power to extend the time for him to complete the collection of the warrants, thereby in effect extending his term of office.

Upon this view of the case he was still the collector, acting under the authority of his original election, and the fact that he accepted the provisions of said ordinance, continued acting as such collector, and retained the fees allowed by law, shows conclusively that he considered he was still collector.

He held himself out to the people as collector, received their money for taxes, and retained his fees as such, and now he shall not be heard to say that he was not. We are of the opinion that he is estopped from denying his official character.

By an act of the general assembly in force April 23, 1873 (Rev. Stat. 1874, p. 252), it is provided that "It shall and may be lawful for the common council or legislative authority of any city in this state to establish and fix the amount of salary to be paid any and all city officers, as the case may be, except members of such legislative body, in the annual appropriation bill or ordinance made for the purpose of providing for the annual expenses of any such city, or by some ordinance prior to the passage of such annual appropriation bill or ordinance; and the salaries or compensation thus fixed or established shall neither be increased nor diminished by the said common council or legislative authority of any such city after the passage of such annual appropriation bill or ordinance, during the year for which such appropriation is made, and no extra compensation shall ever be allowed to any such officer or employe over and above that provided in manner aforesaid."

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Under this statute the salary of appellee was fixed, and as he continued to act as city collector, as we have seen, he is prohibited by it from ever receiving any extra compensations over and above that provided.

He is bound to perform all the duties incident to the office for the compensation fixed, and the rule is the same even though additional duties should be imposed upon him by a statute or ordinance duly passed subsequent to his election and the time his compensation was fixed. *City of Decatur* v. *Vermillion*, 77 Ill. 315.

If appellee was not satisfied with the two per cent upon moneys actually collected, he was under no obligation to accept the office with inadequate compensation.

He voluntarily accepted the office, knowing what pay he was to receive, and on same terms accepted the provisions of the ordinance extending the time for the completion of his duties.

The delinquent lists returned by him to common council were made under the provisions of an ordinance in force at time of his election, defining the duties of collector, and was clearly one of the duties assumed by him at the time of his acceptance of the office. The lists returned by him to county collector in October, 1876, he claims, were so made and returned under the provisions of the ordinance of October 4, 1876, the second section of which allowed him reasonable compensation therefor.

This ordinance imposed no additional duties upon appellee, but simply required him to *immediately* make the return to the county collector, that he should have done long prior to that date.

Section 4 of Article IX of the constitution of 1870, provides that: "The general assembly shall provide in all cases, when it may be necessary to sell real estate for the non-payment of taxes, or special assessments for state, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive state and county taxes; and there shall be no sale of said property for any of said taxes or assessments but by said officer, upon the order or judgment of some court of record."

The legislature, for the purpose of complying with such requirement of the constitution, by act of May 3, 1873 (Rev. Stat. 1874, p. 887, sec. 178), enacted that "when any special assessment made by any city, town or village, pursuant to its charter or by any corporate authorities, commissioners or persons, pursuant to law, remain unpaid in whole or in part, return thereof shall be made to the county collector on or before the tenth day of March next after the same shall have become payable, in like forms as returns are made for delinquent land tax."

Even before this legislation, the return of delinquent taxes and special assessments must be made to county collector, or no sale could be had. *Hills* v. *City of Chicago*, 60 Ill. 86.

The law then having imposed this duty upon him as city collector, the city council had no power to allow him extra compensation, as

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it is prohibited from so doing by the statute. *City of Decatur* v. *Vermillion*, 77 Ill. 315.

It is urged, however, in this case, that as the city withdrew its plea of set-off, no credit should be given for the amounts retained by the appellee.

A plea of set-off was not necessary.

The evidence clearly establishes the fact that the appellee retained as his compensation a much larger amount than he was entitled to.

He made his report to the council of the amount received by him; the amount collected and paid to the city treasurer, and as another proof of the looseness with which our municipal affairs are conducted, the council approved his report, and allowed him to retain as his fees the whole amount.

It was therefore payment, and payment can be shown under the general issue.

The appellee has shown no right to recover, therefore the judgment of the court below will be reversed. *Judgment reversed.*

JOHN M. GUILL ET AL. *v.* FRANCISCA HANNY.

HUSBAND AND WIFE—*Doctrine of, under Act of 1861—Rev. Laws of 1874.*—The continued earnings of the husband cannot be appropriated to the increase of the wife's capital at the expense of his creditors. The law of 1874 is careful to provide that neither the wages nor the earnings of the one shall be liable for the separate debts of the other, clearly indicating that such labor and skill should remain intact for the purpose of enabling each to discharge their own separate liabilities, and nothing appears in the law pointing to an intention to change the doctrine as it had previously been established by the Supreme Court.

EVIDENCE—*As to compensation of husband as agent.*—Where it was claimed that the husband was acting as the agent of his wife, who testified that there was no agreement as to what her husband was to receive by way of compensation for his services in attending to her business, except "that he was to be paid as the business would pay," until about the time of the levy on the property in the business, when it was understood that he was to have $1.50 per day for his labor, and where, on cross-examination, she was asked whether she had ever paid her husband anything on account of his services, and the court refused to permit her to answer the question, it was *held* that, to show the real nature of the transaction between the husband and wife, it was eminently proper to ascertain (if he was acting as her agent only in transacting the business) whether he had ever received any, or what, compensation for his labor.

INSTRUCTION—*Must be based on the evidence.*—Instructions should be based upon the evidence, and it is error not to confine them to the testimony in the case.

APPEAL FROM PEORIA COUNTY. Opinion filed March 20, 1878.

JAMES & JACK, *Attorneys for Appellants.*
S. D. PUTERBAUGH, *Attorney for Appellee.*

SIBLEY, J., delivered the opinion of the court:

The principal question arising in this case is whether the revised

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laws of 1874 have changed the doctrine established in *Brownell* v. *Dixon*, 37 Ill. 198, and approved in *Waterman* v. *Price*, 47 ib. 22, and *Wilson et al.* v. *Loomis et al.*, 55 Ill. 352, under the act of 1861, in relation to the subject whether the continued earnings of the husband can be appropriated to the increase of the wife's capital at the expense of his creditors.

The facts are that the property levied on, consisting of the contents of a wagon shop, by the creditors of Richard Hanny, in July, 1876, was replevied by the appellee in this suit in the following September, claiming the same as her separate property. Mrs. Hanny testified on the trial of the cause that she borrowed of one Granville James $500 for the purpose of purchasing a stock of groceries, in order to furnish her husband, Richard, who was then largely in debt, with some employment. Mr. Hanny, as her agent, made the purchase, and after it was made conducted and controlled the business (she having little or nothing to do with it) for about six months, when the store was sold out and the amount realized from the sale invested in the business of manufacturing wagons and buggies, the preparation and prosecution of which was left entirely to the husband's judgment.

The stock on hand at the time of the levy was worth from $900 to $1,000. She says that the grocery was sold out because Mr. James thought they were not doing well in the business, and proposed that Mr. Hanny should go to work at his trade of wagon making, which proposition she agreed to, and took the proceeds arising from the sale of the grocery and invested it in this enterprise, her husband still continuing to manage and control this new business as her agent.

Mrs. Hanny's testimony is very loose and unsatisfactory, to say the least of it, and in some instances contradictory. She says that she personally borrowed the money of James, and no one else was present when she gave her note except his wife. Afterward, when pressed, admits that her husband may have signed the note for her, which turns out from the testimony of James to be the fact, and that her husband was present at the time. She also says that the money was borrowed two or three days previous to purchasing the grocery. Yet it appears that the goods were purchased in September and the note was dated in April.

Her testimony respecting the $570 which she received from Germany, in 1869, is too vague and inconclusive to be of much weight. She would not use it in purchasing the grocery because she was saving it for her children, and preferred to borrow at a high rate of interest rather than to take the chances of losing her own money in a business with which she was unacquainted. What became of this money does not very clearly appear. She said at the time of the trial that she "had not got it all any more." How it had diminished is not important, since she does not say that any portion of it was ever put into the business managed by her husband, although the impression seems to have been conveyed to the jury that she had

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done so. The record, however, fails to furnish any evidence of it. Then, again, Mr. James was extremely accommodating to loan this $500 to Mrs. Hanny, who had no property, except a little money that she was saving for her children, and refused to risk it in the business that she wished to engage in, without any security, relying, as he says, upon the expectation of its being repaid by means of the husband's earnings. It may here be remarked that if it was, as they all agree (except the husband, who for some reason was not produced as a witness on the trial), understood his earnings were relied upon for the repayment of the money loaned to furnish the capital, how could the business be considered the wife's separate property, when her services had contributed nothing to its profit.

According to Mrs. Hanny's testimony she was present when the contract for purchasing the grocery was made, and paid the purchase money. But the witness, De Worth, who was in possession of the establishment, and Mesterschmidt, the real owner of it, both swear that the sale was made to Richard Hanny, and his wife was not present at the time, nor was her name mentioned in the transaction. De Worth also states that Mr. Hanny gave him a check on the bank to pay for the property. The first time that either of them speak of seeing Mrs. Hanny was after the contract had been closed, and an account of stock was being taken. Mesterschmidt says that two or three days after the matter was closed up he saw the name of Mrs. Hanny on the sign as proprietor of the store; inquired of Mr. Hanny what it meant, and was informed by him that he had a difficulty with one Hughes, and just as soon as he had settled that he would run the business in his own name.

This whole case has so much the appearance of an effort on the part of the principal parties interested to establish the husband of appellee in a business where his earnings and the fruits of his labor were to be placed beyond the reach of his creditors for an unlimited time that it should receive no favor from either courts or juries.

Mrs. Hanny testified that there was no agreement as to what her husband was to receive by way of compensation for his services in attending to her business, except "that he was to be paid as the business would pay," until about the time of the levy on the property, when it was understood that he was to have $1.50 per day for his labor. On cross-examination she was asked whether she had ever paid her husband anything on account of his services, and the court refused to permit her to answer the question. In this we think the court erred. To show the real nature of the transaction between the husband and wife, it was eminently proper to ascertain (if he was acting as her agent only in transacting the business) whether he had ever received any, or what, compensation for his labor.

Instruction number four given for the plaintiff is as follows:

4. "That if the jury find from the evidence that plaintiff had $570 in her own right, derived from a source other than her husband, and that on her own name and credit she borrowed $500, and with these sums she purchased stock and engaged in the business of manufac-

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turing wagons, and that no part of the capital used in such business was furnished by her husband, and that defendants, as constables, by virtue of executions in their hands against Hughes and Hanny, the husband of plaintiff, seized and took the property of plaintiff so purchased and manufactured by her, you will find the defendants guilty, and the property so seized and taken in the plaintiff," was erroneous, for the reason there was no evidence in the case tending to show that Mrs. Hanny even put any amount of money into the business of manufacturing wagons, which she owned in her own right, except the proceeds derived from the sale of the grocery, much less the sum of $570 in addition to it. She says that she put into that business the $500 realized from the sale of the grocery. No other sum is mentioned by her at all.

Instructions should be based upon the evidence, and it is error not to confine them to the testimony in the case. *Goodwin* v. *Durham*, 56 Ill. 239; *Holden* v. *Hulbert*, 61 ib. 280; *Paulin* v. *Howser*, 63 ib. 312; *Alexander* v. *Town of Mt. Sterling*, 71 Ill. 366, ib. 463; *Murphy* v. *Larson*, 77 Ill. 172.

This instruction, as well as number five, is also liable to another objection; that is, if the wife furnished the original capital to commence the business, and the husband conducted it, and though his labor and skill had largely contributed to increase the stock, still this addition to the capital, the jury were instructed, was so far beyond the reach of his creditors as not to be liable to seizure. It was said in *Wilson et al.* v. *Loomis et al.*, *supra*, "that if she could thus appropriate the results of her husband's labor, industry and skill to herself, as separate estate, for a number of years, no reason is perceived why she should not do so for an entire lifetime."

We do not think the law, as settled in that and previous discussions upon the same subject, is at all in conflict with the cases referred to by appellee. *Premmier* v. *Clabaugh*, 78 Ill. 94, and *Blood* v. *Barnes*, 79 ib. 437, simply uphold the doctrine that the wife, by merely allowing her husband to manage her property, does not forfeit her right to it. This does not militate against the former discussion upon the question in controversy, for in these cases the identical articles of property in dispute belonging to the wife were the only subject of question. Hence, while the farm in the one case and the printing press in the other, owned by the wife, could not be taken for the husband's debts, it was conceded that the crops raised upon the land by the husband's labor would, after the payment of a reasonable rent, be liable to seizure by his creditors for the satisfaction of his debts. It is not the wife's property, but the proceeds of the husband's skill and labor, that the creditors have a right to claim. In the present case there was no proof that any of the stock on hand at the time of the levy included articles that were purchased by the money of the wife in the first instance. The changes of the material originally purchased that were produced by the labor and skill of the husband had been so interwoven with the capital of the wife as to render any identity quite impossible. Then the familiar rule that

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one who willfully mixes up his property with that of another so as to destroy its identity loses his right to reclaim it, seems to have some application in cases like the present, although it may be more correct to say, as is said in *Waterman* v. *Price*, *supra*, that "the transaction can only be regarded, as far as concerns the creditors, as a loan of the wife's money to her husband, by means of which he engaged in trade." It is, however, insisted that since the decisions referred to were made the Revised Laws of 1874 have enlarged the rights of married women to such an extent that they can now transact business in the same manner as if they were sole and unmarried. That the husband is not liable for the debts of his wife except in certain cases, nor is she in any way responsible for his. But can it be supposed the legislature meant that either could appropriate the other's labor and skill so as to prevent their separate creditors from obtaining the benefit of it as a means of collecting their honest debts? This would be attributing to the law-makers a motive that cannot be supposed to have existed. Indeed, the law itself is careful to provide that neither the wages nor the earnings of the one shall be liable for the separate debts of the other, clearly indicating that such labor and skill should remain intact for the purpose of enabling each to discharge their own separate liabilities, and nothing appears in the law pointing to an intention to change the doctrine as it had previously been established by the Supreme Court.

For the reasons indicated the judgment of the Circuit will be reversed and the cause remanded. *Judgment reversed.*

MANSFIELD M. STURGEON, ADMR., ETC. *v.* ANN C. BURRALL AND CHARLES M. OSBORNE, EXR., ETC.

HUSBAND AND WIFE—*Husband as agent and trustee, wife his assistant.*—According to the allegations of the bill in this case, the husband was the agent and trustee, and the wife one who aided him in misappropriating for her benefit, or for that of both, the fund intrusted to his charge.

SAME—*Multifariousness for misjoinder of husband and wife.*—If, under such circumstances, the fund went, part into the possession of the husband and part into that of the wife, so that equity following it might decree that each one should account for the portion so obtained, the bill would not be multifarious for such joinder of two defendants, jointly engaged in misappropriating the one fund, and of course not if they were jointly liable.

Multifariousness.—There seems to be no fixed rule, universally applicable, as to what constitutes multifariousness. Yet we do not consider the injustice of proceeding against both defendants in one suit, nor the inconvenience to the court on account of too much intricacy, such as to render the joinder of both defendants a cause why the bill should be deemed multifarious.

EQUITY—*Fraud, undue influence, imbecility, grounds of relief in equity.*—Taking into account the charges of fraud, of undue influence, of mental imbecility, the prayer to set aside the alleged gift of the bonds, and the $5,000 liquidation of the one third of the rents claimed by virtue of dower, the allegation as to the

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fiduciary relations of the parties, and also considering the nature of the accounts of the agency, or trust, that may be required to be taken, and that such accounting may be such as could not as well be taken in a court of law, it was *held* that the case is one in which, if the allegations of the bill are true, the complainant is entitled to relief in a court of equity.

DEMURRER—*Separate demurrers to bill.—Held* under the facts in this case that the demurrers should have been overruled and the bill answered.

APPEAL FROM ROCK ISLAND COUNTY. Opinion filed March 20, 1878.

C. M. HARRIS, *Attorney for Appellant.*
HENRY CURTIS AND CHARLES DUNHAM, *Attorneys for Appellee.*

LELAND, P. J., delivered the opinion of the court:

The court below sustained separate demurrers filed by the appellees to a bill in chancery, and the complainant abiding, it was dismissed. This decision of the court below is assigned for error.

Appellee complains that the bill is very voluminous; that it is indefinite, uncertain, unintelligible, redundant in statement, multifarious, and without equity. With its exhibits it covers some fifty manuscript pages. As it would be remarkable if there could be a bill in equity of such length, with no equity in it, we have endeavored to extract from the bill the material portions.

It alleges that Charles Jack made a will in 1860, and died in 1867. A copy of the will is set out. The will disposes of all his estate, making his daughter, Ann C. Burrall, residuary legatee and devisee, and her husband, Edward Burrall, Jr., executor. The only portions of the will devising or bequeathing anything to his widow, Ann Jack, are as follows:

"Whereas, I consider that my wife, Ann, will be amply provided for by right of dower in property belonging to me, and in a lot of land near Chicago, heretofore sold by me without relinquishment of dower thereof, merely *in memoriam*. I give and bequeath all lots belonging to me in the town of Knoxville, Knox county, Illinois, 80 acres of land on Spoon river, said county, the description not now recollected; also, town lots in Rome, in Peoria county, to have and to hold the same unto the said Ann Jack, her heirs and assigns in fee simple." "Of my horses, I give old Fanny to my wife." (It does not appear by the bill that the widow ever renounced the benefit of the provisions of the will.)

It is alleged that the deceased left a widow, Ann Jack, one daughter, Ann C. Burrall, one granddaughter, Mary J. Ellett, married to Frederick P. Burgett, and one grandson, Charles W. Harris, and no other descendants; that he left a large estate, real and personal, in this state and Texas.

It is alleged in the bill that Edward Burrall, Jr., at the instance of his wife, converted to his own use the personal estate of Charles Jack, collected rents and other debts, and kept the money, some before and some after the death of Charles Jack; and that Ann Jack became entitled, on the death of her husband, to her award of

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personal property of his estate, to amount of $1,500; to her dower in some land near Chicago, and in the real estate in Henry county. It is also claimed by the bill that she was entitled, as widow, absolutely to one third of all the personal estate left by Charles Jack, deducting the indebtedness, which was claimed to be little, if anything; that Ann Jack, the widow, had in her lifetime, and at her decease, moneys, bonds, property, etc., worth more than $25,000; that the defendant converted and sold such property and the award above mentioned, except such as they delivered to complainant as afterward stated. There then follows a long minute account of the physical and mental peculiarities of the widow Jack, giving her weight at 100 pounds, or two thirds of that at times, state of health, and a long list of her idiosyncrasies, followed by, and apparently stated as evidence to support this allegation at the end, that she never had the capacity to comprehend her rights, interest, property, or business affairs, or had much, if any, conception thereof, or to transact business with regard thereunto understandingly; nor to select a suitable person to transact it for her, nor to protect her interest against any who might have control of it, or her property, nor for the determination of her rights of property, and that her physical strength and mental capacity were much reduced by great age, and her apprehensions and distress, hereinafter stated, years before the death of her husband, and thereafter much more, and continuously until her death, and long before the transaction of any of the business hereinafter stated, was wholly incapable thereof, or of properly understandingly transacting any such or other business of any importance whatever.

Next follows a long account of Jack's going to Texas, of his being brought back insane, of how he lived in Texas, among marauding Mexican Indians and half-breeds, who murdered and robbed the inhabitants; that the widow regarded Texans as outlaws and dangerous, and that she suffered from apprehensions for his life, which was aggravated by his being insane, and having been killed by one who was in an asylum with him. Then we have an account of proceedings declaring him insane; that Burrall sought to be appointed conservator, and failed; that he tried to represent the estate as worth less than a seventh of what it was really worth. It is also stated that Ann C. Burrall tried to get appointed administratrix of Ann Jack, and that she represented the estate to be small. It is also stated that Burrall obtained the agency of Jack's business while one Nowers was acting as such, by means of false and fraudulent representations to Nowers as to Jack's wishes, etc., and that Nowers delivered up money and promissory notes (stating their amount), which were collected by Edward Burrall, under the pretense that he was such agent; that Ann Jack resided with Burrall and his wife for some time next before her death; that soon after the death of Charles Jack, said Burrall took charge and control of all the interest and property acquired by Ann Jack as widow of her husband, and of all of her own property, and retained it till her death,

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though a bank account was kept in her name, as Edward Burrall directed it should be; that said E. Burrall, Jr., sold the dower of said Ann Jack in some land in Cook county for $20,000, and, as her agent, he invested $19,000 thereof in United States registered bonds, for the nominal amount and value of $18,000; that said Edward Burrall, Jr., as such agent, sold the remainder of the dower of the said Ann Jack in the Cook county land for $1,550, less fees and expenses of sale. Next follows a long account of the improper means and appliances used by Burrall and his wife, alleged to be undue influence, by which Ann Jack was induced to agree that she would accept $5,000 and her homestead, which was hers, instead of having her dower set off in the remaining lands of the deceased. It is alleged that this was never really paid to her, although probably entered on her bank account at the instance of the said Edward Burrall, Jr., without her knowledge, for the purpose of creating, as he supposed, evidence of a payment to her never made nor intended to be.

It is then claimed that her dower was worth more than the $5,000 and the homestead, and that this agreement should not be recognized as valid, and that she should have what the damages, for not setting off the dower or the rent, was worth. It is alleged that while the homestead was hers independent of said dower of which she was ignorant, she received it as part payment thereof.

It is then alleged that Burrall and wife received a considerable amount for rents of her homestead, which accrued to said Ann Jack after the death of her husband, and that they have converted them to their own use. Here follows another long account of the false statements and improper conduct of Burrall and wife toward, and their improper influence over, Ann Jack, the widow, culminating in the charge that Burrall and his wife claim that said Ann Jack transferred and delivered to Ann C. Burrall the bonds aforesaid, with this allegation in relation thereto, viz: That at the time of the making the alleged transfer and delivery aforesaid, and for some time before then, said Burrall and wife exercised over said Ann Jack an habitual power and influence, constraining her to do whatever they desired her to do, however much against her will, desire and interest, and that she had habitually submitted to such power and influence, and did whatever they directed her to do, although against her will and interest, and not because of attachment or affection for either of them, but from fear of them in such matters which subdued and controlled her more than would have a fear of force, great bodily injury, or of unlawful constraint; that Burrall and wife, by reason of said Ann Jack being incapacitated, of her credulity in believing the false representations aforesaid, and on account of her very old age, and by the use of the means aforesaid, and of said Burrall having been her agent for the transaction of all her business, and of her living with him, and of her having had no independent advice, and of the exercise of undue influence by them over her at the time, and of such fear, did procure from her the alleged assign-

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ment of said bonds, and the delivery thereof; that said Ann Jack did make such transfer and delivery at the dictation and by the direction of said Burrall and wife, and against her will, and that she would not, but for having been compelled to by them; that such transfer and delivery of said bonds is void, for the reasons aforesaid, and did not divest said Ann Jack of the title thereto. Next follows a statement of a demand by the complainant upon Burrall and wife and a delivery of some cash and notes amounting to about $2,125, and of a refusal to account for more, with a prayer for an account of the estate, effects, bonds, etc., possessed or come to the hands of the defendants, or of any other persons for them or either of them. There is also a prayer that the $5,000 should be accounted for under the arrangement to take that for the dower, if the damages for not setting off the dower or rents cannot be recovered in lieu of the $5,000.

This contains as much of this lengthy bill as is necessary to an understanding of the questions, and perhaps more.

Among other causes of demurrer it is said that the two grandchildren were necessary parties, either as complainants or defendants, because of their interest. We have looked at the cases cited by appellee's counsel, and we do not think them applicable. The amount to be collected, if the remedy was at law, as contended, could only be by suit in the name of the administrator of Ann Jack. It does not appear whether there are creditors having claims against the estate or not. The administrator we consider as the proper person, at law or in equity, to collect money due the intestate at the time of her death, though the person of whom it should be collected might be entitled to a share on distribution after payment of debts. Though the grandchildren may have an interest, the administrator is the representative to attend to their interest by collecting what was due the intestate, and making distribution thereof. If there be any equity in the bill, though the amount claimed may be too large, and if the bill is not multifarious, the demurrer should not have been sustained, but the court should find for complainant on the hearing for the portion sustained by the evidence.

We might concede that, as the widow did not renounce the provisions of the will, the personal estate of her husband went to the residuary legatee, and that Ann Jack was not entitled to any of such personal estate except the widow's award mentioned in sec. 74, of chap. 3, as contended for. We might also concede that she was not entitled to the award itself because she did not have it set off to her before she died, and so as to the damages or rents on account of not setting off dower. This would only affect the quantum of the relief upon the final hearing. Mere surplusage does not make a bill multifarious or otherwise bad on demurrer.

The ground upon which this bill is to be maintained is that Edward Burrall, Jr., alone, or he and his wife together, or Ann C. Burrall alone, were agents in charge of the funds of Ann Jack, under such circumstances as would entitle the principal, or her repre-

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sentatives, to an account of the business of the trust or agency; and as incident to this question is the one whether, if they were so, or if either one was, they have adjusted and settled such matters of agency by appropriating to themselves the trust fund by the consent of the principal, or, in other words, whether she has made them, or one of them, a gift or present of it, or part of it. If capable of making such a gift, and if she fairly did so give her agents the whole fund under circumstances to be approved by a court of equity, that might end the matter. If not, the agents should account for that so claimed to be given. At any rate, they or one of them, should account for the portion which was not given.

There is a lack of precision in the allegations of the bill, perhaps unavoidable, as to whether the husband or the wife, or both of them, were the agents of or trustees in charge of the business affairs of Ann Jack. After looking at the bill carefully, it would seem that, as between husband and wife, the former was the principal, and the wife the aider and assistant.

It is alleged that Edward Burrall, Jr., was the business agent or manager of the affairs of Ann Jack. The nature of the business transacted was more proper for a man to perform than for a woman, and the allegations of the bill are, that it was transacted by the husband; that an account was kept in the name of Ann Jack at such bank or banks as Edward Burrall, Jr., directed it should be.

It is also distinctly alleged that the husband had charge and control; that he, as agent, sold the dower right to some of the Cook county land, and received the $20,000 therefor, and that he invested it in United States bonds; that he, as agent, sold the remainder of the dower in this land for $1,550, and, as such agent, received the money, less certain fees and expenses of sale; that he entered on her bank account the sum of $5,000, which Ann Jack agreed to take in lieu of having her dower assigned to her.

If this $5,000, though paid for and on account of Ann C. Burrall to Ann Jack, was received by Edward Burrall, Jr., as the agent of said Ann Jack, he should account for it even though she may have had no right to any rents and profits until dower was assigned, as contended for. Her agreement that she would not claim dower, and her not claiming any rents during her life, would be a good reason why the $5,000 should be accounted for, if Edward Burrall did actually treat it as a fund to that amount, of Ann Jack, in his hands as her agent and business manager, as alleged.

If he seeks to escape liability to account for the United States bonds on the ground that his principal made a gift of them to his wife, the latter has interest enough in this question to make her a proper party, though no case may be made for a money decree against her. If this supposed assignment was nothing more than a fraudulent contrivance on the part of husband and wife to prevent the husband from accounting for the bonds, and for inequitably depriving the nephew and niece of their interest in them, he should account notwithstanding such supposed gift, or both should.

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Whether it was an actual binding gift depends upon the mental condition of Ann Jack at the time, and it is alleged, with a great deal of alleged evidence to prove it, that she was mentally imbecile, to the extent of having no will of her own, and no capacity to understand and perform business, and that inequitable means, amounting to fraud, were resorted to to obtain the supposed gift of the bonds, and settlement at $5,000 for the rents, to which Ann Jack would have been entitled if her dower had been set off.

It seems to us that, according to the allegations of the bill, the husband was the agent and trustee, and the wife one who aided him in misappropriating for her benefit, or for that of both, the fund intrusted to his charge.

Even if, under such circumstances, the fund went, part into the possession of the husband and part into that of the wife, so that equity following it might decree that each one should account for the portion so obtained, the bill would not, in our opinion, be multifarious for such joinder of two defendants, jointly engaged in misappropriating the one fund, and of course not if they were jointly liable.

There seems to be no fixed rule, universally applicable, as to what constitutes multifariousness. Story's Eq. Pl., sec. 530. After examining what this author says in section 271 and following sections, and also other authorities, among them *Gaines and Wife* v. *Chen et al.*, 15 Curtis, 236 (2 How. U. S. 615), we do not consider the injustice of proceeding against both defendants in one suit, nor the inconvenience to the court on account of too much intricacy, such as to render the joinder of both defendants a cause why the bill should be deemed multifarious.

Taking into account the charges of fraud, of undue influence, of mental imbecility, the prayer to set aside the alleged gift of the bonds, and the $5,000 liquidation of the one third of the rents claimed by virtue of dower, the allegation as to the fiduciary relations of the parties, and also considering the nature of the accounts of the agency, or trust, that may be required to be taken, and that such accounting may be such as could not as well be taken in a court of law, we have concluded that the case is one in which, if the allegations of the bill are true, the complainant is entitled to relief in a court of equity. *Craig* v. *McKinny*, 72 Ill. 305.

If the material matters contained in the bill had been more briefly stated, the court below, as well as this court, could have had a better conception of the case, and less difficulty about arriving at a correct conclusion. We hope that the bill may be amended by removing from it that portion which appears to be redundant before taking testimony under an issue made in the case.

Although it is not entirely without difficulty that we have arrived at it, our conclusion is that the bill should be answered, and in order that it may be, and a hearing had, the decree is reversed and the cause remanded. *Judgment reversed and remanded.*

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EDITOR'S NOTES.

OFFICE OF DEMURRER.—"Demurrer must be founded upon some *certain* and *absolute* proposition, *destructive* to the relief sought. It must be founded on some dry point of law, and not on circumstances in which a minute variation may *incline* the court either to *grant* or *modify*, or refuse the application. It is unlike a plea which may be allowed in part. It cannot be separated; if bad in part, is bad *in toto*." 1 John's Ch. 58; 3 ib. 467; 5 ib. 184. "Demurrers should not be sustained unless the words are not fairly capable of the meaning, the defendant had committed and indictable offense. I think the court, though ambiguous, is susceptible of the meaning suggested by counsel in support of it." *Kenchbon* v. *McCollough*, 4 Law and Eq. 13; How. Prac. 53; 49 N. Y. 626, 631-2.

DEMURRER.—"A demurrer does not lie to a bill charging fraud as does the bill in this case, for that an accompanying answer was not filed with it, denying such fraud." Freeman's Ch. 206; Mitford's Eq. Pl. by Jeremy, 209. "Although a case is so defectively made, by a bill in chancery, that the court cannot fully comprehend it, and pronounce upon it with confidence, still if the court can see from what is stated that there is equity in the bill, it is error to sustain a demurrer to the whole bill for want of equity." *Wescott* v. *Wicks et al.*, 72 Ill. 524. "On general demurrer to a bill in equity, general allegations of matters merely going to make up a completed consideration, are good enough, though it is more correct pleading to set them out specifically." *Farwell* v. *Johnston*, 34 Mich. 342. "Defendants, S., M. and K., combined together to obtain the goods of plaintiff without paying for them. The plan adopted was that S. should purchase the goods on credit, make a formal sale of them to M. and K., and then abscond. This plan was carried out. *Held* (Reynolds, C., dissenting), that an action for conspiracy to defraud could be maintained, although no affirmative fraudulent representations were made by S. to induce a credit that a concealment of the true nature of the transaction was sufficient." *Place* v. *Minster et al.*, 65 N. Y. 89.

ACTUAL FRAUD.—"If any contract be infected by fraud it is void. Fraud has been defined to be 'every kind of artifice employed by one person for the purpose of deceiving another.' This is sufficiently descriptive of actual or positive fraud, but the courts have refused accurately to define the term, or to lay down exact rules concerning its nature, or the evidence necessary to prove it, through a fear that their powers might be thereby cramped, and an opportunity created for ingenuity and craft to evade the law. Fraud, therefore, can only be defined to be fraud, and is a fact to be inferred or repelled (by the jury) from the circumstances of each particular case." Story on Sales, sec. 158. "And here we may apply the remark that the proper jurisdiction of courts of equity is to take away one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of law or of positive rules. Hence it is that, even if there be no proof of fraud or imposition, yet, if upon the whole circumstances the contract appears to be grossly against conscience, grossly unreasonable or oppressive, courts of equity will sometimes interfere and grant relief, although they certainly are very cautious of interfering, unless upon very strong circumstances." Sec. 331, Story's Eq. Jur. "Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal and equitable duty, trust or confidence jointly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 Story's Eq., sec. 187; 1 Williams on Ex. 47; *Gale* v. *Gale*, 19 Barb. 269. "Fraud, as denounced in equity, includes all acts, omissions or concealments which involve a breach of legal or equitable duty, trust

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or confidence justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another." *Kennedy's Heirs and Ex.* v. *Kennedy's Heirs*, 2 Ala. 572; *McConnihe* v. *Savage*, 12 N. H. 376.

UNDUE INFLUENCE.—*McLaughlin* v. *McDent*, 63 N. Y. 213; *Rollwaggon* v. *Rollwaggon*, ib. 504; 41 Ga. 271; *Tyler* v. *Wilburn et al.*, 20 Mo. 306; *Hall* v. *Hall*, 18 L. T. N. S. 153, 37 L. J. Ch. 24; *Davis* v. *Calvert*, 5 G. & J. 269; *Gardner* v. *Gardner*, 34 N. Y. 155; *Tyler* v. *Gardner*, 35 N. Y. 559; *Turner* v. *Chapman*, 2 McCoster, 243; *Moore* v. *Blannett*, ib. 367; *Hall* v. *Hall*, 38 Ala. 131; *Rockafellow* v. *Newcomb*, 57 Ill. 187; Note to *Corsett* v. *Bell*, 1 Young & Coll. 578; 2 Redf. Sur. R. 179.

PRESUMPTION OF FRAUD AND UNDUE INFLUENCE FROM IMBECILITY.—"Diversity betwixt a deed, and a will gained from a weak man, and upon a misrepresentation; equity will set aside the first, but not the latter." *James* v. *Greaves*, 2 P. Wm. 270. "Every true consent supposes: 1. A physical power; 2. A moral power of consenting; 3. A serious and free use of them. Undue influence can hardly ever obtain its object without some degree of fraud; but the cases show that it may exist without actual moral fraud. It has a nearer affinity to *duress* than fraud, and in some cases it may contain a mixture of both." Willard's Eq. 170–71. "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside." *Harding* v. *Handy*, 11 Wheaton, 125. "If the provisions of a will, executed by an old man, differ from his previously expressed intentions, and if it is made in favor of those who stand in confidential relations with the deceased, there is evidence and presumption of fraud and undue influence, satisfactory testimony that the testator fully understood its provisions, and acted freely and voluntarily in the final disposition of his estate, it must be his will, and not the will of those who are in a position to mislead him." *Lee* v. *Dill*, 11 Abb. 214. "Where the testatrix is aged, and infirm in body and mind, and her will is impeached on account of the fraud of her son and principal legatee in its procurement, he ought to produce clear and satisfactory proof of the *bona fides* of his conduct in the matter." *Simpler* v. *Lord*, 28 Ga. 52; 66 Penn. St. 281; *Buffalow* v. *Buffalow*, 2 Dev. & Bat. 241; *Long* v. *Long*, 9 Md. 48; 2 Harris, Pa., 147; 9 B. Monroe, 30; 2 Hogg Eccl. 84; *Cruise* v. *Christoph's Admr.*, 5 Dana, Ky., 181; Kerr on Fraud and Mistake, 386. Presumption of fraud where parties are on unequal footing. Kerr on Fraud and Mistake, 143.

FROM THE CIRCUMSTANCES OF THE CASE.—"When undue influence is to be inferred from the nature of the transaction, or when the transaction itself is contrary to the policy of the law, it is the province of the court to determine the point, and the question ought not to be sent to a jury." Willard's Eq. 171; 2 Redf. Sur. R. 179; *Casborne* v. *Bersam*, 2 Beav. 76. "Fraud may arise from facts and circumstances of imposition. It may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and no honest or fair man would accept on the other. It may be inferred from the circumstances and condition of the parties contracting, for it is as much against conscience to take advantage of a man's weakness or necessity as his ignorance. It may also be collected from the nature or circumstances of the transaction as being an imposition on third persons." *Hinchman* v. *Admr. of Edmonds et al.*, 1 Saxton, N. J., 100. I refer to a note in 2 Redfield's Sur. R. 180, which was on a *will*, stating that "the most recent English authorities recognize a distinction in this respect, and transactions *inter vivos*. In the latter class of cases

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they recognize the rule stated above. In the case of wills it is held that the mere existence of the special relation does not throw upon the beneficiary the burthen of proving fairness, etc., but the existence of the relation, coupled with circumstances of secrecy and suggestion, may do so, and doubtless the case in the text, where the relation itself was induced by fraud, is consistent with those decisions." 8 Harris, 329; *Parfitt* v. *Lawless*, L. R. 2; P. & D., 462 to 468; S. C. Moakes, Eng., 693; *Ashwell* v. *Lomi*, ib. 483 to 705; *Dean* v. *Nagley*, 41 Pa. St. 312; *Monroe* v. *Barclay*, 17 O. St. 302; *Wilkinson* v. *Joughlin*, L. R., 2 Eq. 319; *Carron* v. *Hunter*, L. R., 1 H. of L. 362; *Fulton* v. *Andrew*, L. R., 7 H. of L. 448.

CONFIDENTIAL RELATIONS.—"A *conveyance*, obtained by children from a father, will not be sanctioned by a court of equity if it appears to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility and partiality for them, the conveyance being also for an inadequate consideration. He who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. Where a grant is made by an aged father to his children with whom he lives, who have the management of his property, and in whom he reposes particular confidence, if a court of equity sees that any arts or stratagems, or any undue means, or the least speck of imposition, or the least *scintilla* of fraud entered into the bargain, it will avoid the grant. A deed procured by fraud or undue influence is void, and will be set aside in equity, not only as against the one who practiced the fraud or exerted the influence, but as to third persons who have acquired interests under it, though they may be perfectly innocent, thus undoing the whole transaction." *Whelan* v. *Whelan*, 3 Cowen, 537. "Though a relation of trustee, and *cestui que trust* does not strictly exist between parties, yet their relation to each other, and the subject-matter of the transaction, may be such as to require the fullest disclosure of facts known by one party, to preclude the presumption of fraud." *Carpenter* v. *Danforth*, 19 Abb. 225; John Clarkson's Will, 2 Redf. Sur. R. 34; *Dent* v. *Bennett*, 7 Sim. 539; *U. P. R. R. Co.* v. *Durant*, S. C. U. S., Oct. term, 1877, 17 Am. L. R. 72; *Gould* v. *Gould*, 36 Barb. 270; Story's Eq. Pl. 110, 311, 312 *a*, 312 *b*, 312 *c*, 312 *d*, 313, 315, 318, 319, 320 to 323; *Murphy* v. *Osborne*, 2 Jones & L. 222, 425; *Farwell* v. *Farwell*, 1 Bush., Ky., 511. Such presumptions are not removed by recitals in a deed. *Moore* v. *Prancey*, 9 Hare, 299; *Trotter* v. *Smith*, 59 Ill. 240. Statement of consideration is no evidence against such presumptions. *Gressley* v. *Mosely*, 3 D. G., F. & J. 433. "Deed of gift ordered to be delivered up as obtained by undue influence over the donor, who was eighty-four years old and nearly blind, and placed a confidence in the donee." "A gift obtained by any person standing in a confidential relation to the donor is *prima facie* void, and the burden is thrown on the donee to establish to the satisfaction of the court that it was the free, voluntary, unbiased act of the donor. A court of equity, on grounds of public policy, watches such transactions with a jealous scrutiny, and to set them aside it is not necessary to aver or prove actual fraud, or that there was such a degree of infirmity or imbecility of mind in the donor as amounts to legal incapacity to make a will or execute a valid deed or contract." *Todd* v. *Grove et al.*, 33 Md. 188; 1 Cox, 113; *Yostin* v. *Laughan*, 49 Ill. 594; *Griffiths* v. *Robins*, 3 Maddock's Ch. 105; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Tonsa* v. *Judges*, 3 Drew, 306; Holmes' Estate, 3 Giff. 337; *Walker* v. *Smith*, 29 Beav. 394; *Nesbit* v. *Lackman*, 34 N. Y. 167; Story's Eq. Jur. 311.

DOMESTIC RELATIONS.—"Where the testatrix is aged, and infirm in body and mind, and her will is impeached on account of the fraud of her son and principal legatee in its procurement, he ought to produce clear and satisfactory proof of the

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bona fides of his conduct in the matter." *Simpler* v. *Lord*, 25 Ga. 52. "*All* contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside unless third persons have acquired an interest under them, especially where the original purpose for which they have been obtained are perverted or used as a cover. And the same principles are applied to persons standing in the situation of quasi guardians, or confidential advisers. The same principles will also apply where the natural position of the parties is reversed by the influence of time, and the *parent has become a child*, and the child is guardian to the parent. In such cases it is not necessary to prove the actual exercise of overweening influence, misrepresentation, importunity, or fraud, *aliunde* the act complained of. The parent upholding the transaction, or maintaining the gift to disprove the exercise of parental influence by showing that the child was really a free agent, and had competent independent advice, or at least had competent means of forming an independent judgment, and fully understood what he was doing, and was desirous of doing it." *Carpenter* v. *Herrit*, Red. 338; *Jukins* v. *Pye*, 12 Pet. 241; *Taylor* v. *Taylor*, 8 How. 183. "Bounties from a child to parent, soon after coming of age, are received by the court with jealousy. If the parent gains some advantage by the transaction which he did not previously possess, the general principles with respect to parental influence apply, and the transaction cannot be supported unless it can be shown that the child *knew* what he was doing, and was desirous of doing it, and was not unduly influenced by his father." *Heman* v. *Heman*, 2 Atk. 160. "The same considerations apply when a third person takes a benefit under a deed executed by a son in favor of his father." *Berdow* v. *Dawson*, 34 Beav. 603; ib. 382. "When a husband obtains his wife's property under the form of a purchase surrounded by suspicious circumstances and strong evidence of fraud, and for a consideration merely nominal, he will be bound to make clear and satisfactory proof of good faith, or the courts must presume that he has made improper use of his influence. *Held* also, that in such a case the ordinary presumptions in favor of the validity of a deed, would be rebutted by such circumstances of suspicion and fraud. *Held* further, that actual fraud was made out." *Stiles* v. *Stiles et al.*, 14 Mich. 72; 7 Fla. 7. "A conveyance by a wife to her husband, through a trustee, obtained by undue influence, is void." *Wilson* v. *Bull*, 10 Ohio, 250; Kerr on Fraud and Mistake, 378; 2 Smith (Am.) 285. "It is not necessary for the application of the principle that the relation of guardian and ward should exist in perfect strictness of terms, or that the guardian should be a guardian appointed by the Court of Chancery, or nominated by the father. *If the young person lives with and is brought up or under the care, influence and control of a near* relative of mature age, if the relation of guardian and ward thus subsists between them, the principle is equally applicable." Kerr on Fraud and Mistake, 179. "Where a wife insists that her husband made to her an actual gift of property, so as in equity to bind him and his personal representatives, she must show herself meritorious, and show moreover a clear intent on the part of the husband presently to divest himself of the property, and to invest her with a separate estate therein, and that such provision was reasonable." *Paschal, Admr.*, v. *Hall et al.*, 5 Jones' Eq. (N. C.) 108; 57 Barb. 453; 8 D. M. & G. 135; 2 Wash. U. S. 400; 34 Beav. 457.

EQUITY JURISDICTION.—"The superior powers and efficiency of a court of equity in molding its decrees so as to meet the exigency of each particular case, and do justice between the parties in the most minute detail, is often of itself a sufficient ground for the exercise of the jurisdiction in cases where there is a clear remedy at law." Kerr on Fraud and Mistake, 47; *Oard* v. *Oard*, 59 Ill. 46. "All frauds are cog-

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nizable in equity as well as at law." *Colt et al.* v. *Wallafton et al.*, 2 P. Wms. 156. "An old head of equity, that if a representation is made to a man going to deal on the faith of it, in a matter of interest, the person making the representation knowing it false shall make it good, and the jurisdiction assumed by courts of law in such cases will not prevent relief in equity." *Evans* v. *Bicknell*, 6 Ves. Jr. 174. "But courts of equity have general jurisdiction to relieve against frauds, and where a parol agreement relating to lands has been so far partly performed that it would be a fraud upon the party doing the acts, unless the agreement should be performed by the other party the court will relieve against this fraud, and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such a case, but the fraud, so in reference to parol trusts in lands. They are invalid in equity as well as at law. But in cases of fraud, courts of equity will sometimes imply a trust, and will treat the perpetrator of the fraud as a trustee *ex maleficio*, for the purpose of administering a remedy against fraud. For the same purpose it will take the trust which the parties have attempted to create, and enforce it, and in such a case the fraud, not the parol agreement, gives the jurisdiction." *Wheeler* v. *Reynolds*, 2 Law and Eq. R. 12. "Where courts of equity once had jurisdiction of a case they will retain it, through the original ground of jurisdiction, the inability of the plaintiff to recover at law no longer exists. Courts of equity have concurrent jurisdiction with courts of law in all matters of account. When a court of equity has gained jurisdiction of a cause for one purpose, it may retain it generally." *Hawley* v. *Cramer*, 4 Con. 718.

MULTIFARIOUSNESS.—"When two separate and distinct parties are acting in the *establishment of a measure injurious to others* who have rights in the same matter, though they may be acting *separately* and with *adverse* interests as *between* themselves, all may be joined." *Putnam* v. *Sweet et al.*, 1 Chandler, Wis. 286; *Boyd* v. *Hoyt*, 5 Paige, 77; *Ingersoll* v. *Kirby et al.*, Walker's Ch. 65; *Fellows* v. *Fellows*, 4 Cow. 682; *Lewis* v. *Edmund*, 6 Sim. 251; *Payne* v. *Hook*, 7 Wall. 425; *Delafield* v. *Anderson*, 15 Miss. 630; 1 Daniell's Ch. Prac., 336, 337, 338, and note 1 to 339; *The Attorney General* v. *Corporation of Poole*, 4 Mylne & Craig, 30; *Inman* v. *Wearing*, 3 De G. & S. 729; *Kennedy's Heirs and Ex.* v. *Kennedy's Heirs*, 2 Ala. 573; Freeman's Ch. 76; *Robinson* v. *Guild*, 12 Met. 323; *Clarkson et al.* v. *De Peyster et al.*, 3 Paige, 320. "When the case is entire against one, it is not multifarious because another defendant is connected with only a part." *Parr* v. *Attorney General*, 86 Clark & Finn, 409; *Wells* v. *Strange*, 5 Ga. 22. "When the object is a common one, may unite different interests, or a number with different interests may join." 1 Daniell's Ch. Prac. 341; *People* v. *Morrill*, 26 Cal. 336; *Booth et al.* v. *Stamper*, 10 Ga. 116; *Parish* v. *Sloan*, 3 Iredell's Ch. 610; *Van et al.* v. *Gregory*, 2 Devereux & Battle, 31, 35; *Thomas* v. *Doub*, 8 Gill, 8; *Williams* v. *West's Admr.*, 2 Md. 198; *Sears* v. *Currier et al.*, 4 Allen, 341; *Butler, Admr.*, v. *Spann et al.*, 27 Miss. 234; *Graves & White* v. *Hull*, 27 Miss. 419; *Bugbee et ux.* v. *Sargent et al.*, 23 Me. 269; *Warren* v. *Warren*, 56 Me. 369; *Whitney et al.* v. *Whitney*, 5 Dana, 327; 1 A. K. Marshall, 483; *Smith* v. *Evans et al.*, 3 A. K. Marshall, 219; *Finch et al.* v. *Martin et al.*, 19 Ill. 111; *Adair* v. *Johnson*, 2 Little, Ky. 105; *Harward* v. *St. Clair Drain. Co.*, 51 Ill. 131; *Mt. C. C. & R. R. Co.* v. *Blanchard*, 54 Ill. 241; *Robinson* v. *Guild*, 12 Met. 320; *Clarkson* v. *De Peyster*, 3 Paige, 320; *Salvidge et al.* v. *Hyde et al.*, 5 Maddock's Ch. 94; *Kennebec & Portland R. R. Co.* v. *Portland & Kennebec R. R. Co.*, 54 Me. 183. "When relief is given to avoid circuity of action, or multiplicity of suits." *Fellows* v. *Fellows*, 4 Cow. 682. "Bill not multifarious if each party has an interest in some matter in the suit, and they are connected with the others." Story's Eq. Pl. 271, 272; *Addison* v. *Walker*, 4 Younge & Coll. 442; *Worthy et al.* v. *Johnson et al.*, 8 Ga. 238; *Bedsall* v. *Monroe*,

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5 Iredell, 317; *Larkins et al.* v. *Biddle et al.*, 21 Ala. 252; *Nail* v. *Mobly & Nail*, 9 Ga. 278; *Robinson* v. *Cross & Pomeroy*, 22 Conn. 174. "Complainants claiming under one title may recover against various defendants claiming same estate under distinct and separate sales of different parcels *when* the *gravamen* of fraud *or wrong* in the *sale* is the same." Story's Eq. Pl. 285 a, 286. "When one *general* right is claimed, *though* defendants have *separate* and *distinct* rights, a demurrer will not hold." Story's Eq. Pl., note 4, page 460; Mitford's Eq. Pl., by Jeremy, page 209, note 4. "When the lord of the manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders and leaseholders who owed him rents, but have confused the boundaries of their several tenements, praying a commission to ascertain the boundaries, and it was objected that the suit was improper, as it brought before the court many parties having distinct interests, it was answered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements, and a decree was made accordingly." 1 Dan. Ch. Pr. 341; Lord Redesdale, 183. "When the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit is not multifarious." 1 Dan. Ch. Pr. 336; *Campbell* v. *Mackey*, 1 M. & C. 603; *Lewis* v. *Edmund*, 6 Sim. 251, 254; *Rump* v. *Greenhill*, 20 Beav. 512; 1 Jur. N. S. 123, 556; *Atty. Gen.* v. *Cradock*, 3 M. & C. 85, 93; *Young* v. *Hodges*, 10 Hare, 158; *Carter et al.* v. *Balfour's Admr.*, 19 Ala. 814. "The estates of two persons who are joint debtors may be administered in the same suit." *Woods* v. *Sonerberry*, 14 W. R. 9, V. C. W. "I also refer generally to Story's Eq. Pl. 271 a, 271 b, 278 a, 279 a, 279 b, 285. "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story's Eq. Pl. 271.

NON-JOINDER OF PARTIES.—Admitting that they would have been proper parties, which I do not, but deny. If they have any interest it is represented by the complainants, and therefore no advantage can be taken of their non-joinder. *Smyth* v. *Raton*, 44 Ill. 506. Hunter, in his suit in equity, 119, says it must show that they are: "that the bill is for *several, and distinct and independent* causes which have no relation to each other, and in *which* a *greater* part of which these defendants are in *no* ways *interested* or *concerned*." "As to objection that the bill contains several matters in which Moore's heirs have no interest, we do not perceive that it is well taken. It may be, and frequently is, true that a portion of the grounds of relief only affects a part of the defendants, and still they are all necessary parties." *McNab* v. *Heald et al.*, 41 Ill. 331. "A bill is multifarious when it seeks to litigate several claims or demands which are in their nature separate and distinct from, and have no relation with or dependence upon, each other. It was proper to make the owners of the property, not included in the mortgage, parties to the bill seeking its foreclosure. And the trustees of the town were also properly made parties to the bill, for they were ultimately liable for the debt, and consequently interested in taking the account." *Ryan, Assignee etc.* v. *Trustees of Shawneetown et al.*, 14 Ill. 20. If several claimants of portions of an estate unite in filing a bill, this does not make it multifarious. 18 How. U. S. 253. "Bill by two of the intended shareholders of a projected company on behalf of themselves, and all other depositors, for the return of the deposits paid by the two plaintiffs. The bill alleged gross fraud in concocting the company and obtaining the deposits. A demurrer for want of equity, and on the ground that no two depositors could sue together for the mere return of deposits, was overruled." *Beeching* v. *Lloyd*, 3 Drew, 227. "A bill in

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equity was filed by two daughters of P., by his first wife, with their husbands against his second wife, who survived him and her children by him, to set aside several conveyances of realty and personalty made by P. during his lifetime to his second wife and his children by her, charging such conveyances to be the result of undue influence and fraud practiced by the different grantees and donees acting in concert upon his weakness and incompetency. The widow was described in the bill as administratrix as follows: 'That the said P. died on the 16th of February, 1871, the said M. H. P., respondent, having been since appointed and acted as administratrix.' The bill closed with numerous interrogatories, which were not numbered, and which required answers from different respondents." *Held* on demurrer to be a proper case for equitable relief. *Held* further that the bill was not objectionable on the ground of multifariousness. *Winson et al.* v. *Pettis et al.*, Supreme Court, Rhode Island, March 3, 1877; 3 L. and Eq. 766; 1 Oregon, 254; 19 Ill. 105; 2 Day, Conn. 553. "An information was filed against the trustees of certain charities, and against a person who, in concert with one of the trustees, had fraudulently effected the exchange of a farm in which he and the trustee were jointly interested for a portion of the charity lands, praying a general account of the charity estates and apportionment of the rents among different charitable objects and a scheme, and praying also that the exchange might be declared void, and that a new trustee might be appointed in the room of the trustee who had so acted. To this information a demurrer for multifariousness, put in by the party who had colluded with the trustee in the exchange, was overruled." *Att'y Gen'l* v. *Cradock*, 3 Mylne & Craig, 85. "To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: First, the different grounds of suit must be wholly distinct; and secondly, each ground must be sufficient, as stated, to sustain a bill. If the grounds of the bill be not entirely distinct and wholly unconnected—if they arise out of the same transaction or series of transactions, forming one course of dealing and all tending to one end—if one connected story can be told of the whole—then the objection cannot apply." *Bedsall* v. *Monroe*, 5 Ired. 313. "Bill by creditor against executor and trustee and mortgagors in possession for an account, and also against one of several purchasers, in distinct lots of an estate from the executor and trustee impeaching such purchase, *held* not to be demurrable to by such purchaser for multifariousness." *Salvidge et al.* v. *Hyde et al.*, 5 Maddocks, 89. I refer, also, to secs. 76, 76 a; 219, 285, 285 a; 286, 286 a; 530, 533; 534 to 539, inclusive, Story's Eq. Pl.

FALSE REPRESENTATIONS.—Perry on Trusts, 171; Benjamin on Sales, Am. ed. 397; 1 A. K. Marsh. 370; *Elder* v. *Atkins*, 45 Ga. 13; *Peter* v. *Wright*, 7 Blackf. 178. "Gross inequality in the dispositions made by a will where no reason for it is suggested in the will itself, requires satisfactory evidence that it was the free and deliberate offspring of a rational, self-poised and clearly disposing mind." *Harrel etc.* v. *Harrel etc.*, 1 Duval, Ky., 203. "There are other conditions of the mind less than absolute imbecility, or unsoundness, which may materially affect the validity of the will, and though mental weakness of the testator is not itself sufficient to invalidate the will, yet if followed by proof of circumstances, showing undue influence, this will render it void. A person incapable of exercising judgment, reason and deliberation of weighing the consequences of his will and its effects, to a reasonable degree, upon his estate and family, is incompetent to make a will. When the provisions of a will are unreasonable and extraordinary, the fact of mental weakness of the testator will be considered in determining the question of validity of the will, especially if undue influence is actually proved, or the relation of the parties and other circumstances are such as to reasonably warrant the presumption of undue influence." *Bates* v. *Bates et al.*, 27 Iowa, 111.

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YOUNG A. GLENN v. HENRY B. KAYS *et al.*

INSTRUCTION—*Waiving—setting aside verdict.*—Where a party by the mere act of waiving instructions lost none of his rights to a proper verdict if it was legally incorrect, and when it turned out that the jury had mistaken the law, or failed to make a correct application of the evidence to its principles, it was *held* that the court should, without hesitation, have set it aside and granted a new trial.

NEW TRIAL—*To recover vindictive damages.*—The settled practice in this state is not to award a new trial for the purpose of allowing a party to recover vindictive or mere nominal damages.

SAME—*Substantial damages.*—But where it is apparent from the record in the case that the appellant was seeking to recover for substantial injuries, a new trial should be allowed.

JURORS—*Not arbitrators.*—*Held* that appellant in waiving instructions by the court to the jury on the trial of the cause did not constitute the jurors arbitrators between the parties, and that he cannot for that reason assign any error of law as applicable to the evidence which may have been committed in finding the verdict.

TRESPASS—*Pursuing game with dogs.*—Where certain hunters who kept their packs of hounds, at the time of committing the trespasses complained of, were hunting wolves, it was *held* that they had no right to pursue the game with their dogs into and through the plaintiff's inclosures against his objections.

APPEAL FROM PUTNAM COUNTY. Opinion filed March 20, 1878.

J. E. ONG, AND BANGS, SHAW & EDWARDS, *Attorneys for Appellant*, cited: The court admitted incompetent evidence. *Clark* v. *Lake*, 1 Scam. 229. The verdict was clearly against the evidence. Rev. Stat. 1874, ch. 61, sec. 10, p. 549; *Pfeiffer* v. *Grossman*, 15 Ill. 53; *Wells* v. *Howell*, 19 Johns. 385; *Tonawanda Railroad* v. *Munger*, 5 Den. 255; Chitty's Pl., vol. 1, p. 178, note 505, 397; Hilliard on Torts, vol. 2, p. 231, 221 note, 233; *Newkirk* v. *Sabler*, 9 Barb. 652; *Heermance* v. *Vernoy*, 6 Johns. 5; *Blake* v. *Jerome*, 14 Johns. 406; *Gilson* v. *Wood*, 20 Ill. 37; *Ously* v. *Hardin*, 23 Ill. 403; *Guille* v. *Swan*, 19 Johns. 381; *Whitney et al.* v. *Turner*, 1 Scam. 253; *Olsen* v. *Upsahl*, 69 Ill. 273; *Judson* v. *Cook*, 11 Barb. 642; *Burton* v. *McClellan*, 2 Scam. 434; *Painter* v. *Baker*, 16 Ill. 103; *Hume* v. *Oldacre*, 1 Starkie, 351; *VanLeaven* v. *Lyke*, 1 Coms. 515; *Dunckle* v. *Kocker*, 11 Barb. 387; *Woolf* v. *Chakler*, 31 Conn. 121; *Ward et al.* v. *Brown*, 64 Ill. 307.

JAMES S. ECKLES AND GEORGE W. STIPP, *Attorneys for Appellee*, cited: *Young* v. *Silkwood*, 11 Ill. 37; *Johnson* v. *Weedman*, 4 Scam. 497; *Plumleigh* v. *Dawson*, 1 Gil. 552; *Comstock* v. *Brosseau*, 65 Ill. 44; *City of Ottawa* v. *Sweezy*, 65 Ill. 436; *Wiggins Ferry Co.* v. *Higgins*, 72 Ill. 519; *Bishop* v. *Buss*, 69 Ill. 403.

SIBLEY, J., delivered the opinion of the court:

Young A. Glenn, the plaintiff in the Circuit Court, commenced the action against the defendants to recover damages in trespass occasioned by their entering into his inclosed fields with dogs, that chased, frightened and injured his stock, the plaintiff being a farmer and dealer in cattle, and the defendants keeping hounds and frequently indulging in the sport of hunting. On the trial in the lower court the defendants were found not guilty, but the verdict is so palpably against the law and the evidence that even the attorneys for appellees seem in their brief rather to concede that it ought

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to be set aside, unless the reasons urged against it are sufficient to cure the error. First, that these hunters who kept their packs of hounds, at the time of committing the trespasses complained of, were hunting wolves, and therefore had a right to pursue the game with their dogs into and through the plaintiff's inclosures against his objections.

We shall not enter upon the assumed difficult task proposed by appellees to the opposite counsel of producing "some authority against the right of any person to pursue wolves or other animals *feare natura* and dangerous to mankind, for the purpose of their destruction, across the inclosed fields of another," although it is said to have been "one of the main legal questions mooted before the jury," and it appears was the idea acted upon by the defendants in their treatment of the plaintiff's possessions; but shall rest content with a single observation upon the subject, that whenever the law shall be so construed as to permit parties to trespass with impunity on the inclosures of their neighbors under such a plea, the fundamental principles upon which it is based should be so changed as to read, that every man shall be protected in the enjoyment of his property, except in cases where hunters with their hounds may desire to make use of it in the pursuit of game that is considered dangerous.

Secondly, that appellant in waiving instructions by the court to the jury on the trial of the cause, constituted the jurors arbitrators between the parties, and he cannot for that reason assign any error of law as applicable to the evidence which may have been committed in finding the verdict. We think this position equally untenable. It could with as much propriety be said that where the parties waive a jury and try the cause before the court, neither can assign for error that the finding was against the law and the evidence, for as in such cases no instructions are usually asked by either party, therefore they by implication constituted the judge that tried the cause an arbitrator to forever settle unreviewable the disputed matters between them. The plaintiff certainly by the mere act of waiving instructions lost none of his rights to a proper verdict if it was legally incorrect, and when it turned out the jury had mistaken the law, or failed to make a correct application of the evidence to its principles, the court should, without hesitation, have set it aside and granted a new trial.

Again, it is insisted that the settled practice in this state is not to award a new trial for the purpose of allowing a party to recover vindictive or mere nominal damages. This is doubtless the established practice. But it is quite apparent from the record in the case before us that the appellant was seeking to recover for substantial injuries, and perceiving no reason to prevent him from so doing, we think the case ought to be submitted to another jury where the parties will be afforded an opportunity to have the jury properly instructed upon the law of the case. The judgment is therefore reversed and the cause remanded. *Judgment reversed.*

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EDWARD RUTZ v. THE ESLER AND ROPIQUET MFG. CO.

CAPITAL STOCK — *Instruction as to duty to pay calls upon subscription.*—An instruction that if the subscription was made without the knowledge or consent of the defendant it was a fraud, and he could not be compelled to pay his subscription to the stock, unless he subsequently ratified his acts, *held* properly refused, on the ground that the subscriber is estopped when he participates in the organization and acts as director.

SAME— *Release of a portion of subscribers to.*—Where the records of appellee show that at a meeting of the board of directors, after appellant had resigned his directorship and demanded a cancellation of his subscription, a resolution was passed authorizing an arrangement with certain subscribers to the capital stock, by which, upon giving their individual notes for one-half of their subscriptions they were to be released from the payment of the other half, and that this arrangement was made with quite a number of the original stock subscribers and their notes taken and accepted for a moiety of their subscriptions in full satisfaction, it was *held* that a release of a portion of subscribers to the capital stock releases all the subscribers who do not assent to that release, or in some way give their sanction to it.

SAME.—Also *held*, unless there was some proof that appellee had assented to this release of subscribers, or some fact appearing from which his assent could be implied, he is released from his liability on his original subscription.

FRAUDULENT REPRESENTATIONS.—Where a party is induced to make the subscription through false and fraudulent representations of those appointed to solicit subscriptions to the capital stock prior to its organization, *held* that false and fraudulent representations are no defense.

NEW TRIAL.—Under the agreement that every defense that could be legally made might be made under the general issue, *held* that upon that issue the verdict should have been for appellant, and that it was error to refuse the motion for new trial, and to render judgment on verdict of the jury against appellant.

APPEAL FROM ST. CLAIR COUNTY.

R. A. HALBERT, WILDERMAN & HAMILL AND F. A. MCCONAUGHY, *Attorneys for Appellant.*

HAY & KNISPEL AND C. W. THOMAS, *Attorneys for Appellee.*

To the April term of the St. Clair Circuit Court suit was brought by appellee against appellant for the recovery of $2,250, on a call of subscription to capital stock to appellee by appellant.

The declaration alleges that appellee is a body corporate. That appellant, on the 6th day of February, 1875, became a subscriber for thirty shares of the capital stock of appellee; that shares were $100 each, to be paid in such installments as directors of appellee might call for. And that on the 1st of September, 1875, appellee, by its directors, pursuant to its by-laws and the statute laws of the state, made a call upon appellant to pay $75 on each of his thirty shares, by which call appellant became liable to pay $2,250; damages claimed, $2,500.

It was stipulated between the parties that all legal defenses to the action might be proved on the trial under the general issue that might be proved under a special plea. A jury trial was had and

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verdict returned for appellee, fixing his damages at $2,587.50. Appellant moved for new trial. Motion overruled and judgment by court for $2,587.50 and cost of suit. Appeal prayed and allowed to this court.

Several errors are assigned, among which are—

1. Refusal of the court to give third instruction asked for by appellant.
2. In refusing to grant a new trial.
3. In rendering judgment for amount of damages found by jury.

ALLEN, J., delivered the opinion of the court:

The first point made by appellant is the refusal of the court to give the following instruction:

"If the jury find, from the evidence, that at the time the commissioners to open books for subscription to the capital stock of the proposed Esler and Ropiquet Manufacturing Company gave notice of a meeting of the subscribers for the purpose of electing directors or managers of said proposed corporation, the said capital stock had not been fully subscribed, and said commissioner knew that it had not been so subscribed, and that said capital stock was not fully subscribed at the time appointed for said meeting, and that at said meeting one of said commissioners then subscribed eleven shares of one hundred dollars each to complete the full amount of the authorized subscription; and that the directors who made the call sued on in this case were elected at said meeting; and that said commissioners in their report to the secretary of state of their proceedings made it appear that said notice was given after said stock was fully subscribed, and thereby procured said secretary of state to issue a license or certificate of the complete organization of said corporation, then the directors so elected would not be authorized to make calls for the payment of subscriptions to such capital stock; then such subscribers should afterward knowingly carry on business in the name of such proposed corporation would be liable as partners to all persons to whom such proposed corporation might become indebted in business; and if such subscription of eleven shares was made as aforesaid without the knowledge or consent of the defendant in this case, then it was fraud as to him, and he cannot be compelled to pay calls upon his subscription to such stock, unless the jury further believe, from the evidence, that the defendant, after a full knowledge of all the facts, has ratified the aforesaid acts."

It is shown, by the evidence, that when stockholders' meeting was called, and up to the time of that meeting, the amount of necessary capital stock had not been subscribed; that just before the meeting organized Ropiquet, one of the commissioners, made a subscription of $1,100 in the name of Jacob J. Esler, which made the amount required. The evidence tends to show that appellant had no knowledge of the deficit in the amount, or that it had thus been made complete.

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It is insisted by appellant that inasmuch as the full amount of subscription to capital stock had not been made before the stockholders' meeting was called, that under the law authorizing the corporation to be formed, Rev. Stat. ch. 32, p. 286, no organization could then be had, and that a directory elected under an organization had at that meeting could not legally make a call on subscribers to the capital stock.

But the evidence shows that appellant was present and took part in the organization of the company at that meeting; that he was appointed a director and accepted the appointment and acted as such for a time at least, and our opinion is that he is estopped from setting up such an irregularity in its organization.

The case referred to by appellants, *Bigelow* v. *Gregory et al.*, 73 Ill. 197, is, we think, not in point. In that case the question was as to the liability of the members of the association as partners for a debt contracted by them before they had become organized under the laws of the state, and the court held that inasmuch as they had not complied with the law so as to become a corporation at the time they incurred the debt for which they were sued, they were liable as individuals for that debt, and that they could not shield themselves from their personal liability by showing that they had afterward become incorporated. See Angell and Ames on Corporations, 636; *Kansas City Hotel* v. *Harris*, 51 Wis. 464; *Danbury & Norwalk R. R. Co.* v. *Wilson*, 22 Conn. 435; *Law* v. *Brainard*, 30 Conn. 577; *Smith* v. *Hardecker*, 39 Mo.

And in *Stone* v. *G. W. Oil Co.*, 41 Ill. 85, the court holds that the subscriber is estopped when he participates in the organization and acts as director. We therefore hold that the court properly refused that instruction.

Another point urged by appellee is that he was induced to make the subscription through the false and fraudulent representations of Ropiquet and Esler, who were appointed commissioners to solicit subscriptions to the capital stock prior to its organization. While there has been much controversy in the courts of this country over this question of fraudulent misrepresentations by commissioners in the procurement of stock subscriptions, we think the doctrine is pretty well settled that this defense is not available. In *Smith* v. *Hardecker*, 39 Mo. 157, a case in its leading features almost identical with this case, and in *Cully* v. *R. R. Co.*, a recent decision of the Supreme Court of Pennsylvania, and referred to with approval by Wharton on Contracts in note to sec. 1068, the courts say: "These commissioners are not agents of the corporation, for it is not yet in being"; and a subscriber to the capital stock cannot set up fraudulent representations by such commissioners as a release of his obligation to pay his subscription. A different rule rightly obtains where a corporation sends out its agents to procure subscriptions, and subscriptions are obtained by fraudulent representations. In such case it is held that the fraud may be set up in bar of a recovery; but this is upon the ground that the corporation is

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responsible for the act of its agents, and most of the American authorities referred to by appellant in support of his theory are upon subscriptions obtained by the agents of the corporations after they are organized.

Another question is raised by appellant, which, if his view is correct, must prevent a recovery.

The records of appellee, introduced in evidence, show that at a meeting of the board of directors held on the 10th of March, 1877 (after appellant had resigned his directorship and demanded a cancellation of his subscription), a resolution was passed authorizing an arrangement with certain subscribers to the capital stock, by which, upon giving their individual notes for one-half of their subscriptions they were to be released from the payment of the other half, and that this arrangement was made with quite a number of the original stock subscribers and their notes taken and accepted for a moiety of their subscriptions in full satisfaction.

Did this act of the board release appellant from his obligation to pay his subscription?

The courts of this country, with but few exceptions, have held, a release of a portion of subscribers to the capital stock releases all the subscribers who do not assent to that release, or in some way give their sanction to it. *Pittsburgh & Connellsville R. R. Co.* v. *Graham*, 8 Casey; *P. & C. R. R. Co.* v. *M'Cally*, ib.; *P. & C. R. R. Co.* v. *Graham*, 2 Grant, 259; *Stewart* v. *Trustees Hamilton College*, 2 Denio, 403; *Crawford County* v. *Pittsburgh & Erie R. R.*, 32 Penn. 141, and *N. Y. Exchange Co.* v. *De Wolf*, 31 N. Y. 273, all hold this doctrine.

In some of these cases the release had been effected before the *bona-fide* subscriptions were obtained, in others after it had been obtained, as in this case. It destroyed that equality that exists between subscribers, according to the terms of their subscriptions, which is the very essence of the contract; and in Angell and Ames on Corporations, in discussing what will and what will not release a subscriber to capital stock from his liability, the author says: "If a stock company lets off a part of its subscribers and returns their money, the other subscribers, not assenting thereto, are discharged from liability growing out of their original subscriptions." Angell and Ames on Corporations, sec. 531.

Unless there was some proof that appellee had assented to this release of subscribers, or some fact appearing from which his assent could be implied, upon the authorities above cited he is released from his liability on his original subscription. And, as under the agreement that every defense that could be legally made might be made under the general issue, we hold that upon that issue the verdict should have been for appellant, and that it was error to refuse the motion for new trial, and to render judgment on verdict of the jury against appellant.

The *ad damnum* in declaration is $2,500. The jury returned a verdict, and the court entered judgment for $2,587.50. This was

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also an error, but appellee filed a *remittitur* in this court for $87.50, which cured that error so far as the *ad damnum* laid in declaration is concerned, but we are unable to say whether the assessments and interest amount to that sum or not, as the record wholly fails to show when the call for $75 on the shares was made. The only evidence that a call was ever made that we find in the record is the statement of the secretary of the board, in his oral testimony, that he had notified appellant of the call and requested payment. But since this case must be reversed on the other ground above stated, we regard this question as not requiring further notice.

This cause is reversed and remanded. *Reversed and remanded.*

MADISON M. KNIGHT *v.* MALINDA KNIGHT AND MARY A. GASH.

FORCIBLE ENTRY AND DETAINER—*Abandonment of possession.*—The mere fact that plaintiff had removed his goods from the rooms was not of itself an abandonment of possession. Where he locked the door, closed the windows, retained possession of the key, gave his tenant of the other portion of the house directions about exercising oversight over them, declared his purpose to fit them up for rent, and had been talking with one man about renting them, it was *held* that this was not such an abandonment of possession as gave defendants the right to enter.

ERROR TO WAYNE COUNTY.

JAMES MCCARTNEY AND HANNA & ADAMS, *Attorneys for Plaintiffs in Error.*
ROBINSON, BAGGS & JOHNS, *Attorneys for Defendants in Error.*

This was an action of forcible entry and detainer, brought by plaintiff against defendant before a justice of the peace, to recover certain rooms of a house on lot No. 21, in Fairfield, Illinois. A trial was had before the justice of the peace, and an appeal to the Circuit Court. At the March term of that court a jury was waived, and the evidence in the cause was heard by the court. Judgment for defendants for costs, and plaintiff brings the cause to this court on writ of error.

The evidence tends to show that the title to the lot on which the house stands was in the wife of plaintiff, and that plaintiff and wife occupied the house (except one year when it was rented). That at the expiration of that year they again took possession, and retained it until death of plaintiff's wife, which occurred in the year 1871. That plaintiff continued in possession of the rooms in controversy (the remainder of the house being rented and in possession of a tenant of plaintiff) until Saturday, the 1st of July, 1876, when plaintiff, for the purpose of having the rooms fitted up for rent, took out his household goods, locked the door and put the key in his pocket, gave the tenant occupying the remainder of the house directions to look after the rooms, or see to them.

That on the following Monday morning, between daylight and sun-up, defendants came to the house, forced up one of the windows,

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gained an entrance through the window and took the locks off the doors, and have since kept possession of the rooms.

That wife of plaintiff left no issue by her marriage with plaintiff. That by a former marriage she had one son, who died, leaving defendant Malinda Knight, his widow, and defendant Mary A. Gash, and her sister Loucretia, his daughters.

That plaintiff claims no title in premises, in fee, but that his deceased wife, before her death, requested him to settle up her estate, collect outstanding debts, pay what she owed, and then sell the house and lot and divide the proceeds between himself and her two granddaughters equally, and that in pursuance of her directions he proceeded to collect and pay out; but that owing to his inability to collect outstanding debts he has not been able to settle up her estate, and that in pursuance of her request he had retained possession and control of the property in question.

ALLEN, J., delivered the opinion of the court:

The question, In whom is the legal title to this property? is one with which, in this suit, we have nothing to do, as we cannot try the question of title.

If the plaintiff was in the lawful possession of these rooms, either as a tenant by sufferance, or otherwise, the entry of defendants was unlawful if against his will, or by force, and this action will lie to oust them. *Reeder* v. *Purdy*, 41 Ill. 279; *Smith* v. *Hoag*, 45 Ill. 250; *Allen* v. *Tobias et al.*, 77 Ill. 169.

Defendants claim that plaintiff had abandoned possession of the rooms, and that they had a right to enter on them as vacant and unoccupied.

The mere fact that plaintiff had removed his goods from the rooms was not of itself an abandonment of possession—though ordinarily this fact might be so regarded where there were no other circumstances or indicia of his purpose to retain possession. But what are the facts as they appear in this case?

He locked the door, closed the windows, retained possession of the key, gave his tenant of the other portion of the house directions about exercising oversight over them, declared his purpose to fit them up for rent, and had been talking with one man about renting them. All these things go to explain his motive in taking his goods from the rooms, and all contradict the theory that he had abandoned possession of and control over them. We believe this was not such an abandonment of possession as gave defendants the right to enter; and we are supported in this view by Cong. Digest, vol. 4, p. 353; *Hoffstetter* v. *Blattes*, 8 Mo. 276; *Jarvis* v. *Hamilton*, 19 Wis. 187; *Ainsworth* v. *Barnes*, 35 Wis.

And for these reasons this cause is reversed and remanded.

Reversed and remanded.

TANNER, J., did not sit in this case, having tried the cause in Circuit Court.

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CITY OF EAST ST. LOUIS *v.* MARGARETHA KLUG.

AGENT.—Where a party claimed to have been employed as agent to cut a certain tree in a city, and the evidence failed to show any such relation, it was *held* that although the evidence showed that by unskillfulness, negligence or carelessness on his part appellee received her injury, still the appellant would not be liable for the injury.

VERDICT—*Should be set aside when not supported by evidence.*—While courts are reluctant to set aside the verdict of a jury whose province it is to pass upon questions of fact, and will not do so where there is conflicting testimony that has to be weighed, though the court may believe the preponderance of evidence against the verdict; yet it is the duty of a court to interpose and set aside a verdict when that verdict, as in this case, is not supported by evidence.

APPEAL FROM ST. CLAIR COUNTY.

R. A. HALBERT AND JESSE M. FREELS, *Attorneys for Appellant.*
WM. WINKLEMAN, *Attorney for Appellee.*

This was an action of trespass brought by appellee against appellant for an injury to her person.

The declaration charges that the agents and servants of appellants in July 1876, in cutting and falling a cottonwood tree that stood on an alley within the city limits, so unskillfully, negligently and carelessly cut the same, that it fell upon the house in which appellee lived and was then staying, and demolished the house and greatly injured the appellee in her person, and laid her damages at $5,000. Appellants filed plea "not guilty."

At the September term, 1877, the cause was submitted to a jury, and a verdict returned for appellee for $1,000 damages. Appellant moved for a new trial. Motion for a new trial overruled by the court. Judgment for appellee for $1,000 and costs of suit. Appeal prayed and allowed to this court.

The evidence tends to show that one Carroll, with the aid of some others, on the 15th day of July, 1876, cut a large cottonwood tree that stood near an alley in the city of East St. Louis, and that it fell upon the house of appellee, while she was in the house, broke the house down and severely injured appellee. That it was so unskillfully cut, and that no notice was given of danger by Carroll.

ALLEN, J., delivered the opinion of the court:

To hold the appellant liable in this suit two things must appear from the evidence.

1. That Carroll was the agent or servant of the city, in cutting the tree.

2. That by unskillfulness, negligence or carelessness on his part appellee received her injury.

We think the evidence of his unskillfulness and negligence is sufficiently shown; but was he at the time doing this work as the agent or servant of appellant?

The testimony shows that Carroll sometimes done odd jobs for ap-

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pellant. That he occasionally took contract for repairs on streets and sidewalks, but that he had never been in the regular employ of appellant. That he often sought for jobs from appellant. That on the day before this accident occurred, he had cut a tree in another part of the city, but by whose authority is not shown by the evidence.

That on the day before this tree was cut, Carroll, the mayor (Hake) and the city engineer were seen at this tree examining it, and one Burk testifies that while Carroll was cutting the tree on the day it fell, that Mayor Hake and others were present, betting on the size of the tree and the direction it would fall. One Gibbon testifies that he heard Hake tell Carroll on the day before the tree was cut that there was another tree to cut on St. Louis avenue.

This is the substance of the testimony bearing on the point of Carroll's agency or employment by appellant, touching the cutting of this tree. Appellant introduced Hake, who testified that he was mayor at the time. Was informed by some one day before tree was cut that people in its vicinity wanted it cut. That he and city engineer went to look at the tree; that Carroll was along. Examined the tree. Said in Carroll's presence would not have tree cut "right then." Told engineer to make up his estimates for work on streets and alleys and lay before the council; that council would meet next day. Never saw Carroll from that time till after tree was cut; never employed him to cut tree; never said anything to Carroll about cutting tree; had no authority to employ him to do such work, and don't know of his employment by any one else to cut that tree. City paid Carroll for cutting elm tree before that time, but was not employed by him to do so, or by any one else to his knowledge. Suppose he cut it and took his chances for getting his pay from city. Was not at tree day tree was cut, or near to it. "Never offered to bet cigars or anything else about its size or way it would fall"; testimony of Burk on that subject absolutely false. Did not tell Carroll day before that there was another tree to cut.

Frand, assistant engineer, was at mayor's most of the forenoon on day tree was cut. Hake was there; was at office all the afternoon till after heard tree fall, and Mayor Hake was in the office. Don't think Mayor Hake could have been at tree day it was cut without his knowing it. No order for cutting this tree was made by council. Mrs. Cunningham says, saw mayor and engineer at tree day before it was cut. Carroll was near them. Witness asked Hake if he was going to have tree cut. Hake answered: "No ma'am; I will see about it." Carroll was near by; could have heard what was said. Saw Carroll and others cutting tree next day. Did not see Hake there.

Does this evidence support the verdict? Does it sufficiently show that Carroll was the agent or servant of the city, acting under the direction of appellant in cutting this tree as to support this verdict? We fail to find any such relation as agent or servant from the evidence, and unless such relation between appellant and Carroll did exist in the cutting of the tree, appellant would not be liable for the injury.

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While courts are reluctant to set aside the verdict of a jury whose province it is to pass upon questions of fact, and will not do so where there is conflicting testimony that has to be weighed, though the court may believe the preponderance of evidence against the verdict; yet it is the duty of a court to interpose and set aside a verdict when that verdict is not supported by evidence. *Elrich* v. *White*, 74 Ill. 481; *Reynolds* v. *Lambert*, 69 Ill. 495; *T. W. & W. R. Co.* v. *Moore*, 77 Ill. 217.

Believing that the evidence in this case, as it appears of record, brings it clearly within the rule laid down in the cases above cited, and that the Circuit Court erred in refusing the motion for new trial by appellant, the cause is reversed and remanded.

Reversed and remanded.

Illinois & St. Louis R. R. and Coal Co. *v.* Fridolin Decker.

Trespass—*Recovery for damages suffered, and for the loss of profits in trade.—Held* that while in actions of tort the plaintiff is entitled to recover for all damages suffered, yet where it is sought to recover for the loss of profits in any trade or business, the evidence must afford the jury some data from which they can with reasonable certainty determine the loss of profits. The rules of law do not, and perhaps cannot fix any certain guide for the estimate of such damages; and hence the courts can but at best approximate a correct standard. A recovery cannot be had for profits which are merely *probable* or *speculative*.

Same—*Profits, probable or speculative.*—To determine the probable or prospective profits, the jury should be instructed to take into consideration the extent of the plaintiff's business for six months next preceding the commission of the injury. Where a month is adopted as a standard where but one has elapsed, *held* that this could not be adopted as a measure which could with reasonable certainty guide the jury in the calculation of profits.

Same—*Instruction in reference to probable profits.*—Where the jury were told that in assessing damages they could take into consideration such profits as the appellee would have *probably realized* from his business if he had been permitted to carry it on to the extent of his lease, it was *held* that this instruction sent the jury into the fields of conjecture and speculation to determine the amount of damages they should give appellee, and that this rule has no warrant in law.

Appeal from St. Clair County.

Koerner & Turner, *Attorneys for Appellant.*
James M. Dill and A. W. Kueffuer, *Attorneys for Appellee.*

Tanner, P. J., delivered the opinion of the court:

The appellee brought an action of trespass in the St. Clair Circuit Court, and averred in his declaration that he leased from the appellant a certain house situated on the bank of the Mississippi river for the period of one year, beginning on the 1st day of April, 1876, for the sum of $600. That the appellant reserved from the lease two rooms of the house for passenger rooms. That he took possession of the house in accordance with the terms of the

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lease, and put therein a lot of furniture, saloon fixtures, wines and liquors, of the aggregate value of $1,000, and kept a saloon until the committing of the grievances alleged. That on the 10th day of April, 1876, and until the institution of the suit, the appellant was the owner of a steam ferry boat on the river aforesaid; and that on that day, with force of arms, drove and propelled said boat against the house of appellee with great force and violence, and thereby caused said house to fall into said river; by which his property was lost and destroyed and his business broken up. That at that time his profits amounted to $200 per month, and would have been worth that sum per month until the end of his lease. To this declaration the plea of not guilty was interposed, issue joined thereon, the cause submitted to a jury, and a verdict returned in these words: "We, the jury, find for the plaintiff, and assess his damages for his loss of property and his loss of profits for the unexpired term of his lease, at $700."

The appellant moved the court for a new trial. The motion was overruled and judgment rendered against him for the amount of the verdict, and the case is brought to this court by appeal.

The errors assigned are:

1. The admission of improper testimony in behalf of appellee.
2. The exclusion of proper testimony offered on the part of the appellant.
3. The giving of improper instructions to the jury in behalf of the appellee.
4. The refusal to give instructions asked by the appellant.

We think an examination of the first and third alleged errors will dispose of the cause.

The appellee was introduced as a witness, and after he had testified that he leased the building from appellant for one year at fifty dollars per month; that he took possession according to contract on the 1st day of April, 1876, and kept a saloon for the sale of liquors in the house until the 5th of May following, and the value of liquors and other property destroyed by the alleged tortious acts of appellant, he was asked: "What were your profits, as far as you had gone, per month, clear from all expenses?" he replied that he made about $75 the first month. To this question and the answer the appellants made objections, but the court overruled the objections and permitted the testimony to go to the jury.

The latter clause of the first instruction given on the part of the appellee is as follows: "And the jury may allow such further sum as they believe from the evidence the plaintiff would probably have realized as profits from said business during the remainder of the term."

From a careful consideration of the doctrine upon which this evidence was conceived to be admissible, we have been able to coincide with the Circuit Court. The rule as laid down in *Chandler* v. *Allison*, 10 Mich. 460, seems now to be well established, and is so well expressed that we adopt the language of the court: "It may now

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be assumed to be the general rule that in actions of tort, where the amount of profits of which the injured party is deprived as a legitimate result of the trespass can be shown with reasonable certainty, such profits to that extent constitute a safe measure of damages, and so far as it is plainly traceable he should make compensation for it. To this extent the recovery of a sum equal to the profit lost, while plainly within the principle of compensation, is also within the limits which excludes remote consequences from the scale in which wrong is weighed."

The Supreme Court of our own state, in *Green* v. *Williams*, 45 Ill. 206, which was an action for breach of covenant, brought by a lessee against a lessor, the court remarks: "The plaintiff is entitled to recover all expenses necessarily incurred by her in consequence of the defendant's refusal to give possession; but she is not entitled to profits that she might have made by conducting her business on the demised premises; such damages are remote, speculative, and incapable of ascertainment. The case of *Celley v. Hawkins*, 48 Ill. 308, was very similar to this, and the same rule was there announced. The case of *Benton* v. *Fay & Co.*, 64 Ill. 417, was an action for a breach of contract by the non-delivery of mill machinery which occasioned the mill to remain idle. The court, in awarding a new trial, directed the Circuit Court to receive no evidence, on another trial, of probable profits, as they would be purely speculative. The case of *Chapman* v. *Kirby*, 49 Ill. 24, relied on to justify the rulings of the court in the case at bar, was an *action on the case* brought to recover damages for the wrongful withdrawal of steam power from the machinery of the plaintiff. The use of the power was to be continued by the contract for five years, and it had been enjoyed for three years when the wrong complained of was done; on the trial the court instructed the jury "that if they found for the plaintiff, in estimating his damages they could consider the nature and extent of his business at the time the power was withdrawn, the amount of business he had done during the six months previous." This instruction was approved by the Supreme Court, in the following language: "This was an action on the case, and not on contract. In all actions of tort, the amount of damages sustained, and in case, all of the consequential damages sustained, connected with or flowing from the act complained of by the plaintiff. But the damages must be the necessary and natural consequence of the act. They must be real, and not *merely speculative* or *probable*. And of what does this loss consist but of the profits that would have been made had the act not been performed by appellants? and to measure such damages the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted?"

From the rule as established by the authorities above cited we reach the conclusion that while in actions of tort the plaintiff is entitled to recover for all damages suffered, yet where it is sought to recover for the loss of profits in any trade or business, the evidence

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must afford the jury some data from which they can with reasonable certainty determine the loss of profits. The rules of law do not, and perhaps cannot fix any certain guide for the estimate of such damages; and hence the courts can but at best approximate a correct standard. The most reliable authorities agree with our court in *Chapman* v. *Kirby*, that a recovery cannot be had for profits which are merely *probable* or *speculative*.

The question then arises, When are profits probable or speculative, and at what point, or more accurately speaking, upon what character of evidence do they lose the quality of being probable and speculative, and become sufficiently certain to constitute a basis upon which they can be calculated? In *Chapman* v. *Kirby* the owners of the planing mill had been in the use of the steam power and engaged in their trade and business over three years; and this we think ample time to establish a settled course of business, from which they, plaintiffs, could very readily establish, by proof, a reasonably certain measure of profits, by the month or by the year. The court, in order to arrive at the prospective profits, instructed the jury that to determine this they might take into consideration the extent of the plaintiff's business for six months next preceding the commission of the injury. This ruling of the court was without doubt sound, both upon the authority of well adjudicated cases, and upon reason. In the case at bar the appellee was engaged in keeping a liquor saloon. The lease was to continue for twelve months, and the appellee enjoyed it for one month, and for this period of time his profits were about $75. From the profits of one month — one twelfth part of the time — the jury were told, by the admission of this testimony, they might calculate profits for the eleven succeeding months. Distinct periods of time are not and cannot be taken, in this case, by which comparisons can be made.

A month is adopted as a standard where but one has elapsed. Certainly this could not be adopted as a measure which could with reasonable certainty guide the jury in the calculation of profits. The law, while being administered by the courts for the redress of wrongs, must not be made an instrument for the infliction of wrong, while tort feasors should be made to respond in damages to the full extent of their wrongs. Some reasonable standard must at least be approximated for their ascertainment. They ought not to rest merely in conjecture and probability. Any rule less accurate than this would convert the law into an engine of wrong and oppression.

The testimony in regard to profits should not have gone to the jury.

The next assignment of error which we shall notice is the giving of the instruction in reference to probable profits. The jury were told that in assessing damages they could take into consideration such profits as the appellee would have *probably realized* from his business if he had been permitted to carry it on to the extent of his lease.

This instruction sent the jury into the fields of conjecture and

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speculation to determine the amount of damages they should give appellee. This rule has not only no warrant in law, but is in direct antagonism with both the text-writers and the adjudications of our own Supreme Court. Sedg. on Dam. 82; Shear. and Redf. on Neg., sec. 599; *Chapman* v. *Kirby*, supra; *I. B. & W. R. R. Co.* v. *Barney*, 71 Ill. 391.

For the reasons above indicated the judgment of the Circuit Court must be reversed and the cause remanded. *Judgment reversed.*

VALINDA B. DUGGER, WIDOW OF EDWARD C. DUGGER, DECEASED, ALFRED P. DUGGER, JOHN W. DUGGER, MILLARD DUGGER, ELLEN DUGGER, EDWARD DUGGER, JULIA DUGGER AND AUGUSTUS DUGGER, HEIRS OF EDWARD C. DUGGER, DECEASED, AND ALFRED J. PARKINSON, ADMINISTRATOR OF SAID ESTATE, AND GUARDIAN OF THE LAST FIVE NAMED HEIRS, *v.* DANIEL OGLESBY.

DEED—*Certified copy of deed as evidence.*—Where the objection made to the introduction in evidence of a certified copy of a deed is that it is the foundation of the suit, and that therefore a certified copy of it cannot be used in evidence, and that the suit should have been brought upon the deed as a lost instrument, it was *held* that this objection might have been good at common law, but that our statute expressly provides that upon the trial of any cause in law or equity, any party to said cause may, by first complying with the provisions of the statutes, read in evidence in any court in this state the record of any deed, or a transcript of the record thereof certified by the proper recorder, with like effect as though the original of such deed was produced and read in evidence.

SAME—*Certificate of acknowledgment—power of attorney.*—Where the certificate of acknowledgment is unusually full and formal, contains all of the statutory requirements, and conclusively shows that the grantors in the deed appeared in person before the officer and made the requisite acknowledgment, *held* that although it may be unusual for persons who have given a power of attorney authorizing the making of a deed to appear themselves in person before the proper officer after the deed has been properly executed by their attorney in their names and themselves acknowledge the execution of it; yet at the same time it is not impossible or even improbable that such a thing should be done, and that the court properly overruled the objections made to the introduction of this deed in evidence.

TITLE—*Divestiture of legal title.*—While A was a party to an original chancery suit of B, yet neither he nor his heirs were party to subsequent proceedings under a petition for a writ of assistance, and the decree does not find that the legal title was not in A, nor does it divest him of the title, but expressly recognizes his legal title, and finds that he holds his legal title subject to certain equities in B and the creditors of the firm of C and B, and directs that the lots be sold for the payment of the partnership debts, allowing fifteen months for redemption, *held* that it does not follow from this decree that A or his grantees ever were divested of the legal title, but that the judicial determination in that proceeding to which the heirs of A were not parties and of which the grantees of their ancestors gave them no notice, did not, as to them, establish the fact of a divestiture of title.

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OUSTER—*Under a legal proceeding.*—Where a grantee is ousted under a legal proceeding to which his grantor is not a party, he must give due notice of such proceeding to his grantor, or else, in any subsequent suit against his grantor on the covenants of his deed, he has to assume the burden of proving the validity of the title of him by whom he was ousted.

WARRANTY—*Action on covenant of general warranty.*—When the covenanter, by his prior or subsequent acts, defeats the title that he has covenanted to warrant and defend, when a plaintiff can show an eviction under a paramount title derived from a wrongful subsequent sale by the grantor, or derived from an act of the grantor prior to the sale to him and which after such sale culminates in paramount title, then he can maintain an action on the covenant of general warranty.

EVIDENCE—*Variation between allegation and proof.*—The special breach averred must be the breach proven, for otherwise there will be a variance.

STATUTE OF FRAUDS AND PERJURIES.—The statute expressly gives the right to maintain against the heir or devisee the same actions which lie against executors and administrators, and to maintain joint actions, and the right to thus sue in an action at law.

JUDGMENT—*In solido—quando acciderunt.*—Where the judgment rendered by the court below was personal against all the children and the widow for $4,114.83, and for costs, and it awarded execution against them for that amount, and where the administrator was expressly excluded from such judgment and the order as to him was that the judgment be of assets *quando acciderunt*, but for what sum *quando acciderunt* nowhere appeared, it was *held* that the assessment of damages and the judgment should have been *in solido* against the administrator and the heirs, including the widow; that no execution should have been awarded against the administrator, but that as to him the judgment should have been *quando acciderunt;* that the widow should have been subjected to no greater liability than the value that she had received under the statute of descents and excluding widow's award from the personal estate of her husband, and that this value should have been ascertained by the court; that each of the several children should have been subjected to no greater *personal* liability than the amounts that they had severally received from the personal estate of their father and the value of the rents and profits, if any, that they had severally received issuing out of real estate inherited from him, other than thus stated, and that in the absence of proof of any *bona fide* alienations before action brought, they would be answerable for nothing, "as if the same were their own proper debts," but the judgment, otherwise than as indicated, should have been rendered against them to be satisfied only out of the real estate which descended to them from their intestate father.

GILLESPIE & HAPPY, *Attorneys for Appellants.*
METCALF & BRADSHAW, *Attorneys for Appellee.*

BAKER, J., delivered the opinion of the court:

Oglesby impleaded appellants in covenant. The declaration alleged that Edward C. Dugger, now deceased, with Valinda B. Dugger, his wife, on the 29th day of July, 1867, in consideration of $4,000, conveyed certain described lots in the town of Ashley, in Washington county, Illinois, to William Vance and his heirs and assignees forever, and that said Dugger and wife, by the same deed,

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covenanted to and with said Vance, his heirs and assignees, and for themselves, their heirs, executors and administrators, as set forth in said declaration. The declaration further averred that on the 16th of August, 1867, said Vance and his wife conveyed said lots to John Criley, and that said Criley and his wife, on the 1st day of January, 1869, in consideration of the sum of $3,500 conveyed said premises to the plaintiff. The breach assigned in said declaration is hereinafter specially referred to. The declaration further averred that on the 23d day of August, 1869, the said Edward C. Dugger departed this life intestate, leaving as his heirs Valinda B., his widow, and Alfred P., John W., Millard, Ellen, Edward, Julia and Augustus Dugger, his children. Alfred J. Parkinson was appointed administrator of his estate. That there was real estate and personal property inherited from and distributed to the said widow and heirs from the said Edward C. Dugger, deceased, before the commencement of the suit, in the sum of $20,000, and that Parkinson was the guardian of said minor children, Millard, Edward, Julia and Augustus. Plaintiff further averred a demand and refusal before suit, and the *ad damnum* was $5,000.

To this declaration the defendants below filed three pleas:

1. *Non est factum.* 2. *Nul tiel record.* 3. Performance.

With which pleas a *notice was* filed:

1. That the *title was in Dugger when he made* the deed. 2. That when the order of the Circuit Court of Washington county was made, *Dugger* was *dead*, and his *heirs* were not made parties, and that they did not have notice. 3. That there was *no consideration paid* by plaintiff to *Criley*. 4. That defendants have not inherited any property from Dugger. 5. That no demand was made as averred. 6. That *Pearce* had no title when the deed was made by Dugger.

Issues were formed upon these pleas, and no motion was interposed to strike out either the special pleas or the notice of special matter. Without objection the parties tried the cause upon the pleas and notice, and it is therefore unavailing for the appellee to now complain in his argument, even if cross-errors had been assigned. *Hunt* v. *Weir*, 29 Ill. 83.

By agreement the cause was tried in the Madison Circuit Court by the judge without a jury, and the following judgment was entered: "And now on this day, the court being fully advised, it is considered that the issues be found for the plaintiff, and that said defendants (except the said administrator) are heirs of said Edward C. Dugger. That said Dugger left about $5,000 worth of personal property and $10,000 worth of real estate, which said heirs received according to the statute of descents and distribution; and that said administrator had accounted for and paid over all said money to said heirs before the institution of this suit. It is therefore considered and ordered by the court that the plaintiff have judgment in his favor and against the defendants, except said administrator, for the sum of $3,500, with legal interest thereon from the date of his evic-

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tion, October 28, 1874, or $4,114.83. It is therefore ordered by the court that the said plaintiff have and recover of the said defendants (except said administrator) the said sum of $4,114.83, being the amount of the damages, together with his costs and charges herein expended, and that he have execution therefor against said defendants, and as to said administrator that the judgment be of assets *quando acciderent.*" Exceptions were taken and the case is brought to this court by appeal.

On the trial of this cause appellee introduced in evidence a power of attorney from Edward C. Dugger and wife to G. Wright, which authorized him to bargain, sell, grant, convey and confirm the lots in question with covenants of warranty.

He also introduced in evidence a certified copy of a deed for said lots from said Dugger and wife to William Vance, he first orally in court, under oath, laying the foundation required by statute for the introduction of a certified copy. Said deed is signed as follows:

EDWARD C. DUGGER, [SEAL]
By G. WRIGHT, his attorney in fact.
HARRIET V. B. DUGGER, [SEAL]
By G. WRIGHT, her attorney in fact.

And the acknowledgment is as follows:

STATE OF ILLINOIS, }
WASHINGTON COUNTY, } ss.

I, G. T. Hake, notary public in the town of Richview, in the county and state aforesaid, do hereby certify that Edward C. Dugger and Harriet V. B. Dugger, who are personally known to me as the same persons whose names are subscribed to the annexed deed, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth, and the said Harriet V. B. Dugger, wife of the said Edward C. Dugger, acknowledged that she had freely and voluntarily executed the same and relinquished her dower to the lands and tenements therein mentioned, and also her rights and advantages under and by virtue of all laws of the State relating to the exemption of homesteads, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and official seal this twenty-ninth day of July, A.D. 1867.

[SEAL] GEO. T. HAKE, *Notary Public.*

The consideration expressed in said deed is $4,000, and it is upon the covenants contained in this deed that the present suit is brought.

He also introduced in evidence a deed for said lots from William Vance to John Criley, and a deed from John Criley to himself. Both of these latter deeds were for the premises in question, and the deed from Criley is dated January 1, 1867, and the consideration expressed therein is $3,500. Full covenants of warranty, etc., are contained in all of these deeds.

The appellee also introduced in evidence a transcript of the proceedings of the Washington County Circuit Court in the matter of a certain bill in chancery wherein one Edwin Pearce was complainant and William Renfro, Elizabeth Renfro and said Edward C. Dugger were defendants, and also a transcript of the proceedings of said Washington Circuit Court in the matter of a petition of said Pearce for a writ of assistance, and in connection therewith two decisions of the Supreme Court of the state, reported in 68 Illinois

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Reports, on pages 125 and 220, one of said decisions having been rendered in the said chancery case and the other in the matter of the said application for a writ of assistance.

This evidence taken together shows about this state of facts: That said Pearce and said William P. Renfro were merchandising as partners from 1864 until December, 1866. That the partnership was then dissolved, and that Renfro was constituted trustee of the goods of the firm for the purpose of converting them into money by sale at retail and paying the debts of the firm. That Renfro exchanged the goods for the lots in question and had the deed made to his wife Elizabeth, and that Elizabeth conveyed to her brother, Edward C. Dugger, and that he (Dugger) knew how the lots had been acquired by Renfro. Upon the bill filed by Pearce it was held that equity would follow the property thus acquired and subject it to the payment of the firm debts. The bill was filed March 4, 1867, and all three of the defendants answered the bill. On the 29th day of July, 1867, and pending the litigation, Dugger and wife executed the deed upon the covenants of which this suit is predicated. Under the decree in this chancery suit, the lots were sold by the master in chancery on the 20th of June, 1868, to Pearce for $2,000. They were sold subject to redemption and a certificate of purchase was executed. The decree made no order on the defendants to surrender possession on the execution of a deed. In 1871 the original petition for a writ of assistance was filed by Pearce, and various orders were subsequently made in said proceedings, and in 1874, upon remand from the Supreme Court, the petition was amended, and on the 27th day of October of that year a final order was made and a writ of possession awarded. Edward C. Dugger died intestate on the 23d of day August, 1869, and his heirs were not made parties to these proceedings for the possession of the premises, nor was any notice of said proceedings given to them either by Pearce or by Oglesby. The appellee was evicted from the premises October 28, 1874.

It was admitted upon the trial below that the appellants, except Parkinson, were the widow and heirs at law of said Edward C. Dugger, deceased. That said Dugger left about $5,000 in personal property and $10,000 worth of real estate. That after the payment of debts said administrator had paid over and settled with said widow and heirs the balance of the estate before the institution of this suit. There was evidence on some collateral points that it is unnecessary to refer to.

Appellants introduced in evidence the deposition of Criley, and a letter written by appellee to Criley for the purpose of impeaching the consideration of $3,500 expressed in the deed from Criley to appellee.

Appellee then introduced William Vance in rebuttal, who testified that Criley was his son-in-law, and not having paid him (Vance) the consideration for the property, an arrangement was made between him, Oglesby and Criley, whereby the purchase money of $3,500 was paid to him (Vance).

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Numerous errors are assigned upon this record, and the more important of them we will proceed to notice.

The first points that we will note are the objections made to the introduction in evidence of the certified copy of the deed to Vance. The first objection made to its introduction is that it is the foundation of the suit, and that therefore a certified copy of it cannot be used in evidence, and that the suit should have been brought upon the deed as a lost instrument. This objection might have been good at common law, but our statute expressly provides that upon the trial of any cause in law or equity, any party to said cause may, by first complying with the provisions of the statutes, read in evidence in any court in this state the record of any deed, or a transcript of the record thereof certified by the proper recorder, with like effect as though the original of such deed was produced and read in evidence. Rev. Stat. 1874, p. 279, sec. 36.

As to the second objection urged to its introduction, we would say that the certificate of acknowledgment is unusually full and formal, contains all of the statutory requirements, and conclusively shows that the grantors in the deed appeared in person before the officer and made the requisite acknowledgment. *Kerr* v. *Russell*, 69 Ill. 666; *Monroe* v. *Poorman*, 62 Ill. 523.

It may be unusual for persons who have given a power of attorney authorizing the making of a deed to appear themselves in person before the proper officer after the deed has been properly executed by their attorney in their names and themselves acknowledge the execution of it; at the same time it is not impossible or even improbable that such a thing should be done. We are of opinion that the court properly overruled the objections made to the introduction of this deed in evidence.

Among the questions raised by this record is this: We have already seen that while Dugger was a party to the original chancery suit of Pearce, yet, neither he nor his heirs were party to the subsequent proceedings under the petition for a writ of assistance. The decree does not find that the legal title was not in Dugger, nor does it divest him of the title. It expressly recognizes his legal title, but finds that he holds his legal title subject to certain equities in Pearce and the creditors of the firm of Renfro & Pearce, and directs that the lots be sold for the payment of the partnership debts, allowing fifteen months for redemption. It does not follow from this decree that Dugger or his grantees ever were divested of the legal title. We do not say that the court erred in admitting in evidence the record of the proceedings of the Washington Circuit Court in the matter of the petition for a writ of assistance. These were admissible, just as proof of an actual ouster was admissible. But we do say that the judicial determination in that proceeding to which the heirs of Dugger were not parties and of which the grantees of their ancestors gave them no notice, did not, as to them, establish the fact of a divestiture of title. From aught that they know or we know, from this record, Pearce may never have procured a deed from the mas-

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ter. Many sales are made by masters in chancery that never culminate in a conveyance of the fee. Where a grantee is ousted under a legal proceeding to which his grantor is not a party, he must give due notice of such proceeding to his grantor, or else, in any subsequent suit against his grantor on the covenants of his deed, he has to assume the burden of proving the validity of the title of him by whom he was ousted. Nor do we deem it material that in the present instance Pearce elected to proceed against Oglesby by petition for a writ of assistance, instead of by an action of ejectment. There is clearly a link wanting in this part of the case, and that link is the deed to Pearce, if any such deed there be. *Fisk* v. *Woodruff*, 15 Ill. 15; *Claycomb* v. *Munger*, 51 Ill. 373.

The averment in the declaration of a breach is as follows: "And the plaintiff avers that the said Edward C. Dugger or Valinda B. Dugger have not warranted and defended the same premises to the plaintiff or his grantors against all lawful claims whatsoever, but on the contrary thereof, the plaintiff in fact says that at the time of the date, sealing and delivery of said deed by the said Edward C. Dugger as aforesaid, the paramount title to said premises was in one Edwin Pearce, by virtue of which said paramount title to said premises the plaintiff afterward, to-wit, on the 27th day of October, 1874, was evicted, etc."

There is a variation between the allegations and the proofs. The averment is that at the time of the date and delivery of the deed to Vance, the paramount title was in Pearce, by virtue of *which* paramount title the plaintiff was afterward evicted, whereas the proof shows that at that time the paramount title was as a matter of fact not in Pearce. In *Owen* v. *Thomas*, 33 Ill. 320, when the breach assigned was that at the time the deed was made the legal title was not in defendant but was in Robertson and others, and that their title was paramount and that plaintiff could not obtain possession of the land, the defendant having plead that at the time conveyance was made the fee was in defendant and that he conveyed same to plaintiff and the defense was held to be good. In the case of covenants for quiet enjoyment and general warranty, the assignment of a breach must be special. *Marston* v. *Hobbs*, 2 Mass. 437.

In this state, on the principle that the mortgagee is the owner of the fee, he can maintain ejectment, but where he resorts to a court of equity to foreclose and sell, the purchaser under the decree without a deed cannot assert a hostile title to which the plaintiff could rightfully succumb. The plaintiff's title must be defeated by a paramount legal title under which he could oust the plaintiff. The foreclosure, sale, deed and eviction should all be shown. See in this connection, *Brady* v. *Spurck*, 27 Ill. 478. There is a difference between an eviction under the covenant for quiet enjoyment and under that of warranty. The former relates only to the possession, and the eviction is merely required to be of lawful right, while the latter relates to the title, and the eviction must be not only by law-

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ful right, but by paramount title. 2 Washburn, R. E. 665; *Fowler* v. *Paling*, 6 Barb. 165.

It is true that the general doctrine is that under the covenant of general warranty, the covenantee in order to recover must show either that he is unable to obtain possession under the title derived from the grantor by reason of a paramount title by which the land is adversely held, or that he has been evicted by a paramount title outstanding at the time of the execution of the deed. *Beebe* v. *Swartwout*, 3 Gil. 162; *Moore* v. *Vail*, 17 Ill. 185; *Claycomb* v. *Munger*, 51 Ill. 373; *Bostwick* v. *Williams*, 36 Ill. 65; *Brady* v. *Spurck*, *supra*.

This general rule is subject, however, to some exceptions, one of which is, when the covenanter, by his prior or subsequent acts, defeats the title that he has covenanted to warrant and defend, when a plaintiff can show an eviction under a paramount title derived from a wrongful subsequent sale by the grantor, or derived from an act of the grantor prior to the sale to him and which after such sale culminates in paramount title, then he can maintain an action on the covenant of general warranty. *Jones* v. *Warren*, 81 Ill. 343.

But as we have seen in the case of this covenant, and in the case of covenant for quiet enjoyment, the breach must be special, otherwise the covenantee might recover for an eviction occasioned by his own acts. The special breach averred must be the breach proven, for otherwise there will be a variance, and in the case of the plaintiff, if the rule governing him is the same as in the case of the exception, then the plaintiff, both by his pleading and proof, must bring himself within the exception. It is suggested by appellee that the maxim, "*Atile pro investile non vitiatur*," will apply to his declaration in this case, and that the whole of the covenant, except that plaintiff was evicted by a superior title in one Pearce, could be rejected as surplusage. But the rule contended for would not apply to the case at bar, for the averment is not foreign and impertinent to the cause, nor is it repugnant to precedent matter, but the very ground of the action is misstated. 1 Chris. Pl., ed. 1809, 232, 233, 304, 305, et seq.

The matter that is claimed to be surplusage we regard as substitutive, for suppose it stricken out and the covenant simply to be as suggested, that appellee was evicted by a superior title in one Pearce *non constat*, but that such superior title may have grown out of the act of appellee himself, the plaintiff must recover, if at all, *secundum allegata et probata*. *McConnell* v. *Kibbe*, 33 Ill. 175; *Boynton* v. *Robb*, 41 Ill. 349; *Rudd* v. *Williams*, 43 Ill. 385.

The deed from Dugger to Vance is in the record in this case and contains covenants perhaps somewhat variant from the covenants alleged in the declaration. Upon the covenants contained in the deed the plaintiff can readily frame breaches under which he can recover if so entitled, upon the supposed state of facts in the case.

Another point upon which the evidence in this case is wholly insufficient to support the findings of the court is that it nowhere

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shows that property, either real or personal, to any certain value, had ever descended or been distributed to the heirs. It may be true that Dugger left about $5,000 in personal property and $10,000 worth of real estate, and that after the payment of debts, he had paid over and settled the balance with the widow and heirs, but it nowhere appears from the evidence what the balance was. The payment of the debts may have absorbed nearly all of the estate, and the amount distributed may have been a merely nominal sum, or at all events, a sum not sufficient, in any view of the law, to justify a judgment for $4,114.83 and the awarding of execution to the heirs for that amount. In fact, the phraseology of the admission in regard to this balance paid over would rather seem to imply that it was a balance in the hands of the administrator of the whole estate after a sale of the real estate, otherwise how could the administrator have settled it with, or paid it to, the heirs?

Considerable criticism is indulged in by the attorneys for appellants upon the several sections of the statute of frauds and perjuries that afford joint remedies for the debts and liabilities of a deceased person against the executor or adminstrator and against the devisees or heirs, and it is elaborately argued and seriously contended that in case of such character as this, the appropriate and only remedy is in chancery, and it is even assigned as error that the court found for appellee upon the ground that there is no jurisdiction in such a case as this in a court of law.

The statute expressly gives the right to maintain against the heir or devisee the same actions which lie against executors and administrators, and to maintain joint actions, and the right to thus sue in an action at law. The devisee or heir is expressly recognized in the cases of *Ryan* v. *Jones*, 15 Ill. 1, and *Branger* v. *Lucy*, decided by the Supreme Court at the June term 1876, as yet unreported.

It is true that the case of *Van Meter's Heirs* v. *Lore's Heirs*, 33 Ill. 260, was in chancery, but that was a bill by the wards for an account and the appropriate remedy was by bill.

The administrator was properly and necessarily made a party defendant in this suit. The assets in the hands of the administrator are primarily liable for the debts of the deceased, and under the statute you can only sue the heirs without joining the administrator in two cases—where there is no administration within a year, and when a judgment has already been obtained against the administrator and there are no personal assets. Rev. Stat. 1874, ch. 59, secs. 14, 15 and 16. Nor can the administrator complain of a judgment against him *quando acciderent.* Such judgment does not imply assets and the heirs may have aliened the real estate before suit brought and may be insolvent, and after discovered, assets may come to the hands of the administrator, in which event the plaintiff would be entitled to have a *scire facias.*

If we admit that by the eleventh and twelfth sections of this statute remedy is given against the heirs only as to real estate descended, yet that makes no difference in this case. The contract of the ancestors

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was under seal and the heirs were expressly included in the covenants of the deed, and by the common law the heirs of the contracting party, when expressly named in the contract, are liable to an action for the breach of it, if they have legal assets by descent from the obligor. 1 Chit. Pl. 39. But it was only in particular cases that heirs were liable as to lands descended, for the debts of the intestate, and in those cases only when they had not aliened before suit brought: therefore the necessity for these statutory provisions. *Ryan* v. *Jones*, supra.

The widow was properly joined as a party defendant under our statute of descent; she is in any event as to one-third of the personal estate of the intestate an heir of the intestate. But we are unable to see upon what theory the guardian of the infant heirs of Dugger was made a defendant in this suit, or what judgment could properly be rendered against him. Rev. Stat. ch. 59, sec. 17, and ch. 64, sec. 18.

The judgment rendered by the court below was erroneous. It was personal against all the children and the widow for $4,114.83, and for costs, and it awarded execution against them for that amount, and then the administrator, too, was expressly excluded from such judgment and the order as to him was that the judgment be of assets *quando acciderent*, but for what sum *quando acciderent* nowhere appears. Under an execution issued on this judgment, the whole amount of the judgment might well be made by the sale of the property of one of the children alone, or of the widow alone, although there can be no claim under the evidence that any one of the appellants has inherited that value of property from the intestate.

The assessment of damages and the judgment should have been *in solido* against the administrator and the heirs, including the widow. No execution should have been awarded against the administrator, but as to him the judgment should have been *quando acciderent*. The widow should have been subjected to no greater liability than the value that she had received under the statute of descents and excluding widow's award from the personal estate of her husband, and this value should have been ascertained by the court. Each of the several children should have been subjected to no greater *personal* liability than the amounts that they had severally received from the personal estate of their father and the value of the rents and profits, if any, that they had severally received issuing out of real estate inherited from him, other than thus stated, and in the absence of proof of any *bona fide* alienations before action brought, they would be answerable for nothing, "as if the same were their own proper debts," but the judgment, otherwise than as indicated, should have been rendered against them to be satisfied only out of the real estate which descended to them from their intestate father. *Van Meter's Heirs* v. *Lore's Heirs*, supra; *Branger* v. *Lucy*, supra.

It is true that the consideration expressed in the deed from Criley to Oglesby may be inquired into, but we deem it wholly immaterial whether such consideration was paid directly to Criley or by his con-

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sent settled with Vance. The evidence is somewhat conflicting as to what the amount of the actual consideration was, but as there will probably be a second trial of the case, it is inexpedient to discuss the evidence upon this point.

For the errors indicated, the judgment of the Circuit Court will be reversed and the cause remanded. *Reversed and remanded.*

MILICAN ARNOLD AND FLETCHER ARNOLD, EXRS. OF CARTER ARNOLD, *v.* ELIZABETH FRANKLIN.

PROMISSORY NOTE—*Evidence of consideration.*—Where the evidence fails to establish a contract, either express or implied, to pay for services rendered by appellee to the deceased, and where there is no evidence tending to show an express agreement to pay for services, it was *held* that the mere fact that a child lives with parents after reaching majority raises no obligation to pay for services thereafter rendered as a member of the family, and therefore such services cannot be presumed to constitute a consideration for the note in suit.

SAME—*Gift—valuable consideration.*—Where the testimony shows clearly that the father desired to make a gift to the appellee of money, but that having none on hand he executed and delivered the note as a gift, it was *held* that the note therefor was executed and delivered without a valuable consideration, and will not support an action either in law or equity.

SAME—*Instruction—new trial.*—*Held* that the court erred in giving the instruction for appellee and refusing to give the third instruction asked for by appellants, and should have set aside the verdict of the jury and allowed a new trial.

ERROR TO CLAY COUNTY.

HAGLE & FINCH AND CHESLEY & HAGLE, *Attorneys for Plaintiffs in Error.*

TANNER, P. J., delivered the opinion of the court:

This cause was submitted to a jury at the October term, 1877, of the Clay Circuit Court.

The appellee sought to recover against the executors of the last will and testament of Carter Arnold, deceased, the amount of a promissory note executed by the testator on the 8th day of November, 1876, for $200, and payable one day after date, for value received.

The jury returned a verdict for appellee and assessed her damages at $211.30. The appellants moved for a new trial, but the court overruled the motion and rendered judgment upon the verdict in favor of the appellee and against the appellants for two hundred and eleven dollars and thirty cents and costs. The appellants bring the cause to this court by appeal, and assign for error the giving of an improper instruction to the jury on behalf of the appellee, and the refusal to give the third instruction asked for on behalf of appellants. That the verdict of the jury was against the evidence, and a new trial should have been given to the appellants.

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All these assignments of error we think are well taken. The evidence upon which the judgment rests is as follows:

General Howard Franklin testified: Know the parties; knew Carter Arnold in his lifetime. He was my mother's father. (Note handed to witness, and he asked about the execution thereof.)

Grandfather was at our house the day of the last presidential election, and staid over night; at about four o'clock the following day, while I was at the barn, he (Carter Arnold) called me to the house. I went. He was sitting on the bed (being in poor health) and my father and mother were in the room. Grandfather said he wanted me to write him a note. He dictated the note and I wrote it. He told me to sign his name to the note, and I did so, and he made his mark.

On cross-examination stated: Do not know of grandfather getting anything for the note.

Note offered in evidence and read to the jury:

November 8, 1876. I promise to pay Elizabeth Franklin the sum of two hundred dollars, due one day after date, for value received. CARTER ARNOLD.

William J. Franklin testified: "Am the husband of plaintiff." Witness objected to by defendant as incompetent. Objection overruled; exceptions taken. Witness then testified: "Carter Arnold came to our house the day of last presidential election; staid over night. The next day in the afternoon the old man said he wanted to give Elizabeth something, but that he did not then have any money by him, but he would give her a note for $200. She said, 'No, father, you need not mind doing that.' He replied, 'Yes, I will'; and he went to the door, called my son in, told him to write a note. He asked, 'What for?' The old man made no reply. He then dictated and my son wrote the note, and he handed it to her (plaintiff). He did not say for what purpose he wanted to give her the $200. My wife, the plaintiff, staid at home with her father after she was of age, until she was twenty-five years old before she and I were married; that was some twenty odd years ago."

Upon this evidence the court gave, against the objection of the appellants, to the jury the following instruction: "The court instructs the jury that if you believe, from the evidence, that the deceased, Carter Arnold, gave the note in question in consideration of services rendered by his daughter before marriage, you should find for the plaintiff, and assess her damages at the amount of the note with interest at six per cent from due."

The appellants then asked the court to instruct the jury, "that the mere fact that the plaintiff resided with her father after she was of age does not make him liable for her services during such time, unless the proof shows that it was in pursuance of a contract or at his request."

This instruction was refused, and the appellants excepted to the ruling of the court. The evidence fails to establish a contract, either express or implied, to pay for services rendered by appellee

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to the deceased. There is no evidence tending to show an express agreement to pay for services, and the mere fact that a child lives with parents after reaching majority raises no obligation to pay for services thereafter rendered as a member of the family, and therefore such services cannot be presumed to constitute a consideration for the note in suit. *Freeman* v. *Freeman*, 65 Ill. 106.

The testimony shows clearly that the father desired to make a gift to the appellee of money, but having none on hand he executed and delivered the note as a gift. The note therefore was executed and delivered without a valuable consideration, and will not support an action either in law or equity. 2 Kent, 438; 2 Pars. B. & N. 54; *Bloucher* v. *Williamson*, 70 Ill. 652.

The court erred in giving the instruction for appellee and refusing to give the third instruction asked for by appellants, and should have set aside the verdict of the jury and allowed a new trial.

For the several errors indicated the judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

WM. C. TAYLOR, ADMR. ESTATE OF JOHN TAYLOR, DECEASED, *v.* GEORGE THOMPSON.

PROMISSORY NOTE—*Innocent purchaser.*—Where it is urged that the form of the note and its indorsements throw a suspicion upon its character, and should put a purchaser upon inquiry before purchasing, and the evidence shows no fraud in obtaining the execution of the note; *held*, that were the transaction fraudulent in reference to the consideration of the note, this taint could not follow it to the hands of an innocent purchaser.

CONSIDERATION—*Failure of—fraud.*—The only evidence tending to show a want of consideration is that of the appellee and his daughter, and is that "the machine was not in repair, and would not run." No evidence was given to show the value of the machine, or in what respects the same was not in repair, or that it was of less value than the consideration expressed in the note. A failure of consideration in whole or in part, or fraud in the consideration of the note, cannot be set up as a defense, where the note has been assigned before its maturity for a valuable consideration, without tracing its defects to the knowledge of the assignee.

APPEAL FROM PERRY COUNTY.

T. T. & D. W. FOUNTAIN, *Attorneys for Appellant.*
HAUMACK & DAVIS, *Attorneys for Appellee.*

TANNER, P. J., delivered the opinion of the court:

This cause was tried in the Circuit Court of Perry county, on appeal from a justice of the peace, and resulted in a verdict and judgment for the appellee, from which the appellants appealed.

The appellants on the trial offered in evidence, with its indorsement, the following promissory note:

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$75. January 10, 1874.

Eighteen months after date, I promise to pay to the order of A. J. Shepherd, seventy-five dollars, payable at Adams express, Coultersville, Ill., for value received, with ten per cent interest from maturity. I hereby confess judgment for the above sum, with ten per cent fees if collected by an attorney. This note is given subject to the conditions on the back. I also agree to make no payment on this note to any agent unless he has this note in his possession, and indorses the payment on the back at the time it is made.

his
GEORGE × THOMPSON.
mark.

P. O. address, Coultersville, Ill.
Witness, S. E. BALDWIN.

Upon the end of said note is (printed) the following:

Remington Sewing Machine, N. J. Shepherd, general agent, 617 North Fourth street, St. Louis, Mo.

Upon the back of said note are the following indorsements:

For value received, I hereby guarantee the prompt payment of the within note.
(Signed) N. J. SHEPHERD.

Pay John Taylor for collection account of J. B. Collins. MG'R. P.

The appellee then testified that the note was given to one Baldwin for a sewing machine. That Baldwin took the machine to his house to sell it to him, but his family did not know how to use it, and Baldwin had no needles with him, and could not teach his family, but he was to return in a few days and teach them; and if he he did not he would return the note. That he, appellee, then signed and delivered the note, after having it read in presence of his family and one Woodsides, who was a shrewd business man, and would know if anything was wrong about it. That Baldwin said, the machine would stand good for itself. That his family could not use it; it would not run; it was out of repair, and that he had never seen Baldwin since he gave the note, and when sued he took the machine and left it with the justice at his office. In these statements the appellee was fully corroborated.

The appellants then read in evidence the deposition of J. B. Collins here following:

"I am the general manager of western business of Davis Sewing Machine Company, and reside at Chicago. I have been manager for said company for three and a-half years past, with office at Chicago; and for a year prior to that time with office at St. Louis. Have whole control of business for west. No other person in the west has had authority to employ agents to sell machines for said company, or make contracts during the time I have been manager of said company. N. J. Shepherd has had no connection with the Davis Sewing Machine Company during the time I have been manager. He bought machines of the company, and agreed to pay for them, but never was agent of the company in any way. The note in suit was received by the company from N. J. Shepherd January 16, 1874, and has been owned and under the control and possession of the company ever since. Mr. Shepherd had been purchasing

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machines of the company for which he was indebted for more than amount of said note; he sent the note to us—said company—to be credited upon his indebtedness. The note was received by said company, and said Shepherd was given credit upon his account at the time for the full amount of the note, as he requested. Neither the Davis Sewing Machine Company nor myself had any knowledge of any contract or arrangement upon which said note was given at the time it came into the hands of the company, except what the note showed on its face. At the time of taking the note I had not heard of any defense to said note, and never knew of any until we attempted to collect the note after it became due. S. E. Baldwin has never had any connection whatever as agent, or in any other capacity, with the Davis Sewing Machine Company. The indorsement, 'Pay to John Taylor for collection account of J. B. Collins, manager,' on the back of said note was made by my authority acting for said company, as manager: it was made to John Taylor for collection."

The appellee insists, first, that the note was given without consideration; secondly, that it was obtained by fraud.

The only evidence tending to show a want of consideration is that of the appellee and his daughter, and is that "the machine was not in repair, and would not run." No evidence was given to show the value of the machine, or in what respects the same was not in repair, or that it was of less value than the consideration expressed in the note. Still, had this been done, it would have secured no advantage to the appellee. A failure of consideration in whole or in part, or fraud in the consideration of the note, cannot be set up as a defense, where the note has been assigned before its maturity for a valuable consideration, without tracing its defects to the knowledge of the assignee.

It is next urged that the form of the note and its indorsements, throw a suspicion upon its character, and should put a purchaser upon inquiry before purchasing. The only reply we make to this view of the case is, that the evidence shows no fraud in obtaining the execution of the note, and were the transaction fraudulent in reference to the consideration of the note, this taint could not follow it to the hands of an innocent purchaser.

Again it is urged that the "Davis Sewing Machine company cannot buy notes in the usual course of trade." The authorities cited in behalf of this position do not sustain the views taken of them by the appellee; they are all to the point that corporations organized for manufacturing or mechanical purposes cannot go beyond their chartered powers and engage in banking purposes, and in discounting commercial paper, where the charters forbid it, or do not confer the power.

We think the Circuit Court should have rendered judgment for the appellants for the amount of the note, with interest. The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

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EZEKIEL B. MOORE, APPELLANT, *v.* MATTHIAS MANK, APPELLEE

SLANDER—*In an affidavit.*—Where appellee made an affidavit in which he stated, among other things, that he had been acting as sexton of a church four years, and that during all that time he never, as an individual or as sexton, refused A the use of the church, but always opened it and lighted it up when directed by A to do so, and that during the four years A never furnished a stick of wood for fuel, and appellant afterward charged that appellee had sworn falsely in this affidavit, and no point was made but that the speaking of one or more of the sets of actionable words stated in the declaration were proven, and the jury returned a verdict in favor of appellee; it was *held* that the evidence being conflicting and preponderating against appellee, the verdict of the jury should be set aside.

AFFIDAVIT—*Swearing falsely in affidavit*—Where A as sexton refused B the key to his church, and A swore in an affidavit that he did not refuse B the use of the church, it was *held* as tantamount to a refusal of the use of the church.

SAME—*Mitigation of damages.*—Where appellant believed that the affidavit was false and that he was sincere and honest in speaking of it as false, and that the conduct and language of appellee himself engendered such honest belief, and it appeared that the defendant, though he could not fully justify, had reason to believe from the defendant's own conduct that the charge was true, then such fact is in mitigation of damages.

APPEAL FROM CRAWFORD COUNTY.

WHITEHEAD & JONES AND CALLAHAN, JONES & MAXWELL, *Attorneys for Appellant.*

J. C. ROBINSON, WILKIN & WILKIN, AND DULANEY & GOLDEN, *Attorneys for Appellee.*

BAKER, J., delivered the opinion of the court:

This was an action on the case for slander brought by the appellee against the appellant in the Clark Circuit Court. The venue was changed to Crawford county, where a trial was had before the judge and a jury and a verdict returned in favor of appellee for $2,000 damages. A motion for a new trial was made by appellant and overruled by the court and judgment was rendered upon the verdict.

The case is brought to this court by appeal, and several errors are assigned.

The trouble between the parties seems to have grown out of a church difficulty, and their difficulty ripened into a chancery suit and injunction, wherein Moore was complainant and Duncan and others were defendants. In this chancery suit appellee made an affidavit in which he stated, among other things, that he had been acting as sexton of the church since August 1871, and that during all that time he never, as an individual nor as sexton, refused E. B. Moore the use of the church, but always opened it and lighted it up when directed by said Moore to do so, and that during the four years E. B. Moore never furnished a stick of wood for fuel. Appellant afterward charged that appellee had sworn falsely in this affidavit, and hence this suit for slander.

To the declaration filed the appellant pleaded "not guilty," and for

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several pleas of justification averring the truth of the matter charged by him and the falsity of the affidavit, issues were formed on these pleas.

It is assigned for error that the verdict of the jury is contrary to the evidence and contrary to the law and instructions of the court, and that the court erred in overruling the motion for a new trial.

No point is made but that the speaking of one or more of the sets of actionable words stated in the declaration are proven. The real controversy in the case arises upon the special pleas. The court instructed the jury that the appellant, in order to prevent a recovery by the appellee, was only bound to show by a preponderance of the evidence that there were statements made in the affidavit, and to which the pleas applied, that were false, and that it made no difference whether Mank knew they were untrue or not, and that if the affidavit sworn to by Mank was in fact false in any one or more of its said statements, then the defense of justification was made out.

We have carefully examined all the evidence in the record bearing upon these pleas, and find that as to at least two of them the weight of the evidence is clearly and greatly in favor of appellant. Three witnesses, Samuel Rusk, Hayden Dougherty and appellant testify positively to the fact that appellant did furnish for the church wood in the fall of 1874. Nor do we regard the statement of Mr. Walmsley and of appellee that Moore furnished wood in December 1875 as at all in conflict with the testimony of appellant and the witnesses who support him, and more especially so when we take into consideration the statements of appellant that he furnished wood at various other times before and after the injunction.

Upon the question as to whether Mank had ever refused Moore the use of the church, we have upon the one side the testimony of the appellee himself, corroborated, if it can be regarded as corroborated at all, but slightly, by the evidence of one single witness, and upon the other side the positive testimony of Joseph Comstock and appellant, strongly corroborated by the evidence of ten other witnesses, including three witnesses introduced by appellee himself. This, even though we adopt the theory of appellee that there is a distinction between refusing appellant the use of the church and refusing to let him have the key to get into the church. But it does appear to us that the refusal of the key under the circumstances as detailed by most of these other witnesses was tantamount to a refusal of the use of the church, and if it is to be so regarded, then appellee is in direct conflict with some nine or ten witnesses when he claims that he never refused Moore the use of the church.

When the evidence is conflicting, courts are always loth to disturb the verdict of a jury, yet even where there is some evidence both ways, if the finding of the jury is manifestly against the weight of the evidence the verdict will be set aside. *Reynolds* v. *Lambert*, 69 Ill. 495; *St. Paul F. and M. Ins. Co.* v. *Johnston*, 77 Ill. 598.

Even in actions *ex delicto* courts will interfere with the verdicts of juries in order to prevent manifest injustice. *Smith* v. *Slocum*, 62 Ill. 354; *I. C. R. R. Co.* v. *Chambers*, 71 Ill. 519.

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It is also assigned for error in this case that the damages are excessive. Even if appellee was entitled to a verdict, there can be no question under the evidence in this case but that appellant believed that the affidavit was false and that he was sincere and honest in speaking of it as false, and that the conduct and language of appellee himself engendered such honest belief. If it appears that the defendant, though he cannot fully justify, had reason to believe from the defendant's own conduct that the charge was true, then such fact is in mitigation of damages. Sedgwick on Damages, 541.

If the pleas were improved, yet the filing of said pleas would not be, under the circumstances of this case, proof of malice. Rev. Stat., ch. 126, sec. 3; *Hawver* v. *Hawver*, 78 Ill. 412.

The fifth instruction given for appellee is complained of. That instruction is in part inartificially drawn, but as it would not probably mislead the jury, we would not reverse on that account.

We are of opinion that the verdict of the jury in this case is against the weight of the evidence and contrary to the law and the instructions of the court, and that the damages are excessive, and that the court erred in overruling the motion for a new trial and in rendering judgment upon the verdict. The judgment is reversed and the cause remanded. *Reversed and remanded.*

ALLEN, J., took no part in the decision of this case.

JAMES H. WILSON, RECEIVER OF THE ST. LOUIS AND SOUTHEASTERN RY. CO. (CONSOLIDATED) *v.* HERMAN G. WEBER, COLLECTOR OF ST. CLAIR COUNTY, GEORGE GUNDLACH, COLLECTOR OF CLINTON COUNTY, JACOB MAY, COLLECTOR OF WASHINGTON COUNTY, C. D. HAM, COLLECTOR OF JEFFERSON COUNTY, JAMES M. BLADES, COLLECTOR OF HAMILTON COUNTY, G. E. BURNETT, COLLECTOR OF SALINE COUNTY, JOHN YOST, COLLECTOR OF GALLATIN COUNTY, AND B. F. WHITE, COLLECTOR OF WHITE COUNTY.

TAXES—*Enjoining collection of tax where part is unauthorized.*—Where the bill does not allege facts which show that it was impossible to determine the amount of taxes to be paid by the company on its real estate, and does not allege any reason why the facts which would amount to such proof were not attainable without the aid of the court, the bill was *held* to be within the rule that a property owner seeking to enjoin the collection of taxes on the ground that a part is unauthorized, should show by this bill, as near as may be practicable, what part is just and what is unjust and unauthorized, and he should pay to the proper officer that part which he concedes to be properly chargeable against him, and where he seeks to enjoin the collection of taxes under such circumstances he must be required as a condition of relief to pay such amount as is just.

AFFIDAVIT—*For continuance under sec. 18, ch. 69, Rev. Stat.*—*Held* that the affidavit required by the statute before cited must "*satisfy*" the court (1) that the whole or some material part of the answer is untrue; (2) that the complainant has testimony by which he can prove it to be untrue, and (3) that since the com-

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ing in of the answer he has had no opportunity to procure such testimony; that these exactions of the statute are not answered by simply negativing the truth of the allegations of the answer, and affirming the existence of testimony by which they can be disproved, and a want of opportunity since the coming in of the answer, to procure such testimony. The court must be *satisfied* of the existence of these several facts before a continuance of the motion can be allowed.

CONTINUANCES.—In applications for continuances, where parties bring themselves clearly within the provisions of the statute, a denial of the right would be error.

SAME—*Under special rule of court.*—Appellant asked for time to prepare and file an affidavit in support of his motion, and did not give nor attempt to give any cause for not having his affidavit ready, but insisted that he had a right to claim the indulgence of the court for this purpose for the space of one-half an hour, under a rule of the court, which is as follows: "After a case is called for trial, thirty minutes shall be allowed to prepare and file an affidavit for a continuance, *unless under special circumstances, to be judged of by the court.* Whenever time is asked and given to prepare an affidavit for a continuance, the case shall not lose its place for trial." *Held* that this rule, even if it should be thought applicable to motions of this nature, does not necessarily suspend the power of the court to require litigants to proceed to trial at once upon the call of the docket, that under special circumstances, the court may refuse to allow the time ordinarily given by the rule, that this right is reserved in the rule, and that nothing short of an unwise and oppressive administration of it can give cause for complaint.

SAME—*From laches.*—The appellant may, from *laches* or other causes, have been unable to procure a continuance of the motion to dissolve the injunction, and yet upon the call of the cause for trial may have been ready to sustain his bill by proof, it was *held* that the bill should have been retained until a final hearing.

DAMAGES—*Assessment of for solicitors' fees.*—Where it was urged that the court erred in assessing damages to the appellees of eight hundred dollars for solicitors' fees, and the solicitors were the attorney general and the state's attorneys of several of the counties whose collectors were restrained, and these solicitors were, so far as is shown by the record, rendering *ex officio* services, it was *held* that an allowance for such service finds no warrant in the statute, and that where the record fails to furnish the testimony upon which the allowance was made this omission is fatal to the decree assessing damages.

APPEAL FROM ST. CLAIR COUNTY.

BLUFORD WILSON AND JAMES M. HAMILL, *Solicitors for Appellant.*
JAMES K. EDSALL, Attorney General, *Solicitor for Appellees.*

TANNER, P. J., delivered the opinion of the court:

This was a suit in equity, instituted in the Circuit Court of St. Clair county. A temporary injunction was granted, by which the collectors of revenue in the several counties named in the bill were restrained from distraining and selling the personal property belonging to the St. Louis and Southeastern Railway Company (consolidated) for certain taxes assessed and levied against its real and personal property for the years 1873 and 1874. On the 24th day of October last an answer was filed to the bill, and a motion was entered to dissolve the injunction. The motion was set down for hearing on the 31st day of the same month, by order of court. When

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the day arrived for hearing and the motion was called up, the solicitor for the company moved to continue the motion to dissolve the injunction, and proposed to prepare and immediately present an affidavit showing that certain material parts of the defendants' answer were untrue, stating particularly what parts were untrue, and also that he had testimony which would disprove all the material parts of the answer specified, which he could produce at the next term of the court, or at an earlier day, and that he had no opportunity to procure such testimony since the coming in of the answer, and further, that the senior counsel of the Railway Company, and who had drawn the bill for the injunction, was unable to be present in court by reason of sickness in his family. On this statement the court refused to continue the motion to dissolve the injunction, but a hearing was then had on the motion, the injunction was dissolved, and the bill dismissed. A suggestion of damages was then filed, and the court, after hearing evidence touching the same, decreed that the defendants in the suit have and recover $800, for attorneys' fees.

The railway company brings the case to this court and assigns the following errors:

1. The court erred in overruling the motion for a continuance, and urges with much earnestness that in offering to present the affidavit in support of his motion for a continuance, the company brought itself within the provisions of sec. 18, ch. 69, Rev. Stat. 1874. This section provides: "If after a motion is made to dissolve an injunction the complainant in the bill will satisfy the court by his own affidavit, or that of any disinterested party, that the answer or any material part thereof (to be specified in such affidavit) is untrue, and that he has testimony which will disprove the answer, or such material part thereof, which he can produce at the next term of court, or at an earlier day, and that he has had no opportunity to procure such testimony since the coming in of the answer, the court may grant a continuance of such motion until the next term, or until such testimony can be produced."

It is insisted in behalf of the appellant that under the ruling of the Supreme Court in *Cole* v. *Chouleau*, 18 Ill. 441; *Sherwin* v. *People*, 69 Ill. 58, and *The St. Louis and Southeastern Railway Company* v. *Teters*, 68 ib. 146; a continuance of the motion to dissolve the injunction was imperative upon the Circuit Court. These authorities hold that in applications for continuances, where parties bring themselves clearly within the provisions of the statute, a denial of the right would be error. The soundness of this view cannot be questioned, but the inquiry is, did the appellant bring itself within the rule laid down by these authorities, or, rather, did it bring itself within the provisions of the aforementioned statute? The answer to this inquiry must be drawn from the facts presented by the record.

It appears the appellant was actually present in court when the motion was entered and the time for its hearing fixed by order of the court, and therefore could not have been surprised at its call for hearing. The answer of the appellees had been on file and the mo-

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tion to dissolve known to the appellant one week before its hearing and the dissolution of the injunction. When the solicitor for the appellant asked for time to prepare and file an affidavit in support of his motion, he did not give nor attempt to give any cause for not having his affidavit ready. But he insisted that he had a right to claim the indulgence of the court for this purpose for the space of one-half an hour, under a rule of the court which is as follows: "After a case is called for trial, thirty minutes shall be allowed to prepare and file an affidavit for a continuance, *unless under special circumstances, to be judged of by the court.* Whenever time is asked and given to prepare an affidavit for a continuance, the case shall not lose its place for trial." This rule, even if it should be thought applicable to motions of this nature, does not necessarily suspend the power of the court to require litigants to proceed to trial at once upon the call of the docket. Under special circumstances, the court may refuse to allow the time ordinarily given by the rule. This right is reserved in the rule, and nothing short of an unwise and oppressive administration of it can give cause for complaint.

The appellant, however, insists that this was done in this case—that "by offering to immediately prepare and file an affidavit showing that all the material parts of the defendants' answer were untrue," it was simply exercising a right conferred by sec. 18, ch. 69, Rev. Stat.

This assumption must rest upon two grounds; first, that the appellant had not by *laches* forfeited the right to delay the motion, and second, that the proposition embodied all that the statute required in such an affidavit. We think the first ground was wholly swept away by the facts already noticed, but nevertheless, we will briefly notice the second. The affidavit required by the statute before cited must "*satisfy*" the court (1) that the whole or some material part of the answer is untrue; (2) that the complainant has testimony by which he can prove it to be untrue, and (3) that since the coming in of the answer he has had no opportunity to procure such testimony.

These exactions of the statute are not answered by simply negativing the truth of the allegations of the answer, and affirming the existence of testimony by which they can be disproved, and a want of opportunity since the coming in of the answer, to procure such testimony. The court must be *satisfied* of the existence of these several facts before a continuance of the motion can be allowed. How can conviction be wrought in the mind of the court without a presentation of facts? The solicitor of appellant did not state to the court by what character of evidence he expected to disprove the answer or where it existed, whether any and what portions were matters of record, what part, if any, was to be established by witness, their names and residence. Neither did he state any facts by which the court could become satisfied that no opportunity was given after the coming in of the answer to procure such testimony. The rule in regard to an application for the continuance of a motion to dissolve an injunction is not less rigid than the rule at law. *Smith* v. *Powell*, 50 Ill. 21, is in point.

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The statement of the appellant was not sufficient if it had been offered in the form of an affidavit, as it did not present any facts to satisfy the court as the statute required.

Again, the appellees were restrained from collecting the public revenues for the years 1873 and 1874 in all the counties through which the appellant's railroad passes. Whilst the bill admitted a liability to pay a portion of the taxes, the collection of which was enjoined and alleged only as a reason why payment had not been made that "the tax assessed on the real estate of the company for the years 1873 and 1874 in the several counties is so mixed and confounded with the tax on personalty that it is impossible to discriminate between them and determine the amount extended against the real estate."

The bill, however, does not allege facts which to our minds show that it was impossible to determine the amount of taxes to be paid by the company on its real estate. If this fact can be determined by the court on a hearing of the cause it would be determined by proof, but the bill does not allege any reason why the facts which would amount to such proof were not attainable without the aid of the court. A property owner seeking to enjoin the collection of taxes on the ground that a part is unauthorized, should show by this bill, as near as may be practicable, what part is just and what is unjust and unauthorized, and he should pay to the proper officer that part which he concedes to be properly chargeable against him, and where he seeks to enjoin the collection of taxes under such circumstances he must be required as a condition of relief to pay such amount as is just. *Merrill* v. *Humphrey*, 24 Mich. 170; Railroad Tax Cases, 92 U. S. S. C. R. 616; *Mills* v. *Johnson*, 17 Wis. 598; *Taylor* v. *Thompson*, 42 Ill. 10.

The principle in these authorities enunciated lies at the threshold of a court of equity. The force of these authorities is fully appreciated by the appellant and the rule they establish not denied, but it is persistently urged that the bill presents a case not within the rule. We cannot think so. The court on the hearing of the motion to dissolve the injunction had the right to look into the bill in this regard, in connection with all the facts presented by the record and in denying to appellant time to prepare and present an affidavit as proposed, and in dissolving the injunction did not indiscreetly exercise its power in view of the provisions of the statute and the rule of court cited.

It is also insisted that it was error to dismiss the bill upon the dissolution of the injunction. The record does not, as stated by appellees, show that the issues presented by the bill and answer were submitted to the court at the time the motion to dissolve the injunction was heard. The decree recites: "And the cause coming on to be heard upon complainant's bill, answer and replication thereto *upon a motion to dissolve the temporary injunction* heretofore granted, and the court being now fully advised in the premises, it is ordered, adjudged and decreed that the injunction be and it is hereby dis-

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solved, and the complainant's bill dismissed at his cost." This decree does not show that the cause was submitted and to be heard upon bill, answer and replication, with the motion to dissolve the injunction. The bill was not framed wholly with the view to obtain an injunction.

It also alleges, among other things, that the board of equalization in assessing the capital stock of appellant, included some proportional part of the franchise of the corporation as vested in it by the legislatures of Indiana, Kentucky and Tennessee. That said board added together the market or fair cash value of the consolidated capital stock and the market or fair cash value of the consolidated debt, excluding current expenses, and from the aggregate amount so obtained deducted the amount of the tangible property, and took the amount remaining to be the fair cash value of the capital stock, including the franchise, thereby including the value of the franchise, not only in Illinois, but in Indiana, Kentucky and Tennessee; and the tangible property in the same states and the value of the debt (excluding current expenses) in the same states.

If these allegations are true, property not subject to taxation in Illinois have been made the subjects of taxation by the board of equalization. Hence, although the preliminary injunction was properly dissolved, yet upon a final hearing, if these allegations should be established, relief would be granted, and if necessary, a perpetual injunction awarded. The appellant may, from *laches* or other causes, have been unable to procure a continuance of the motion to dissolve the injunction, yet upon the call of the cause for trial may have been ready to sustain his bill by proof.

These allegations would seem to bring the appellant within the jurisdiction of a court of equity and demand relief, according to the case of the *Chicago, Burlington & Quincy R. R. Co.* v. *Cole et al.*, 75 Ill. 591. Hence the bill should have been retained until a final hearing. This rule of chancery practice is so well settled that a reference to the authorities by which it is established is unnecessary.

It is further urged that the court erred in assessing damages to the appellees of eight hundred dollars for solicitors' fees. The solicitors were the attorney general and the state's attorneys of several of the counties whose collectors were restrained. These solicitors were, so far as is shown by the record, rendering *ex officio* services, and an allowance for such service finds no warrant in the statute, and further, the record fails to furnish the testimony upon which the allowance was made. This omission is fatal to the decree assessing damages. *Hamilton* v. *Stewart et al.*, 59 Ill. 331; *White et al.* v. *Pearce et al.*, 47 ib. 415.

We are of opinion the Circuit Court erred in dismissing the bill, and in allowing the appellees $800 as fees for the services of the attorney general and the several state's attorneys, and also in rendering a decree against the appellants for all costs.

For these several errors the decree is reversed and the cause remanded. *Reversed and remanded.*

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JACOB B. REUTCHLER, WHO SUES FOR USE OF PEOPLE'S BANK OF BELLEVILLE, *v.* AUGUST C. HUCKE.

SET-OFF.—Where the set-off is for money paid for plaintiff, and it has not in fact been paid, either in money, property, negotiable paper or securities, or in any manner whatsoever; *held* error to allow it.

SAME—*Dealing with agent.*—Where one deals with an agent, knowing of the agency, he cannot set off a claim due him from the agent against the debt due to the principal.

SAME—*Instruction—taxes.*—Where the court instructed the jury that, "if the jury believe, from the evidence, that plaintiff told defendant to pay his taxes, and that defendant did pay his tax, or settled the same with the city, so as to make him legally and absolutely liable to the city for them, prior to the commencement of this suit, and has proved the amount so paid or settled by a preponderance of evidence, they, the jury, should allow defendant a credit on any claim plaintiff may have proved against defendant, if any has been proved," it was *held* erroneous, because in it the jury was told that if the defendant settled the tax with the city, so as to make himself legally and absolutely liable to the city, then the plaintiff was liable to defendant, thus leaving the jury to determine the question of law as to what constitutes a legal and absolute liability.

ERROR TO ST. CLAIR COUNTY.

CHARLES W. THOMAS, *Attorney for Plaintiff in Error.*
HAY & KNISPEL, *Attorneys for Defendant in Error.*

BAKER, J., delivered the opinion of the court:

This was an action of assumpsit, prosecuted by Jacob B. Reutchler, who sued for the use of the People's Bank of Belleville, against August C. Hucke. The declaration contained the common counts. The defendant filed the general issue, and gave special notice that he would prove on the trial that before the suit was commenced he paid, laid out and expended for plaintiff, at his special instance and request, $1,250, the said sum being so paid by defendant for the taxes of plaintiff, due by him to the city of Belleville for the year 1874, and that defendant would set off said sum against the amount claimed in the declaration. The case was submitted at the January term, 1878, of the St. Clair Circuit Court, to a jury, and the jury returned a verdict in favor of the plaintiff, and assessed his damages at $298.49. The plaintiff thereupon moved the court for a new trial, which motion was overruled by the court, and judgment rendered upon the verdict. The plaintiff excepted to the ruling of the court in overruling the motion for a new trial, and brought the case to this court on a writ of error.

There are several errors assigned on the record. Among these are that the court erred in refusing to give plaintiff's second instruction, in giving the instruction hereinafter referred to, and in overruling the plaintiff's motion for a new trial.

The evidence shows that the defendant purchased from plaintiff a bill of nails amounting to $1,017.

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In reference to the matter of set-off referred to in the special notice, the defendant Hucke testified upon the trial substantially as follows: "I was city tax collector of Belleville prior to 1876. Before that time Reutchler told me to mark his taxes paid when I settled with the city, and when I wanted my money I should come to him and get it. This was done two years in succession. I marked the tax books paid. Afterward Reutchler refused to pay me, and I bought these nails to get my money. I paid the city part of this tax. I settled with the city, and I owe the city part of it yet. I am responsible to the city for it. The total amount of the taxes was $718.51. I offered Reutchler his tax receipts, and he refused them. He said he wouldn't pay his taxes. I have settled with the city, and Mr. Reutchler is discharged as far as the city is concerned. The city has the tax books."

Upon cross-examination he stated: "Reutchler came to me and told me he wanted me to pay his taxes in March, 1874. I was collector in 1875 and 1876. I didn't know that Reutchler would not pay me the taxes. It was after that I wanted a settlement with him. He put me off. I am to pay his taxes, and therefore I won't pay those notes. There has been an understanding that I am not to be bound unless I get the money out of Mr. Reutchler. I have paid over $100 of these taxes into the city treasury. How much over $100 I cannot say. I don't know whether I can say I have paid the money. I paid over all the money I collected and $100 more. That which I have not collected I have not paid, except about $100. I guess I have to pay the money yet. I only remember Mr. Reutchler refused to pay his taxes, and he owes them to me, and that is all I can remember distinctly."

In reference to this same matter of the taxes Reutchler testified: "Some time in the early part of 1875 I went to Mr. Hucke and told him to make out my tax receipts and lay them by, and when I got ready I would pay them. I never told Mr. Hucke to pay my taxes. The year before he had made out my receipts and laid them by, and when I got ready I paid them. I never gave Hucke any authority to pay my taxes, and my property is still liable for it. I paid the tax in 1874. It was in 1875 I told Hucke to make out my receipts. I never paid Hucke this claim, nor did I pay any of the city taxes in 1875. They were considered illegal."

G. A. Willey testified that he was a member of the city council, and on the committee on collector's report; that there was no particular agreement about the taxes, but that the understanding with Hucke was that Hucke was to pay when he collected, if he did collect; that they were to remain a charge against Hucke in that way until he collected of Reutchler if possible; that there was no resolution or ordinance, and that the council took no formal action that he recollected.

The court instructed the jury as follows:

"If the jury believe, from the evidence, that plaintiff told defendant to pay his taxes, and that defendant did pay his tax, or settled

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the same with the city, so as to make him legally and absolutely liable to the city for them, prior to the commencement of this suit, and has proved the amount so paid or settled by a preponderance of evidence, they, the jury, should allow defendant a credit on any claim plaintiff may have proved against defendant, if any has been proved."

To the giving of this instruction plaintiff excepted.

The jury allowed the plaintiff's claim for nails, $1,017, and the whole of defendant's set-off for taxes paid, $718.51, and returned a verdict for the plaintiff for the balance, $298.49.

The set-off should not have been allowed. Hucke has not paid this $718.51, either in money, property, negotiable paper or securities, or in any manner whatsoever, to the city. All that he has done is to make out the tax receipts, and mark the taxes paid on the tax books. He merely states that he paid over all the money he collected and about $100 in excess; but his own testimony, regarded as a whole, rather rebuts any presumption that he paid this excess specifically as a payment on Reutchler's taxes. Moreover, he states himself that he is not to be bound for the taxes unless he gets the money out of Reutchler. The set-off is for money paid for plaintiff, and we are unable to gather from the evidence that he has ever made payment in any mode. Even if the agreement was that Hucke was to pay the taxes, yet he has never done so, and the agreement made has not been executed by either party. 2 Greenl. Ev., sec. 519 et seq.; *Smalley* v. *Edey*, 19 Ill. 207; *Ralston et al.* v. *Wood*, 15 Ill. 171.

If the city has ever received these taxes, it is difficult to see from the evidence when, how and from whom it received them.

The above instruction given by the court was wrong, and it should not have been given, and it probably misled the jury. In it the jury was told that if the defendant settled the tax with the city, so as to make himself legally and absolutely liable to the city, then the plaintiff was liable to defendant, thus leaving the jury to determine the question of law as to what constitutes a legal and absolute liability. When Reutchler refused to pay the taxes Hucke should have destroyed the receipts, and erased the entries of payment on the tax books, and proceeded to make the money out of Reutchler's property. The law designates what funds tax collectors shall receive in payment of taxes, and they are not authorized to receive either the promissory notes or the verbal promises of the taxpayer in payment. If there is any legal liability on the part of Hucke to the city, which point we are not called upon to determine, it grows out of his own disregard of duty. At all events, he has never paid these taxes to or settled them with the city.

On grounds of public policy, no arrangement can be made between the tax collector and the property owner, whereby the collector can, by merely marking the taxes paid on the tax books, discharge either the owner or the property from liability. If these taxes ever were a valid charge against either the plaintiff or his property, they still

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continue such, unless discharged otherwise than by the facts here in proof.

An objection is also urged by the plaintiff in error to the ruling of the court, in refusing the second instruction asked by him. There can be no doubt of the correctness of the proposition, that where one deals with an agent, knowing of the agency, he cannot set off a claim due him from the agent against the debt due to the principal. This suit was instituted by Reutchler in his own name simply. Afterward, by leave of the court, the style of the cause was changed, so that he could prosecute still in his own name for the use of the bank. If Reutchler was agent and his principal was disclosed, then it would seem that this case would not be included in one of any of those classes of cases where suit can be brought in the name of the agent. Wharton on Agency and Agents, ch. xiv, sec. 428 et seq.

The theory of the instruction asked is inconsistent with the theory that the legal cause of action is in Reutchler. We are of the opinion that the plaintiff has no right to complain of the action of the court in refusing to give this instruction.

As the court erred in giving the instruction first referred to herein, and in overruling the motion for a new trial, the judgment of the Circuit Court is reversed, and the cause remanded.

Reversed and remanded.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO. *v.* ARTHUR M. DAWSON, A. A. FREW AND HENRY STALL.

GARNISHMENT—*Service of summons and scire facias in—returns.*—Where the returns of the officer, indorsed upon the summons in garnishment and upon the *scire facias* to make the conditional judgment final, were in these words: "Served by reading and leaving a copy with C. B. Wade, agent of said company," with the difference that the return of service upon the *scire facias* styles the company the "St. L. V. & T. H. H. R. R. Co," *held* that these returns show no service upon appellant.

SERVICE—*Sec. 21, ch. 79, Rev. Stat. 1874.—Held* that the return, to have been good under this section, should have shown that the president of the company did not reside in or was absent from the county, and that only in that contingency does the statute authorize service on an agent. The statute has divided the officers, agents and employes of incorporated companies into two classes, and the service upon one class is primary to a service upon the other; and before service had upon those of the second class can give the courts jurisdiction, it must appear affirmatively that service could not be had upon those persons embraced in the first class, on account of the existence of the causes for which the statute authorizes service upon the persons embraced in the second class.

APPEAL FROM EFFINGHAM COUNTY.

GILMORE & WHITE AND JOHN G. WILLIAMS, *Attorneys for Appellant.*
WOOD BROS., *Attorneys for Appellees.*

TANNER, P. J., delivered the opinion of the court:

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The appellant filed his bill to restrain a constable from levying an execution, which he then held, upon its property. A temporary injunction was granted, but on a final hearing of the cause the injunction was dissolved and the bill dismissed.

It appears that the judgment upon which the writ issued was obtained against the appellant in a procedure of garnishment as a creditor of one Gilfoil. The appellant did not appear and resist the proceedings, which resulted in the rendition of the judgment at any stage. The returns of the officer, indorsed upon the summons in garnishment and upon the *scire facias* to make the conditional judgment final, were in these words: "Served by reading and leaving a copy with C. B. Wade, agent of said company," with the difference that the return of service upon the *scire facias* styles the company the "St. L.V. & T. H. H. R. R. Co." These returns show no service upon appellant. The proceedings were had in January, 1877, and the service, in order to have given the justice jurisdiction, should have been made in conformity to the requirements of the 21st sec. ch. 79, Rev. Stat. 1874. It provides that incorporated companies may be served by leaving a copy of the summons with the president, secretary, superintendent, general agent, cashier or principal clerk, if either can be found in the county in which the suit is brought. If neither shall be found in the county, then by leaving a copy of the summons with any director, clerk, engineer, conductor, station agent, or any agent of such company found in the county. The statute of 1853 providing for service upon incorporated companies is substantially the same as the act under which these proceedings were had. The former statute was construed in this respect by the Supreme Court in the *St. L. A. & T. H. R. R. Co.* v. *Dorsey*, 47 Ill. 289. There the court says: "The return to have been good under the act of 1853 should have shown that the president of the company did not reside in or was absent from the county. Only in that contingency does the statute authorize service on an agent." In the case before us the returns of the officer are vitiated by the same fault or omission. The statute has divided the officers, agents and employes of incorporated companies into two classes, and the services upon one class is primary to a service upon the other; and before service had upon those of the second class can give the courts jurisdiction, it must appear affirmatively that service could not be had upon those persons embraced in the first class, on account of the existence of the causes for which the statute authorizes service upon the persons embraced in the second class.

We think by reason of the similarity of the statutes of 1853 and the statute now in force in reference to the character of service upon incorporated companies, the decision of the Supreme Court in that case is decisive of the case before us, and we must hold accordingly. The record presents another question of some magnitude, and upon argument a decision was pressed; but as the case must be reversed, and the injunction made absolute, for the cause already mentioned, and as the rulings of this court are authorized only so far as they

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are directory in cases which may be reversed and remanded for further proceedings, we deem it unadvisable to pass upon the question.

The judgment rendered against the appellant was rendered without service, and is therefore void, and the Circuit Court on the hearing should have made the injunction absolute.

The cause is therefore reversed and remanded, with directions to the Circuit Court to make the injunction absolute.

Reversed and remanded.

BLAISDELL *v.* SMITH ET AL.

VENDOR'S LIEN — *Reserved in deed, innocent purchaser — note recited in deed.*— Whether a lien is reserved in a deed must depend upon what the deed itself contains, and where a note held by complainant is particularly described in the body of the deed as forming a part of the consideration of the deed, and in the habendum it is referred to in the following language, "*To have and to hold on the payment of the notes herein above stated*," etc.; *held* that if these statements in the deed, when recorded, are sufficient to put subsequent purchasers upon inquiry as to whether the notes for the purchase money are paid, then they cannot claim that they are innocent purchasers without notice. The lien of a vendor takes effect against the vendee, his heirs and privies in estate, and against subsequent purchasers who have notice that the purchase money remains unpaid. Purchasers are bound to take notice of all liens shown to exist by the vendor's deed, and subsequent purchasers will not be regarded as innocent purchasers if such notice of the lien exists as would put a reasonable man upon inquiry.

SAME — *Recital in a deed charges purchaser with notice.*—Also *held* that a recital in a deed that a part of the purchase money remains unpaid is notice to the extent of the sum so recited, and that this deed with its recitals was of record, and these defendants are charged with notice of whatever it contained, and that the statements in the deed were sufficient to put a reasonable man upon inquiry.

SAME — *Recital in deed need not appear in any particular part of deed — habendum clause part of deed.*—Also *held* that the description of the note in the body of the deed, with the statement that it constituted a part of the consideration, would be sufficient to charge them with notice, but the court is not aware of any rule or decision that requires the recital to appear in any particular part of a deed. The habendum clause is part of the deed.

SAME — *Note itself a lien.*—The note itself need not show that it was a lien on the land sold, for it is private property, and the law does not require it to be recorded. A stipulation in the note itself could not be notice to subsequent purchaser.

SAME — *Assignee of vendor, right to enforce lien.*—When a vendor's lien is reserved in a decree, the right to enforce that lien passes to the evidence of the note executed for the purchase money. In the habendum of this deed defendants were notified that the grantee was "to have and to hold on the payment of the notes above stated," etc., showing that the lien for the payment of the notes was expressly reserved; *held* that this note is an express lien reserved in the deed.

APPEAL FROM ALTON CITY COURT.

ALLEN, J., delivered the opinion of the court:

A bill was filed in the City Court of Alton by complainant against

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defendants to enforce a vendor's lien on certain lots situated in the city of Alton, for the amount of a promissory note for $300, and accrued interest on the same, which she held as assignee of Moses G. Atwood.

Upon a hearing in that court the prayer of the bill was denied, and the bill dismissed with a decree against complainant for costs. Exception was taken by complainant to the decree of the court, and by agreement the cause was brought to this court on an agreed state of facts.

Complainant introduced in support of her bill a conveyance from Moses Atwood and wife (to certain lots in the city of Alton, described in the deed) to John H. Smith, dated April 27, 1857, which was acknowledged and recorded on the 18th day of June, 1857.

The consideration expressed in the deed is $400 cash, and two notes of $800, each bearing date even with the deed; the first payable fifteen months after date, and the second thirty-two months after date, each drawing eight per cent interest per annum, payable annually. And in habendum to deed, the following words: "To have and to hold on payment of the notes herein above stated, the above granted premises," etc.

Complainant then introduced the note bearing date April 27, 1857, for $800, payable to grantor in deed with eight per cent interest, signed by grantee in deed.

It was further admitted that said note had been duly indorsed to the complainant by the payee, Moses G. Atwood, subsequent to the conveyance to other defendants hereinafter mentioned, and that the principal sum and about two years' interest on the same was yet due and unpaid.

It was further admitted that Smith, the grantee in deed from Atwood and wife, conveyed the premises to James Valentine and A. G. Smith on 30th December, 1859, and that in June following Valentine and Smith conveyed to Elizabeth Smith, wife of John H., and that these deeds were duly recorded.

That Elizabeth Smith, after she acquired title, executed a mortgage on a part of the premises to Thomas Biggins to secure the payment of a promissory note for $1,000, dated March 13, 1867, and that said note was unsatisfied when this suit was brought.

That afterward, on the 1st day of December, 1875, a fee bill issuing from the Supreme Court in a case wherein Elizabeth Smith was a defendant, and was levied on said lots described in deed from Atwood and wife to Smith, and that the same were sold, and that Henry Watson became the purchaser at said sale, and that said Watson, at the time this bill was filed, held a certificate of purchase for the same, and that after said sale Elizabeth Smith executed and delivered to said Watson a deed for the said lots.

That on the trial below John H. Smith was introduced as a witness for defendant, and testified that at the time he purchased said lots of Atwood, Atwood informed him that there was a mortgage

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on the lots, but that the debt was paid, and that he, Smith, could pay interest on second note till mortgage was satisfied of record.

That after complainant got this note he notified husband of complainant of the existence of the mortgage.

It is further admitted that Atwood and Blaisdell, husband of complainant, both died more than four years before the commencement of this suit.

This suit was brought to the February term, 1877.

It is insisted by complainant in the bill that this note is made by the deed from Atwood to Smith a vendor's lien upon the premises conveyed: that this lien attached from the making and delivery of the deed, and that it is a prior lien to any subsequent purchaser or incumbrancer, and that by the indorsement of the note to complainant by the payee, she became entitled to enforce the lien and collect the note out of the proceeds of a sale of the land.

Defendants controvert this, and insist that no vendor's lien attached by reason of anything contained in the deed.

That complainant acquired no right to enforce a vendor's lien on the premises as the assignee of Atwood.

That defendants are not chargeable with notice of any vendor's lien by reason of anything appearing in the deed from Atwood to Smith.

That a vendor may reserve in a deed a lien that he may enforce in a court of equity against subsequent purchasers and incumbrancers, is no longer a controverted question.

Whether any such lien is reserved in the deed of Atwood to Smith must depend upon what the deed itself contains.

The note held by complainant is particularly described in the body of the deed as forming a part of the consideration of the deed.

Again, in the habendum we find it referred to in the following language: "*To have and to hold on the payment of the notes herein above stated*," etc.

If these statements in the deed, when recorded, are sufficient to put subsequent purchasers upon inquiry as to whether the notes for the purchase money are paid, then they cannot claim that they are innocent purchasers without notice.

The lien of a vendor takes effect against the vendee, his heirs and privies in estate, and against subsequent purchasers who have notice that the purchase money remains unpaid. Purchasers are bound to take notice of all liens shown to exist by the vendor's deed, and subsequent purchasers will not be regarded as innocent purchasers if such notice of the lien exists as would put a reasonable man upon inquiry. Washburn on Real Property, page 89.

A recital in a deed that a part of the purchase money remains unpaid, is notice to the extent of the sum so recited (ib. 89). Story Eq. Jur., sec. 401.

This deed with its recitals was of record, and these defendants are charged with notice of whatever it contained. 26 Ind. 333.

This court is of opinion that the statements in the deed were suffi-

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cient to put a reasonable man upon inquiry. *Case* v. *Busteed*, 24 Ind. 429; *Melross* v. *Scott*, 18 Ind. 250; 26 Ind. 333.

It is insisted that defendants are not chargeable with notice of anything that may appear in the "habendum"; that it is no part of the deed; that the conveyance would be good without it, if it were true that what appears in the habendum they were not bound to notice; still we hold that the description of the note in the body of the deed, with the statement that it constituted a part of the consideration, would be sufficient to charge them with notice under the authorities above cited.

But the court is not aware of any rule or decision that requires the recital to appear in any particular part of a deed. The habendum clause is part of the deed.

Again, it is insisted by defendant that the note itself ought to show that it was a lien on the land sold. The note is private property; the law does not require it to be recorded; how, then, could any stipulation in the note itself be notice to subsequent purchasers, unless it was recorded, or had been exhibited to the purchaser? We think this objection is not well taken.

Defendants insist that this lien should not be enforced, because there was a mortgage on this property when Smith purchased of Atwood. The evidence tends to show that that mortgage was due at the date of sale, and that it had been satisfied, but not released of record. More than twenty years had elapsed before this suit was brought. The law raises the presumption that it was satisfied, and in the absence of any proof tending to show the contrary, the court will regard it as satisfied.

The only additional question raised by the defendant is, can the complainant, as assignee of the vendor, enforce this lien?

When a vendor's lien is reserved in a decree, the right to enforce that lien passes to the evidence of the note executed for the purchase money. *Carpenter* v. *Mitchell*, 54 Ill. 126; *Craskey* v. *Chapman*, 26 Ind. 333.

In the habendum of this deed defendants were notified that Smith, the grantee, was "to have and to hold on the payment of the notes above stated," etc., showing that the lien for the payment of the notes was expressly reserved.

Regarding this note as an express lien reserved in the deed, the decision of the City Court must be reversed, and the cause remanded. *Reversed and remanded.*

EDITOR'S NOTE.

MORTGAGE—*Validity when executed by a married woman.*—Where a mortgage is not executed or acknowledged in the mode prescribed by the statute in force at the time of its execution, to enable a married woman to convey her real estate, it is invalid. *Moulton* v. *Hurd*, 20 Ill. 137; *Cole* v. *Van Keper*, 44 Ill. 58; *Lindly* v. *Smith*, 58 Ill. 250; *Bresser* v. *Kent*, 61 Ill. 426; *Board of Trustees* v. *Davison*, 65 Ill. 125; *Elder* v. *Jones*, Supreme Court Ill. Oct. 9, 1877.

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SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION. SEPTEMBER TERM, 1877.

WILLIAM ETTINGHAUSEN *v.* MARIA A. MARKS.

PRACTICE—*Trial of causes.*—Where a Circuit Court of a county consists of several judges, any arrangement made regarding the trial of causes between the judges is not subject to review in a higher court, without very strong reason.

SAME.—The calling of a cause for trial out of its order, and the transfer thereof to another judge, will be presumed regular.

SAME.—The court below is the best interpreter of its rules of practice.

VERDICT—*Motion to set aside.*—In an action of trespass for assault and battery, where the affidavit admits the cause of action, the verdict should not be set aside.

APPEAL from Cook County. Opinion filed January 21, 1878.

H. D. P. HOISER, *Attorney for Appellant.*
ARNOLD TRIPP, *Attorney for Appellee.*

SHELDON, J., delivered the opinion of the court:

The bill of exceptions in this case shows that on the 20th day of December, 1875, this cause being then within the call of the trial calendar before the Hon. Henry Booth, one of the judges of the Circuit Court of Cook county, was among the other cases called for trial, the plaintiff appearing, and the defendant not appearing; that Judge Booth sent the cause for trial to the Hon. John G. Rogers, one of the judges of the said Circuit Court, before whom and the jury, the defendant not appearing, a trial of the cause was then had, and a verdict for $150 returned by the jury.

On the following 22d day of December the defendant moved to set aside the verdict, which motion was overruled. This is assigned as error.

The motion was supported by affidavit that it was the rule and practice in the court that the common law cases on the term docket of even numbers were placed on the trial calendar of Judge Booth, and those of uneven numbers were placed on the trial calendar of Judge Rogers; that the cause was placed on the trial calendar of Judge Booth, and stood thereon as No. 256, and that it was not on the trial calendar of Judge Rogers; that Judge Booth had previously ordered that the call for December 20 should commence with No. 138, and from 250 to 264 inclusive; that the trial of No. 138 commenced in the forenoon of December 20, and continued throughout that day and for several days thereafter; that defendant had no knowledge of the transfer of the cause to Judge Rogers, not being present at the time, as he was relying upon the supposition that the cause would not be called for trial except in its order on the docket; that the transfer of the cause was without any application for a change of venue.

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It is urged that the calling of the cause for trial was out of its order, and that the transfer of the cause to Judge Rogers was irregular.

It was *held*, in *Smith* v. *Barlow*, 67 Ill. 519, that where a later cause on the docket was tried in the absence of defendant's counsel before cases standing earlier, which counsel had been informed would be tried by jury, and the record failed to show what disposition had been made of the preceding cases, that if they were passed without being finally disposed of for the term, it would be presumed, in the absence of any statement of the cause in the record, that the court had good and sufficient cause for what was done.

It was also *held*, in *Mix* v. *Chandler*, 44 Ill. 174, that the court below was the best interpreter of its rules of practice, and that a judgment should not be reversed merely on the ground that one of those rules had been disregarded, unless the violation was very plain and likely to result in injustice; and that it is the duty of counsel to be in court when their case is regularly reached upon the docket for trial, and they cannot complain if, issue being joined, the court disposes of it in their absence.

Each judge does not hold a distinct and separate Circuit Court in Cook county, but the Circuit Court of that county consists of five judges, and any arrangement made regarding the trial of causes between the judges themselves ought not to be reviewed in this court, at least without very strong reason.

The action here was trespass for an assault and battery. The affidavit virtually admits the cause of action, and sets up as the matter in defense what would go only in mitigation of damages.

The verdict and judgment were for $150. We do not consider that there is such a case here presented as requires that the verdict should be set aside, and the judgment is affirmed.

Judgment affirmed.

EDITOR'S NOTES.

ASSIGNMENT.—A vendor's lien to the purchaser of the notes given for the purchase money is not assignable; it is personal, and must be enforced by the vendor himself. 32 Ill. 524; 27 Ill. 431.

REAL PROPERTY.—Real estate purchased with partnership funds for partnership purposes and appropriated to partnership uses is, in equity, presumed to be partnership property, and it is the same when the legal title is taken and held in the name of one or more of the partners as tenants in common. Story, Part. 153; *Durea* v. *Burt*, 28 Cal. 580.

SAME—*Individual real property.*—When individual real property is brought into the partnership, and by proper agreement of the partners converted into partnership property, and appropriated to its uses, becomes a portion of the capital stock of the firm, and will be treated as such in equity. Lindly, Part. 450; Pars. Part. 366; Story, Part., sec. 15, 16 C., 98, 371, 372, 373, p. 158; Cow. Part. 254, 255; Bissell, Part. 33, 36; 1 Am. Lead. Cas. 496; *Sigourney* v. *Munn*, 7 Conn. 11; *Frink* v. *Branch*, 16 Conn. 269; *Hoxie* v. *Carr*, 1 Sumner, 180; *Duryea* v. *Burt*, 28 Cal. 588.

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SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

GENERAL NO. 69,821. ASSUMPSIT.

THE FIDELITY SAVINGS BANK AND SAFE DEPOSITORY, USE OF VIRGINIUS A. TURPIN, RECEIVER, *v.* GEORGE SHUFELDT, JR.

PLEADING.—Plea stricken out for want of sufficient affidavit of defense.

PLUMMER & BRADFORD, *Attorneys for Plaintiff.*
SHUFELDT & WESTOVER, *Attorneys for Defendants.*

Plaintiff sues on a note, to secure which certificates of stock of Fidelity Bank & Globe Insurance Company were deposited as collateral, declaration, special and common counts, copy of note sued upon and affidavit of claim. Defendants filed a plea of *non assumpsit* in substance and form the same as that filed in *Chisholm et al.* v. *McGinnis*, Chicago Law Journal, vol. 1. No. 1, p. 56, and notice of set-off; to which plaintiff demurred. The demurrer was disposed of at February term, 1878, as follows:

GARY, J: Let the demurrer be sustained, as decided in *Chisholm* v. *McGinnis.*

MR. WESTOVER: The defendants ask leave to amend.

GARY, J: You can do so, on filing an affidavit showing that you have a good defense.

To this defendants file an affidavit setting up that the stock deposited was, at the time deposited, valuable, and that while valuable defendant notified plaintiff to sell and apply proceeds to payment of note sued upon. This plaintiff neglected to do, and defendant was damaged thereby, and asks to have his damages set off against this action.

MR. BRADFORD: This is no defense in law, and I refer your honor to the following cases:

Prettyman v. *Barnard*, 37 Ill. 109; *Rozet* v. *McClellan*, 48 Ill. 347; Story on Bailment, sec. 308–321; *Henry* v. *Eddy*, 34 Ill. 508; *Cashman* v. *Hays*, 46 Ill. 145; *Leake* v. *Brown*, 43 Ill. 372; *Belden* v. *Perkins*, 78 Ill. 449; *Chicago Artesian Well Company* v. *Corey*, 60 Ill. 73; *Coggs* v. *Benard*, Smith's Leading Cases, vol. 1, pt. 1, 384.

MR. WESTOVER: I refer your honor to 28 Minn.

GARY, J: Plaintiff was not bound to sell collaterals which defendant had the right at any time to redeem. He did not do so, and could not force plaintiff to the expense and trouble of sale or litigation. Let the plea be stricken out for want of sufficient affidavit of defense. Plea stricken and judgment $4,751.28.

Appeal prayed and allowed.

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DISTRICT COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF ILLINOIS. JANUARY TERM, 1878.

FIRST NATIONAL BANK OF CHICAGO *v.* THE THIRD NATIONAL BANK AND THE UNION NATIONAL BANK *v.* THIRD NATIONAL BANK.

CHECK—*Alteration of.*—Where A gives his check to B for $10, and B raises that to $100 by the addition of a cypher to the ten, and B then deposits the check with his banker, and his banker in the due course of business collects the check from A's banker, each party has a reclamation against the other till it falls upon the party who is to blame in the transaction. The loss must fall finally upon the party who stands nearest in relation to the party who committed the offense.

SAME—*Indorsement.*—Where a bank, by indorsing the draft which was raised by their depositor and deposited with them, gave it a credit upon which the plaintiffs paid, it was *held*, that there could be a recovery.

BLODGETT, J., delivered the opinion of the court:

These two cases were submitted to the court for trial without a jury, and I gave notice to counsel I would dispose of them this morning.

I have not time to give an elaborate opinion, but from the facts in the case I am satisfied the plaintiffs ought to recover; mainly from the consideration that I think the defendant bank by indorsing the draft which was raised by their depositor and deposited with them gave it a credit upon which the plaintiffs undoubtedly paid.

The point was made upon the trial that the drawer and drawee of this bank were guilty of negligence, and such negligence as released the defendant by reason of their not using proper precautions to prevent drafts from being raised, the drafts being drawn for $25.23, and raised to $2,500.23, but I think that was an obligation equally upon them. The defendant put this draft in circulation, and they were equally bound with the plaintiffs to see to it that proper precautions had been used to prevent the draft from being mutilated or altered as well as the plaintiffs, the drawees of the draft.

I take it that if A gives his check to B for $10, and B raises that to $100 by the addition of a cipher to the ten, and B then deposits the check with his banker, and his banker in the due course of business collects the check from A's banker, that each party has a reclamation against the other till it falls upon the party who is to blame in the transaction. And it was the misfortune of the Third National Bank, in this case, that their depositor, who seems to have been the party who manipulated these alterations in these checks, is not to be found. The loss must fall finally upon the party who stands nearest in relation to the party who committed the offense.

I can see no other solution of a difficulty of this kind. It strikes me that the authorities cited on the part of the plaintiffs are suffi-

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ciently in point to sustain this view of the case, although, of course, they are like any other case, or nearly every other case, that arises in a court of justice, not on precisely all-fours.

Judgment for plaintiffs.

EDITOR'S NOTES.

CHECKS.—While the giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given, yet such check may *by agreement of parties* be given and received in *full payment and absolute discharge and satisfaction of the debt;* and whether it was so given and received is a question of *fact* for the jury. *Dinwiddie Co.* v. *Stuart*, 1 Virg. L. J. 297. A check may be offered in evidence under the money counts, and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts; yet it is only *prima-facie* evidence of money lent, paid and advanced, or had and received, and when it is *proved* that no money had come to the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts. Ib. Where an action of *assumpsit* is brought for goods sold and delivered, the declaration filed contains only the *common counts*, the bill of particulars is filed, and the only counts in the declaration to which the evidence applied was that for goods sold and delivered. If it is shown that the goods were *absolutely paid for by a check*, the demand upon the *account* is thereby *extinguished*, and there is no count in the declaration upon which the plaintiffs can recover. Ib. The payee of a check which has not been accepted by the bank on which it is drawn cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payee and the bank. *First Nat. Bank of Washington* v. *Whitman*, 1 Virg. L. J. 395. So held were a check of the Treasurer of the United States upon a depositing bank had been paid upon an unauthorized indorsement of the name of the payee, and where the action was brought by the true owner of the check. Ib. It does not alter the rule that there has been a settlement of accounts between the treasurer and the bank, and the check in question was allowed in the account to the credit of the bank, upon the supposition that it had been properly paid. Such erroneous allowance does not affect the real state of the accounts, but is open to correction when discovered. *Ib.* Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check. Ib.

PRACTICE—*Motion that action be remitted where there are two substantial counts, one in contract and the other in tort.—Held*, no jurisdiction to remit an action containing those two separate counts. 37 L. T. Rep., N. S. 449.

CHOSES IN ACTION—*Reduction into possession defined.*—Reduction into possession as regards *choses in action* means actual payment to the husband in his character of husband, not as trustee, or what is equivalent to it, if the property has been paid to his agent, or so dealt with that the property is no longer a *chose in action* of the wife, but under the exclusive control of the husband, or has been in the exercise of his exclusive control, placed by him in the hands of, or transferred to, other persons upon some trust inconsistent with the exercise of the wife's possible title by survivorship, that will be considered to be a reduction into possession. 2 Eq. Jur. 478.

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CONTRACT OF SERVICE.—A, an infant, contracted to serve B, who was a ship-builder, as a plater and riveter for five years, at increasing weekly wages mentioned in the agreement, provided that if B should cease to carry on his business, or find it necessary to reduce the operation of his works from any cause over which he should not have any control, B was to be at liberty, on giving fourteen day's notice, to terminate the agreement and discharge A from his service. *Held*, that the agreement was not on the face of it inequitable, and that its validity depended upon whether its provisions and the wages fixed were usual and reasonable under all the circumstances of the contract. *Leslie* v. *Eitzpatrick*, 37 L. T. Rep., N. S. 461.

SAME—*When binding on infant.*—A contract is binding on an infant unless it is manifestly to his prejudice, or at least, so plainly so that the court can say that it is to his prejudice; it is then not voidable only, but absolutely void. On examining the cases that will be found to be the law. *Cooper* v. *Simmons*, 7 H. and N. 707, 721; *Reg.* v. *Welch*, 22 L. J. 145, M. C.; *Whittle* v. *Frankland*, 31 L. J. 81, M. C.; *Thomas* v. *Vivian*, 36 J. P. 373.

SPECIAL ASSESSMENTS—*Park in west Chicago.*—The net damages for taking property for the park and boulevards in west Chicago, are the amounts required to be paid to the owners for the taking of their land, and this is the cost which is meant in the provision of the statute limiting the amount of the cost of the improvement. But even if the assessment exceeded the sum limited, the objection should be made before confirmation. *Andrews* v. *The People*, 83 Ill. 529.

SAME—*Supplemental Park Act—submission to vote.*—Where, by a vote of the people, under the original Park Act, the park commissioners became corporate authorities, for the purpose of constructing and maintaining certain public improvements, it was *held*, that the legislature might regulate and modify their powers and duties without submitting the supplemental act to a vote. Ib.

SAME—*Whether property is benefited.*—It is too late, on application for judgment against lands for special assessments, to insist that the property is not benefited to the amounts assessed thereon. The judgment confirming the assessment is conclusive upon the question, and cannot be attacked collaterally. Ib.

SAME—*Notice of application for judgment.*—Under the acts relating to the park and boulevards in west Chicago, and assessments therefor, on application for judgment for unpaid assessments, a notice of the application published three times, for three successive weeks, is all that the statute required. Ib. *Vide: Garrett* v. *Moss*, 20 Ill. 549; *Madden* v. *Cooper*, 47 Ill. 359; *Brislin Case*, 80 Ill. 423.

EXECUTION—*Against city.*—It is error to award an execution against a city. Ib. *Vide: City of Pekin* v. *Brereton*, 67 Ill. 477; *City of Shawneetown* v. *Mason*, 82 Ill. 337; *The People* v. *McRoberts*, 62 Ill. 38; *Clayburgh* v. *City of Chicago*, 25 Ill. 535; *C. & P. R. R. Co.* v. *Francis*, 70 Ill. 238; *The Jacksonville & S. R. R. Co.* v. *Kidder*, 21 Ill. 131.

VENDOR'S EQUITABLE LIEN.—Equitable lien of a vendor for the price of land that he has conveyed to the purchaser, is not stipulated for in the contract of sale, but is a creature of a court of equity, upon the principle that a person who has gotten the estate of another ought in conscience, as between them, to be allowed to keep it, and not pay the full consideration money. 2 Story's Eq., sec. 1219.

SAME—*Promissory note.*—The vendor's is raised for the benefit of himself; but when he transfers the note for value to another person, without indorsing it, or by an indorsement without an engagement or guaranty that it shall be paid, then the weight of authority is that the right to the vendor's equitable lien becomes extinguished. 2 Story's Eq., sec. 1227; 1 Leading Cases, Hare and W. Notes, 362, *et seq.*; *Hall's Exrs.* v *Click*, 5 Ala. 363.

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INJUNCTION—*Continuing.*—An appeal from a final judgment dissolving an injunction and dismissing the bill, on which a bond is given to prosecute the appeal with effect, will continue the injunction during the pendency of the appeal. *Wood* v. *Dwight*, 7 Johns. Ch. 295; *Hoyt* v. *Golston*, 13 Johns. 139; *Garrow* v. *Carpenter*, 4 Stew. & Port. 336; *Chegany* v. *Scofield*, 1 Halst. Ch. 525; *contra*: *Yocum* v. *Moore*, 4 Bibb. 221; *Pendice* v. *Wallis*, 37 Miss. 172; *Turner* v. *Scott*, 5 Rand. 332.

BURGLARY—*Intent to commit.*—It is essential to show the intent to commit burglary. The *quo animo* constitutes an indispensable part of the crime. 1 Greenl. Ev. sec. 53. The proof may be relevant and yet not essential. 1 Phil. Ev. 622, C. H. & E. notes; *Pierce* v. *Hoffman*, 24 Vt. 527; *Commonwealth* v. *Call*, 21 Pick. 522; *Rex* v. *Wylie*, 4 B. & P. 92; *Thorp* v. *State*, 15 Ala. U. S. 757.

CONTRACT—*For payment of debt.*—Where the parties are competent to contract they can legally contract as to the time and mode of payment, and the court is bound to give effect to the contract according to the terms therein expressed. 4 Edw. Ch. 208; 7 Paige, 179; 11 Kan. 222.

Such a condition is not in the nature of a forfeiture. Ib.

DECREE—*Vacating by default.*—A decree by default for one's own negligence and disregard of the process of the count will not entitle a defendant to have the decree vacated by original petition—12 Pet. 492; 3 Marsh. 7; 2 A. K. Marsh. 11; 4 Johns. Ch. 203; 6 Leigh, 439—unless he has not been negligent and can show equitable grounds. 6 Md. 329; *Horn* v. *Queen*, 4 Neb. 13.

JUDGMENTS.—Judgments and decrees may be set aside upon sufficient showing during the term at which they are rendered, but after the term is past it can only be reformed by motion made and cannot be vacated except for fraud. 30 Iowa, 486; 9 Johns. Ch. 89; 45 Mo. 570; 39 Cal. 303; 9 Wis. 31.

GIFT.—A gift of an estate for life, and a comfortable support out of it, creates no trust—*Stevens* v. *Winship*, 1 Pick. 318; *Larned* v. *Bridge*, 17 Pick. 339; *Harris* v. *Knapp*, 21 Pick. 412; *Dodge* v. *Moore*, 100 Mass. 335—as to devise over, residuary devise and contingent remainder. *Hohn* v. *Law*, 4 Met. 190, 201; *Thompson* v. *Ludington*, 104 Mass. 193; *Symmes* v. *Moulton*, 120 Mass. 343.

PATENT.—Courts have no right to enlarge a patent beyond the scope of its claim, and where the terms of a claim in a patent are clear and distinct, the patentee, in a suit brought upon the patent, is bound by it. *Merrill* v. *Yeomans*, 94 U. S. 573; *Reeves* v. *Keystone Bridge Co.*, 5 Fish, 468–456.

BURNT RECORD ACT—*When record will not be restored.*—Where a party's land had been sold under a trust deed, and he procured a person to purchase the title for his benefit, such person holding the title as a mere security for the repayment of the money advanced, which the original owner afterward repaid with interest, and such person so holding the title conveyed the same to a third person and he to another, during all which time the original owner was in the open and actual possession of the land, the court refused to restore the record of such conveyances which had been destroyed by fire. *Strong* v. *Shea*, 83 Ill. 575.

MORTGAGE—*Deed, when taken as a security.*—Where one person advances money for another with which to purchase the title to land, taking the conveyance in his own name, as a security for the money so advanced, with interest, his deed will be treated as a mortgage, and on repayment he will be required to convey to the person for whom he so purchased. Ib.

NOTICE—*By possession of land.*—Where a person is in the actual, open and notorious possession of land, claiming to own the same, this will afford notice to the world of all his rights and equities in the same. Ib.

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CONVERSION—An action for conversion of a promissory note fraudulently procured is the proper remedy. 10 J. R. 172; 12 N. Y. 313; 50 N. Y. 531.

BANKRUPTCY—*Mode of settlement of estate and discharge.*—A bankrupt estate may be settled and the bankrupt discharged in three different ways: (1) By an assignee appointed and a certificate of discharge granted by the court. U. S. Rev. Stat., sec. 5070; *Mace* v. *Wells*, 7 How. 272; *Hunt* v. *Taylor*, 108 Mass. 508. (2) By trustees nominated at a meeting of creditors, by three-fourths, in value, of the creditors. U. S. Rev. Stat., sec. 5103. (3) By a composition proposed by the debtor and accepted in satisfaction of the debts due them from him. U. S. Stat. 1874, ch. 390, sec. 17.

SURETY—*Consent to composition does not discharge for debt.*—A creditor, by participating in either of these forms of proceedings, whether by assenting to a certificate of discharge or by consenting to a resolution either for a winding up through trustees or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety. *Brown* v. *Carr*, 2 Russ. 600; 5 Moore & Payne, 497; Ex parte Jacobs, L. R. 10, ch. 211; 7 Bing. 508; *McGrath* v. *Gray*, L. R. 9, C. P. 216; *Ellis* v. *Wilmot*, L. R. 10, Ex. 10.

COMPOSITION—*Proceedings under the statute—composition deed.*—The proceedings for a composition under the statute differ wholly in nature and effect from a voluntary composition deed, which binds only those who execute. *Oakly* v. *Parker*, 4 Cl. and Fin. 207; S. C. 10 Bligh, N. R. 548; *Bailey* v. *Edwards*, 4 B. and S. 761; *Phoenix Cotton Manfg. Co.* v. *Hazen*, 3 Allen, 441; *Gifford* v. *Allen*, 3 Met. 255; *Cragoe* v. *Jones*, L. R. 8, Ex. 81; *Bateman* v. *Gosling*, L. R. 7, C. P. 9; *Oriental Financial Co.* v. *Gurney*, L. R. 7, Ch. 142.

COMMON CARRIER—*Liability for delivery to connecting line.*—A common carrier's liability extends to the ultimate destination of the goods, where there is a special undertaking to carry the goods beyond the terminus of his own line of railway. *R. R. Co.* v. *Johnston*, 34 Ill. 389; *Kruber* v. *Woolcot*, 1 Hill, 223; *Hunt* v. *R. R. Co.*, 1 Hill, 278; *Ward* v. *R. R. Co.*, 19 Wend. 534; 24 N. Y. 269; 47 Me. 573; 20 Ill. 375; 25 Ga. 231; 1 Gray, 502; *Moore* v. *R. R. Co.*, 3 Mich. 23; *Keyle* v. *R. R. Co.*, 10 Rich., S. C. 382; *Hempstead* v. *R. R. Co.*, 28 Barb. 485.

PREMIUM—*Waiver of payment.*—Ambiguous circumstances will not show waiver of punctual payment of premium. *Life Ins. Co.* v. *Willets*, 24 Mich. 268; *Morland* v. *Ins. Co.*, 71 Penn. Stat. 393.

POLICY—*Forfeiture.*—A policy of insurance, forfeited by breach of a condition, cannot be revived by any act of waiver or estoppel, unless such act is done on full knowledge of the facts. *Piedmont Ins. Co.* v. *Ewing*, 2 Otto, 380; *Catoir* v. *Am. L. I. and T. Co.*, 33 N. J. 487; *Finley* v. *Lycoming Ins. Co.*, 30 Penn. Stat. 314; *Security Ins. Co.* v. *Fay*, 22 Mich. 467; *Chase* v. *Hamilton Ins. Co.*, 20 N. Y. 55; *Franklin Ins. Co.* v. *Chicago Ins. Co.*, 36 Md. 119; *Blake* v. *Exchange M. I. Co.*, 12 Gray, 265; *Worcester Bank* v. *Hartford F. Ins. Co.*, 11 Cush. 265.

RECEIPT—*Of overdue renewal premium.*—The receipt, by an agent, of an overdue renewal premium, with knowledge of any breach of the terms of the policy, continues the policy. The effect is the same as when the premium has been paid when due. May on Ins., sec. 502; Bliss on Life Ins. (2d ed.), sec. 308; *Carpenter* v. *Ins. Co.*, 2 Am. Lead. Cases (5th ed., Hare and Wall, notes), 906; *North Berwick Ins. Co.* v. *Ins. Co.*, 52 Me. 336; *Bouton* v. *Ins. Co.*, 25 Conn. 542.

COMPOSITION—A creditor can be bound by a composition against his will, only by being brought within the terms of the act, or by reason of some personal equity between himself and the other creditors. *Ex parte Lang*, 37 L. T. Rep., N. S. 449.

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APPELLATE COURT OF ILLINOIS.

The St. Louis, Vandalia & Terre Haute Railroad Co. v. The Town of Summit.

Trespass—*As to whether the plaintiff below had such possession of the locus in quo as would enable it to maintain trespass.—Held*, that when the plaintiff is the owner and the lands are unoccupied, or there is no adverse possession, trespass can be maintained, but that in this case there is no such possession as will support trespass *quare clausum fregit*, since a party with no property in the soil, and not in actual possession or occupancy of a road or bridge, could not maintain trespass *quare clausum fregit*, merely on the ground that such party was charged with the duty of keeping it in repair. The proper common law remedy for an injury would be in case.

Case—*Distinction between trespass and case.—Held* that the statute abolishes the technical distinction between the two forms of action so that you may join counts in trespass with counts in case, and may call your action trespass or case, it is wholly immaterial which, and may sue out your writ in either form of action, and may then count in either trespass or case, or both, at your option. But your count, if in case, must contain all the elements of a good count in case, or if in trespass must contain the elements of a good count in trespass. The change goes only to the matter of the form of action, and does not change substantial rights and liabilities. Nor does this statute repeal that well settled principle that in all actions the proofs must correspond with the allegations. Where a declaration is filed showing a good cause of action in either trespass or case, it is wholly immaterial whether you call your action trespass or case, but such facts must be alleged as show a legal cause of action in the one form or the other, and the facts that are alleged in the pleading must be supported by the proofs. If the declaration is in trespass *quare clausum fregit*, then there must be a possession in order to support it—either actual, or in case the premises are vacant and unoccupied, a constructive possession that follows ownership and title.

Evidence—*Admissibility of.*—Where, upon the trial, against appellant's objections, the court permitted appellee to ask its witnesses "what it would take to place the road in its old condition, including the bridge, grading and everything," and permitted the witnesses to answer, they stating various sums ranging from $1,000 to $5,000, it was *held* erroneous, because the verdict of the jury was predicated to a very considerable extent upon the opinions of witnesses based upon the supposed value of this bridge.

Same.—Where witnesses were permitted, against the objection of appellant, to make estimates of the cost of restoring the road to the same condition, at the same grade and in the same place as the old one, it was *held* error. The appellant had a license from the state to build its railroad across and upon the highway and to maintain it there.

Instruction.—Where the court refused to give the following instruction: "In determining plaintiff's damages in this case the jury are not to take into consideration the value of the bridge which formerly crossed the Wabash river in Summit township, or what it would take at the time defendant's road was constructed to put said bridge in good repair," it was *held* erroneous.

Highway.—*Held* that under the statutes of the state, it is the duty of the town to keep so much of this highway as lies within its limits in repair. Out of this liability grows the right of the town to maintain an action for damages. The

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damages that it would be entitled to recover, if any, would be measured by its liability, and would be altogether compensatory in their character.

APPEAL FROM EFFINGHAM COUNTY.

BAKER, J., delivered the opinion of the court:

This is an action of trespass, *quare clausum fregit*, prosecuted by the appellee against the appellant. The *locus in quo* is that part of the National or Cumberland road that is located in the township of Summit, in Effingham county.

The case was submitted to a jury at the September term, 1877, of the Effingham Circuit Court, and a verdict was returned into court finding the appellant guilty and assessing the damages at $2,000.

Motions for a new trial and in arrest of judgment were overruled and a judgment was rendered by the court on the verdict of the jury.

The case is brought by appeal to this court, and numerous errors are assigned.

The National road was laid out and constructed by the general government, under an act of congress passed in 1820, between Wheeling, in West Virginia, and a point on the bank of the Mississippi river, and so much of the lands of the United States as were included in the road were by said act reserved and excepted from sales of the public lands. In 1856 congress conveyed and transferred to the State of Illinois so much of the Cumberland or National road as lay within the State of Illinois. U. S. Stat. at Large, 1856, p. 7.

Thus the fee in the road was reserved to the United States by the act of 1820, and conveyed to the state by the act of 1856. The state has never divested itself of the title that it received from the general government, and still continues to be the owner in fee of the road.

The state has, however, from time to time made provision for working and keeping in repair this in common with the other public roads and highways. In 1859 the board of supervisors in all counties under township organization were given entire control of all the state roads in their respective counties. Laws of 1859, p. 194. Afterward, in 1861, this was changed, and the care and superintendence of highways and bridges therein was delegated to the commissioner of highways of the several towns in all counties under township organization. Thus it appears that in Effingham county, it having been under township organization since a time anterior to the passage of either of these acts, the control and care of the National road was at one time committed to the supervisors of the county, and at another time to the commissioner of highways in the several towns, the state retaining the ownership and fee of the road.

By the act of 1861 it was made the duty of the commissioners of highways "to give directions for the repairing of roads and bridges in their respective towns, and to cause the building of bridges when the public interests or necessity require it, to lay out and establish roads, to regulate the roads already laid out and to alter and vacate

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roads, and to cause the highways and bridges which are or may be erected over streams intersecting highways to be kept in repair." Laws of 1861, p. 246. The same care and superintendence over highways is committed to such commissioners, and the same duties imposed upon them, by the act of April 11, 1873.

The first question that arises upon this record is as to whether the plaintiff below had such possession of the *locus in quo* as would enable it to maintain trespass.

The gist of the action of trespass, *quare clausum fregit*, is the injury to the possession, and the general rule is that without actual possession trespass cannot be supported. The English doctrine is that as to real property. There is no such *constructive* possession as will enable the plaintiff to support this action. 1 Chit. Pl. 176, 177, and notes.

With us the rule is relaxed, and when the plaintiff is the owner and the lands are unoccupied, or there is no adverse possession, trespass can be maintained. *Dean* v. *Comstock*, 32 Ill. 173; *Smith et al.* v. *Wunderlich et al.*, 70 Ill. 426.

The title to the National road being in the state, and not in the town of Summit, it is clear that there can be no constructive possession in the town upon the principle that the possession follows the title when there is no adverse possession. The town, through its commissioner of highways, had merely the care and superintendence of the road, and the duty imposed upon it of keeping it in repair, etc.

The only evidence in the case tending in the least to show actual possession in the plaintiff was the testimony of several witnesses, who stated that the national road through Summit township had been worked by the road labor in that township, as other highways were worked. We do not understand that this was such possession as would sustain the action of trespass *quare clausum fregit;* in fact, it was a mere performance of the duty imposed by statute upon the town authorities to keep the highways in repair. It has been held that commissioners of sewers could not maintain an action of trespass against commissioners of a harbor for breaking down a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessionary interest as would entitle them to maintain such action, and the proprietors of a navigation, having by statute a mere easement or right to use land for the purposes of the navigation, do not acquire such interest in the soil of a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the act, as will enable them to maintain trespass. 1 Chitty Pl. and Notes, 176.

The case of *Connor* v. *The President and Trustees of New Albany*, 1 Black. 88, was trespass *quare clausum fregit*, and seems to be very much in point. The court says: "A street in a town is a public highway. It is a subject of common use, and not of exclusive possession, an incorporated hereditament in which all

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persons possess equal right, the right of passing over it, and is in its nature incapable of being reduced into possession. But it is a subject of government, and the government of it is, by the act regulating the incorporation of towns, placed in the hands of the corporation. They have the power to keep it in repair, to remove nuisances, etc.; but this power is no more than a supervisor possesses over a common highway, and is certainly of a very different nature from a possession, either absolute or qualified. Consequently, no possessory right exists in the corporation, by which the action can be supported." So in the case at bar, the National road is a public highway, the ownership of which is in the state. It is for the common use of all. The public have the right to pass and repass, and it is incapable of being reduced into possession. So, also, said road is the subject of government, and under the control of the state, and the state has, for the time being, imposed the care and superintendence of it upon certain township officers, and has made it their duty to keep it in repair, etc., and has imposed fines and penalties, to be recovered in the name of the town, for obstructing or encroaching upon the same. Rev. Stat. 121, secs. 58, 59, 60 and 61. In this case there is no such possession as will support trespass *quare clausum fregit;* but the remedy in ordinary cases for obstructing or encroaching upon the road would be by suit in the name of the town, for the penalties imposed by the statute.

But it is urged in this suit that an action on the case would lie, and that the distinction between trespass and case was abolished by our statute before the commencement of this suit. Laws 1871–2, p. 342.

The Supreme Court say, in the case of *Blalock* v. *Randall*, 76 Ill. 228–9: "The statute does away with the technical distinction between the two forms of action, but does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy for acts done than before existed." We understand the statute to accomplish these objects and these only, to abolish the technical distinction between the two forms of action so that you may join counts in trespass with counts in case, and may call your action trespass or case, it is wholly immaterial which, and may sue out your writ in either form of action, and may then count in either trespass or case or both, at your option. But your count, if in case, must contain all the elements of a good count in case, or if in trespass, must contain the elements of a count in trespass. The change goes only to the matter of the form of action, and does not change substantial rights and liabilities. Nor do we understand that this statute repeals that old and more than well settled principle, that in all actions the proofs must correspond with the allegations. Where a declaration is filed showing a good cause of action in either trespass or case, it is wholly immaterial whether you call your action trespass or case, but such facts must be alleged as show a legal cause of action in the one form or the other, and the facts that are alleged in the pleading must be supported by the proofs. If the declaration is

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in trespass *quare clausum fregit*, then there must be a possession in order to support it—either actual, or in case the premises are vacant and unoccupied, a constructive possession that follows ownership and title.

Even if there was in this case such possession as would sustain trespass, it is difficult to see how the plaintiff could recover in such action. The public highways in the state are of general concern and are fully and completely under the control of the legislature, and in the case of this particular road the fee itself was and is in the state, and the legislature had full power to make other arrangements in regard to the same or vacate it or dispose of it as it deemed proper.

It was stipulated in this case that any evidence admissible under a good plea might be admitted under the plea of the general issue. The ninth section of the act amending the act incorporating the appellant provides, among other things, that "Whenever it shall be necessary for the construction of said railroad, to cross any road or highway lying on the route of said road, it shall be lawful for the company to construct their railroad across, upon, or by the side of the same, provided that the said company shall restore the road or highway thus traversed or crossed to its former state, or in a sufficient manner not materially to impair the same in its usefulness." Thus it appears that a license was given to the corporation by the supreme power of the state, and by virtue of that license the company entered upon the National road and constructed its railroad across, upon and by the side of the same, and that by virtue of such license it has combined to operate its railroad across and upon the said road. It is difficult to see why such license is not a full and complete defense to an action of trespass, as appellant of lawful right entered upon and constructed its said road upon said highway.

The attention of the court is called by counsel for appellee to the case of *Ellicottville etc. Plank Road Co.* v. *Buffalo etc. R. R. Co.*, 20 Barb. 644. That was an action prosecuted by the plank road company against the railroad company for a trespass committed by entering upon the plank road and for tearing up the plank and grading, etc. The plank road company was a private corporation, duly organized under the laws of the state, and was "in the actual use, occupation and enjoyment of the plank road, toll-gates," etc. The liability in that case is distinctly put upon the ground of the inviolability of private property, "whether belonging to individuals or private corporations." The court say: "The legislature could not give to this railroad company a right to enter upon the plaintiff's road, and in any way to impair its usefulness or diminish its value, without making or becoming liable to make the plank road company just compensation. This statute is construed as granting only the right which the public had in these streams of water, watercourses, streets, highways, plank roads, turnpikes and canals, and not as attempting to grant any right to violate private property without the consent of the owners."

The distinctions between that case and the case at bar are obvious;

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in that case the plank road was the property of and in the actual use, possession and occupancy of the plaintiff; in this case the plaintiff had no possession and had only the care and superintendence of the highway; in that case the plaintiff was a private corporation with vested rights of property, and in this case the plaintiff is merely one of the political subdivisions of the state, with a mere duty imposed upon it by the state of keeping the highway in repair, and that care, superintendence and duty liable to be taken away and devolved upon others at the legislative will.

Our attention is also called to the case of *The Town of Troy* v. *Cheshire Railroad Company*, 3 Foster, p. 83. The declaration is in case, and alleges that there was a public highway in Troy leading from Troy toward Keene, and which the town was liable to repair, and that there was upon the highway and forming a part of it, a valuable stone bridge, in good repair and suitable for the accommodation of the public; that the defendant had built a railroad partly upon and over said highway, and did in constructing their railroad cause obstruction and injury to the said highway and to said bridge, by demolishing and destroying the bridge and converting to their own use the material thereof and by erecting upon the site of the bridge a railroad bridge impassable by the public travel, and by occupying with the rails embankments and excavations of the railroad a part of the highway, etc., and by placing upon said highway a large quantity of stones and by creating upon the traveled part of the highway a fence, etc., by means of which the highway was narrowed and rendered unsafe, etc.

It will be seen that the case above referred to differs materially from the case at bar as presented by the pleadings, that being an action on the case, alleging no possession by the plaintiff or trespass by the defendant, but alleging the injury complained of according to the real facts of the case. Aside from the question of damages, which we will hereafter refer to, the only point decided in the case is that towns that are required by law to construct and keep in repair highways and bridges within their boundaries have a qualified interest in the roadways and bridges that they have erected, and may maintain an action upon the case for the destruction or obstruction of the road, or the conversion of the materials. The case of *Harrison* v. *Parker*, 6 East. 154, is cited several times in the opinion of the court. In that case Harrison, under a grant of authority from Sir G. Warren, built a bridge on the land of Warren for public use, and covenanted to keep it in repair and not to demand toll. He sued the defendants in trespass, alleging in the first count of the declaration that these defendants broke down and damaged plaintiff's bridge, etc.; and the second and third counts were for similar trespasses. The fourth count was on the *asportavit* for taking and carrying away the goods and chattels of the plaintiff and converting them, etc. At the assizes a verdict was found for the plaintiff. Afterward in the Court of King's Bench it was held that the action might be maintained by the plaintiff on the fourth count

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for the *asportavit*, as there was a qualified right of property subsisting in the plaintiff after the dedication of the bridge to the public, and that upon severance of the materials of the bridge they returned to him again as his absolute property, so as to enable him to maintain a possessory action for the materials subsisting in the shape of several chattels. Lord Ellenborough, C. J., in delivering his opinion, says: "If it were necessary to decide whether trespass were maintainable by the plaintiff for pulling down the bridge, it might be proper to consider whether any property in the soil had passed to him under the grant, but on the fourth count it is not necessary to decide that question."

In fact, we have been unable to find any case where it has been held that a party with no property in the soil, and not in actual possession or occupancy of a road or bridge, could maintain trespass *quare clausum fregit*, merely upon the ground that such party was charged with the duty of keeping in repair. We feel clear that the proper common law remedy for an injury would be in case.

Even were the declaration such as to permit a recovery, the present judgment would have to be set aside and the cause remanded for errors in admitting improper testimony against the objections of the appellant, and in refusing proper and giving improper instructions to the jury, and for the further reason that the damages assessed by the jury are altogether excessive and not justified by the evidence in the case.

The facts in the case, as shown by the evidence, are about as follows: The National road was laid off by the general government eighty feet wide, and was graded for the width of thirty feet. The town of Summit has never spent any money in repairing the road, but ordinary road labor has been done upon that part of the road within the town. The appellant constructed its railroad upon the National road for about 800 feet through Ewington, on the west bank of the Little Wabash river; through Ewington the railroad cut is between twelve and eighteen feet deep, and across this cut the railroad company built a bridge for the wagon road; about thirty feet on the north side of the National road was left by the railroad for the use of the public, except for a short distance at or near the bridge. For a very short distance the railroad occupies all or nearly all of the National road. But to obviate the difficulty the railroad condemned or attempted to condemn, and graded a strip of ground north of and parallel with the old road for a road for the accommodation of the public, and to furnish a way from the east edge of Ewington; and also opened a road south of the railroad that leads back to the National road west of the bridge across the railroad cut, these two pieces of road, one on the north and the other on the south side of the railroad, being connected by said bridge.

It appears from the evidence that at the time that the railroad was constructed there was an old bridge across the Little Wabash river on the National road; that the railroad did not touch the National road at either end of the river bridge; that the center line of

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the railroad was twenty feet south of the line of the National road; that it was about one hundred feet from the railroad to the old bridge, and that the whole width of the public road was open there. This old bridge, from innate defects and its own weight, fell down about one year after the railroad was built, and there is nothing whatever in the evidence showing or tending to show that the railroad company had anything whatever to do, directly or indirectly, with the destruction of this bridge. It is, however, in evidence that this part of the road was considered somewhat dangerous by some on account of the liability of horses to get frightened at the cars.

Upon the trial, against appellant's objections, the court permitted appellee to ask its witnesses "what it would take to place the road in its old condition, including the bridge, grading and everything," and questions of similar import, but of slightly variant phraseology, and permitted the witnesses to answer, they stating various sums ranging from $1,000 to $5,000. Moreover, the court refused to give the following instruction which was asked by the appellant: "In determining plaintiff's damages in this case the jury are not to take into consideration the value of the bridge which formerly crossed the Wabash river in Summit township, or what it would take at the time defendant's road was constructed to put said bridge in good repair."

We are wholly unable to perceive how it became the duty of appellant to repair said bridge, it being upon a portion of the National road that was not even touched by its railroad, or upon what theory of law or justice it was liable to pay the value of a bridge for the destruction of which it was in no way accountable, and which it does not appear to have meddled with in the least. We are satisfied that the verdict of the jury for $2,000 damages was predicated to a very considerable extent upon the opinions of witnesses based upon the supposed value of this bridge. There was error in permitting questions of the character above indicated to be asked and answered, and also in refusing to give the instruction mentioned.

Again, witnesses are permitted, against the objection of appellant, to make estimates of the cost of restoring the National road to the same condition, at the same grade and in the same place as the old one. There was error in this. The appellant had a license from the state to build its railroad across and upon the highway and to maintain it there. The occupation of the appellant was necessarily permanent in its character, and surely it never was contemplated by the legislature when it required the appellant to restore the highway in a sufficient manner not to materially impair the same in its usefulness, that the appellant would fill up cuts twelve or eighteen feet deep, and thereby cover up its road-bed and tracks to that depth. Nor is it to be supposed that appellee intends to perform any such labor.

We have heretofore seen that, under the statutes of the state, it is the duty of the town to keep so much of this highway as lies

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within its limits in repair. For this purpose it is authorized to apply the road labor of the township, and to assess and collect a road tax. It is also authorized to alter or widen the road, and to have the damages of the owners of the land, if not released or agreed upon, assessed by a jury, and such damages are to be paid by the town, and the town, out of the funds raised for road and bridge purposes, and by availing itself of the road labor of the township, is required to make and pay the expenses of grading and opening the road thus altered or widened. Out of this liability grows the right, if any such right it has, of the town to maintain an action for damages, upon a count properly framed, against the appellant. The damages that it would be entitled to recover, if any, would be measured by its liability, and would be altogether compensatory in their character. In this case, while the railroad company occupies a portion of the public highway under license from the state, yet it was required to restore the highway in a sufficient manner not materially to impair its usefulness. If it has already done this then it has already performed all that was required of it, and it is not bound to respond in damages to the town. If it has not done so, then the town will have to perform the duty that appellant should have performed, so that the public may safely pass and repass upon the highway, and for any expenses that the town would necessarily incur in procuring right of way, or in opening or grading the new portion of the road so as to make it equally safe and convenient to the old portion, or for any extra expense of keeping in repair the road as remodeled, over and above the expense of keeping in repair the old road, and for any expense of removing obstructions upon the portion of the old road retained within the new highway, the town would perhaps be entitled to recover as compensation. In this case the injury and nuisance is necessarily of a permanent character and will continue without change. The continuance of the state of facts produced by the acts of appellant will necessarily follow, as it must be presumed that appellant will continue to occupy such portion of the highway as its road is built upon, and it is a permanent diversion of that property to a new use. The ingredients above mentioned, growing out of the acts of appellant and the liability of appellee, would probably constitute measure of damages, and if so may be recovered, not as prospective damages, but as compensation for the injury sustained. In this connection see *The Town of Troy* v. *Cheshire R. R. Co.*, 3 Foster, 83.

Those damages which necessarily result from the injury complained of may be shown under the *ad damnum*, but where the damages, though the natural consequences of the act complained of are not the necessary result of it, they are termed special damages, which the law does not imply, and they must therefore be specified in the declaration or the plaintiff will not be permitted to give evidence of them at the trial. This principle would probably apply to some of the elements of damages above indicated, such as expense of right of way, which, even if not already procured by appellant,

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might be donated or released, and it might be necessary as to such damages to specify in the declaration and moreover show either actual payment or legal liability to pay on the part of appellee.

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

EDITOR'S NOTES.

TRESPASS QUARE CLAUSUM FREGIT.—"Title may be inferred from ten years' possession, sufficient to put the defendant on his defense." *Smith* v. *Burtie*, 9 Johns. 197. "A prior possession, short of twenty years, under a claim of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side." Ib., *Smith* v. *Lorillard*, 10 Johns. 355; *Jackson* v. *Myers*, 3 ib. 388; *Jackson* v. *Horder*, 4 ib. 202. "The proof here adduced was *prima facie* evidence both of title and of right of possession, and was sufficient to put the defendant on his defense. It was not necessary that the plaintiff should have shown a possession of twenty years, or a paper title. His possession as proved was presumptive evidence of a fee, and was conclusive on the defendant until he showed a better title. Upon this state of the case, the mere naked possession of the defendant could not prevail against it." *Doe* v. *Herbert*, Breese, 279.

"In actions of *quare clausum fregit* the law is well settled that possession of the close is sufficient to sustain the action against any person who shall enter upon that possession, except the owner. The possession, where that alone is relied on, must, however, be an actual and not a constructive possession. The mere entry upon a tract of land, without any color of title, and inclosing a small part of it, does not, of itself, constitute an actual possession of any more land than is inclosed." *Webb* v. *Sturtevant*, 1 Scam. 181. "A squatter upon public land, if he can maintain an action of trespass *quare clausum fregit* for cutting down timber, is confined in his claim of title to his *pedis possessio*." 1 Scam. 185.

"To maintain trespass *quare clausum fregit*, the plaintiff must have the actual or constructive possession of the premises. The gist of the action is the injury to the possession. If the premises are occupied, the action must be brought by the party in possession; if unoccupied, by the party having the title and the right to the possession. The owner cannot maintain the action where the land is in the occupancy of his tenant. The trespass is a disturbance of the tenant's possession, and he alone can bring the action. Bac. Abr. Trespass, C. 3, 1 Chit. Pl. 202; *Campbell* v. *Arnold*, 1 Johns. 511; *Holmes* v. *Seeley*, 19 Wend. 507; *Bartlett* v. *Perkins*, 18 Maine, 87; *Roussin* v. *Benton*, 6 Missouri, 592; *Davis* v. *Clancy*, 3 McCord, 422. If the trespass is prejudicial to the inheritance, the remedy of the owner is by an action on the case. He may, in that form of action, recover damages for any injury to the freehold. *Bedingfield* v. *Onslow*, 4 Leoniz, 209; *Jesser* v. *Gifford*, 4 Burr. 2141; *Lienow* v. *Ritchie*, 8 Pick. 235; *Brown* v. *Dinsmore*, 3 N. H. 103; *Randall* v. *Cleveland*, 6 Con. 328; *Hall* v. *Snowhill*, 2 Green, N. J. 8"; *Halligan* v. *The C. & R. I. R. R. Co.* 15 Ill. 558; *Dean* v. *Comstock*, 32 Ill. 173; *Barber* v. *Trustees*, 51 Ill. 396.

"There are some cases which hold that trespass *quare clausum fregit* may be maintained by the owner for an injury to the freehold, though the land be in the possession of his tenant at will." *Starr* v. *Jackson*, 11 Mass. 519; *Hingham* v. *Sprague*, 15 Pick. 102; *Curtis* v. *Hoyt*, 19 Conn. 154; *Davis* v. *Nash*, 32 Maine, 411." *Halligan* v. *The C. & R. I. R. R. Co.*, 15 Ill. 558, 561.

"While it may be true that the action of *quare clausum fregit* only lies for an injury to the possession, still it is equally true, the ownership in fee draws to it the

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legal possession, unless there be an adverse occupancy." *Barber* v. *Trustees*, 51 Ill. 396.

A plea which does not allege possession in the defendant at the time of the plaintiff's entry, is informal and insufficient. Possession is the foundation of his right. *Ross* v. *Nesbit*, 2 Gil. 252.

A plea that the parties, since the commencement of the suit, had agreed to submit the supposed trespass to the award and final arbitration of certain referees, is no bar to the suit. *Ross* v. *Nesbit*, 2 ib. 252.

A party has a right to introduce such evidence of title as he possesses, in order to raise a question and obtain a decision upon the proper construction of a deed under which he claims title. *Louk* v. *Woods*, 15 Ill. 256; 2 Hilliard on Real Property, 352, sec. 134–147.

Where excavations are made on defendant's land so as to cause plaintiff's land to fall into them of its own weight, the plaintiff can recover in trespass. *Mann* v. *Lussen*, 65 Ill. 484; *Guest* v. *Reynolds*, 68 Ill. 478; but for the falling or the settling of the house of plaintiff he cannot recover. Ib.

Title in severalty is not inconsistent with joint possession. *Glenville* v. *Rittlesdorf*, 73 Ill. 475.

But the plaintiff must have the actual possession at the time the injury is committed, except only where he is the owner and the land is unoccupied, or there is no adverse possession. *Smith* v. *Wundorlich*, 70 Ill. 426.

Prior possession is not always proof of prior right; that depends upon the nature of the possession. Temporary occupancy without claim of right does not tend to show prior right. *I. & St. L. R. R. and Coal Co.* v. *Cobb*, 82 Ill. 183. An instruction that prior possession by the defendant will defeat a recovery by the plaintiff was erroneous. Ib.

A recovery in this action is *res adjudicata*. Ib. A peaceable retaking possession by the plaintiff is lawful, and he can recover in another action for subsequent entry by the defendant. Ib.

A title deed is admissible in evidence to show the right claimed by possession. *City of Chicago* v. *McGraw*, 75 Ill. 566; *see McWilliams* v. *Morgan*, ib. 473. When the plaintiff has possession, and no defense is made to the action, proof of possession is all that is necessary. Ib.

The owner of lands and tenements has no right to enter against the will of the occupant, except to demand rent and make necessary repairs. *Dearlove* v. *Herrington*, 70 Ill. 251.

JONATHAN EDWARDS *v.* BENJAMIN F. SAMS, JOHN B. KIMBALL AND F. SMITH & COMPANY.

MISTAKE—*Power of a court of equity to correct a mistake in the record of a court —demurrer to bill.*—Where the demurrer admits that judgment was not rendered until the 9th of April, and admits that it was a mistake of the clerk that judgment appears to have been rendered upon the 24th of March, and it also admits that appellant's deed was filed for record several days before judgment was rendered, and where appellee denies the power of a court of equity to correct this mistake, and insists that the mistake could only be corrected on notice and by a motion in the court where the mistake occurred, saving such rights as may have accrued to third parties in the meantime, it was *held* that a correction might have been made by the parties to that suit upon motion, but that as ap-

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pellant was no party to that suit, he was in no position to avail himself of this method of redress.

SAME.—A court of equity will go beyond a court of law in correcting mistakes in the record of a court.

SAME—*Bill, averments in, time, diligence—sufficiency of.*—Where the bill avers that a knowledge of the facts as to the mistake of the clerk and of the sale on execution of the land came to him within ten days before the bill was filed, it was *held* that he could not be charged with want of diligence in not moving sooner in the matter, and also that the bill is not insufficient because it does not aver that no intervening rights of third parties had accrued.

SAME—*Presumption of law.*—The law will not presume that intervening rights have accrued, and it was not necessary that that fact should be expressly negatived in the bill.

INJUNCTION.—Under the statements in the bill it was *held* that the injunction ought not to have been dissolved.

APPEAL FROM JACKSON COUNTY. Opinion filed March 20, 1878.

ANDREW D. DUFF AND BARR & LEMMA, *Attorneys for Appellant.*
WILLIAM J. ALLEN, *Attorney for Appellee.*

ALLEN, J., delivered the opinion of the court:

This was a bill filed by appellant against appellees to the September term of the Jackson Circuit Court for 1877. Complainant alleges that he is a resident of New London, in the State of Connecticut. That James V. Logan, of said county of Jackson, was the owner in fee of certain lands in that county described in bill. That said Logan, to secure the payment of a $5,000 loan made by Equitable Trust Company, of New York, made a trust deed to complainant, and that by the terms of deed Logan was to have five and a half years to redeem lands, by paying principal and interest according to terms of trust deed.

That deed bears date November 2, 1874, but was acknowledged and filed for record March 25, 1875, in the recorder's office of said county. That when deed was filed for record the records of Jackson county disclosed no judgment against Logan which was a lien on said lands, and charges that in fact there was no such judgment.

Bill charges that appellant for the first time was informed within ten days before bringing their bill that there appears now upon the record of said court a judgment against Logan, and in favor of F. Smith & Co., for $1,443.96, purporting to have been rendered on the 24th day of March, 1875, one day prior to the filing of appellant's deed of trust for record in the recorder's office. Bill charges that no such judgment was rendered on that day. That record of court shows that court was in session on the 25th day of March; that 25th day of March was first Thursday of said term. That suit was pending in that court by F. Smith & Co. *v.* Logan. That a motion for default by plaintiff against defendant in that suit was made on Thursday, 25th, but that no judgment was rendered. That plaintiff in that suit asked and obtained leave to amend jurat affidavit of merits. That affidavit had to be sent to St. Louis for

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amendment to jurat, and that in fact no judgment was rendered until 9th day of April following in that suit.

That plaintiffs in that judgment, F. Smith & Co., had execution issued on the pretended judgment of March 24, and levied upon lands described in deed, and that at a sale on said execution F. Smith & Co. became the purchaser at amount of judgment, interest and costs. That they hold a certificate of purchase, and that they will be, unless restrained, entitled to take, and will take, a deed for the premises on that certificate at the end of fifteen months from date of sale. That lands will not be redeemed. That clerk's computation of interest on note shows that it was made on the 9th day of April. That the date of said judgment, as it appears of record, was entered by mistake of clerk, and in fraud of the rights of appellant. That appellant has no remedy at law.

Bill prays that F. Smith & Co. may be restrained from transferring their certificate of purchase to a third party, and that court may correct mistake in date of judgment and decree the trust deed to be declared a prior and superior lien upon the lands described therein, and for general relief.

Upon this bill a temporary injunction was granted by the judge, August 15, 1877. At the September term, 1877, a general demurrer was interposed by appellee to the bill, and demurrer sustained and injunction dissolved. Decree against appellant for costs.

The demurrer to this bill admits everything that is well stated in the bill, and the only question is, did the bill contain enough to entitle the appellant to have the judgment corrected or to have his deed declared a prior lien upon the land?

The demurrer admits that judgment was not rendered until the 9th of April. Demurrer admits that it was a mistake of the clerk that judgment appears to have been rendered upon the 24th of March; it admits that appellant's deed was filed for record several days before judgment was rendered in favor of F. Smith & Co. against Logan, because these facts are well stated in the bill. But appellee denies the power of a court of equity to correct this mistake, and insists that the mistake could only be corrected on notice and by a motion in the court where the mistake occurred, saving such rights as may have accrued to third parties in the meantime.

That a correction might have been made by the parties to that suit upon motion we do not question. Appellant was no party to that suit, and hence was in no position to avail himself of this method of redress. The decision in *Cairo & St. Louis R. R. Co.* v. *Holbrook*, 72 Ill. 419, is not applicable to this bill, and the same may be said of *Hodgen* v. *Guttery*, 53 Ill. 431. These were mistakes where parties to the record sought a correction, and when they were at all times charged with the notice of the mistake. But we apprehend that such a rule would not be applied to one who was no party to the record, who was not chargeable with notice of the mistake, and whose rights were seriously affected by such mistakes.

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In *Griffin* v. *Ketchum*, 18 Ill. 330, the court, in discussing the time within which a motion to amend record or correct a mistake may be made, say that while a cause is pending such errors may be corrected, and that upon notice to the other party they may still amend after the case is finally determined, except in so far as the amendment may affect the rights of third parties; and after reviewing the cases in which it was held that amendments could be made upon notice, say, "undoubtedly a court of equity, by virtue of its jurisdiction in cases of *accident* and *mistake*, upon proper application by bill, and full proof, would grant relief by decree, adjusting and protecting the rights of all persons to be affected thereby." Here is a clear recognition of the doctrine that *a court of equity will go beyond a court of law* "in correcting mistakes in the record of a court."

In *Owens* v. *Ransted*, 22 Ill. 161, it is said "that the power of a court of chancery to correct a mistake in a case like this, when properly made out, cannot be questioned." In *Robbins* v. *Swain*, 68 Ill. 198, where the clerk had improperly entered a decree for sale of a tract of land not included in a foreclosure, the court say, although the mistake "might have been corrected after notice, it is equally within the province of a court to make the correction upon bill filed for that purpose. That this mode of relief is more satisfactory and complete."

In case of *Owens* v. *Ransted*, supra, the learned justice, in delivering the opinion of the court, says: "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 to interfere and give relief, and to permit the party injured to aver against the truth of the return, and show it to be false, *although it is a matter of record*."

We think no decision will be found contradicting the doctrine laid down in that decision.

The bill avers that a knowledge of the facts as to the mistake of the clerk and of the sale on execution of the land came to him within ten days before this bill was filed. He cannot be charged with want of diligence, then, in not moving sooner in this matter. Appellee says the bill is insufficient because it does not aver that no intervening rights of third parties had accrued. We do not regard this objection as well taken.

The bill asks that F. Smith & Co. may be restrained from transferring the certificate of purchase "which they had," and that no deed shall be taken by them under their purchase. The law will not presume that intervening rights have accrued, and it was not necessary that that fact should be expressly negatived in the bill. Under the statements in the bill we hold that the injunction ought not to have been dissolved, and for the reasons above we reverse the decree of the circuit court and remand the cause for further proceedings in that court. *Reversed and remanded.*

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ROBERT S. REYNOLDS, ADMR. OF THE ESTATE OF JOHN MORELAND, DECEASED, *v.* CALVIN B. DISHON ET AL.

JUDGMENT — *Revival of, by scire facias—pleas of riens per descent, nul tiel record, statute of limitations.*—Where the appellant sued out a *scire facias*, directed to the widow, and to the appellees as the heirs of A, deceased, for the purpose of revising a judgment, and the widow set up a right of homestead in the premises, and the heirs plead *riens per descent, nul tiel record* and the statute of limitations, and the court below upon the facts found the right of homestead to exist in behalf of the widow, and for the appellees on the plea of *riens per descent*, and against them upon the pleas of *nul tiel record* and the statute of limitations, and rendered judgment, this was *held*, under the facts, erroneous, and that the plea of *riens per descent* presented no issue in the case, that a revival of the judgment can only operate upon the premises described in the *scire facias*, that the appellees were the owners of the lots described in the writ in fee simple, and that the judgment obtained should have been revived and an execution ordered for the sale of the premises described in the *scire facias*.

APPEAL FROM UNION COUNTY. Opinion filed March 20, 1878.

W. S. DAY, *Attorney for Appellant.*
A. N. DOUGHERTY, *Attorney for Appellee.*

TANNER, P. J., delivered the opinion of the court:

The appellant sued out a *scire facias*, directed to Josephine T. Dishon as the widow, and to the appellees as the heirs, of Henry Dishon, deceased, for the purpose of revising a judgment in the Circuit Court of Union county. The widow set up a right of homestead in the premises, and the heirs plead *riens per descent, nul tiel record* and the statute of limitations.

The evidence shows this state of facts: John Moreland, in October, 1858, recovered a judgment in said court for $500, with cost, against Henry Dishon and Calvin B. Dishon. In 1859 Henry Dishon died without having paid said judgment. Subsequently, Moreland died, and the appellant was duly appointed administrator of his estate. On the 30th day of November, 1853, Henry Dishon was the owner in fee of lots numbered 33 and 34, in "Grammar's Donation to Jonesboro," and on the said day he executed and delivered a deed of mortgage for said lots to Lorenzo P. Wilcox, to secure the payment of $1,500 in three installments, the last to fall due in three years from that date. His wife joined in the mortgage and relinquished her dower in the lots. On the same day that Moreland obtained his judgment, Wilcox foreclosed or attempted to foreclose his mortgage by *scire facias*, and an execution was awarded against the lots for the sum of $1,500. The judgment of foreclosure does not describe the lots, but simply directs an execution against the "mortgaged premises."

In December following the rendition of the judgment of foreclosure, a special execution was issued and delivered to the sheriff, as appears by his indorsement on the 7th of December. On the 15th of January following the execution was returned, indorsed, "Sold

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on the 1st day of January, 1859, to Lorenzo P. Wilcox, for the sum of $1,537. I hereby return this *fi. fa.* satisfied on this 15th of January, 1859."

The premises were occupied by Henry Dishon at his death as a homestead, and his widow has occupied them as such ever since, and at the institution of this proceeding they were worth $2,500. Letters of administration were never sued out upon the estate of the said decedent. That in 1859 or 1860 the amount of money necessary to redeem the premises from the sale was tendered to the then sheriff of Union county, but he did not accept it.

The court upon the foregoing facts found the right of homestead to exist in behalf of Josephine T. Dishon, widow of Henry Dishon, deceased, and for the appellees on the plea of *riens per descent*, and against them upon the pleas of *nul tiel record* and the statute of limitations, and rendered judgment in the following words: "It is therefore adjudged and ordered by the court that the said judgment be revived against the said defendants, to be satisfied out of any property hereafter descended to them from the said ancestor."

The appellant took exceptions to the rendition of the foregoing judgment, and assigns for error,

1st. The court erred in finding for the appellees on the first plea.

2d. The court erred in not finding for the plaintiff on the first plea and in not finding the value of the premises and ordering that they be sold to satisfy said judgment.

The plea of *riens per descent*, we think, presented no issue in this proceeding. The Rev. Stat. 1874, ch. 542, sec. 13, authorizes this plea where a recovery is sought against the heir for the indebtedness of the ancestor, and this is the use assigned to the plea in the works on pleading. If the lands described in the *scire facias* had not passed by descent to the appellees, it was a matter of no moment to them that such lands should be subjected to sale in satisfaction of the judgment against their ancestor. In such case no judgment could be rendered against them.

If the defects attending the proceeding to foreclose the Wilcox mortgage and subject the lots to sale were fatal, it seems clear that the mortgage could not at that late day be interposed as an obstacle to the revival of the judgment and the subjection of the mortgaged premises to sale in behalf of the appellant. It also seems equally clear that if the foreclosure of the mortgage and the sale of the lots were regular and valid, but that no deed of conveyance was ever executed to the purchaser thereof after the lapse of nearly twenty years, it would be but reasonable to presume that the premises had been redeemed from such sale. This view falls within the reasoning of the court in *Rucker* v. *Dooley*, 49 Ill. 383. A revival of the judgment can only operate upon the premises described in the *scire facias*, and if the title is not in the appellees they can in nowise be affected thereby, neither could it be prejudicial to the rights of the widow of Henry Dishon. The state affords to her a complete shield.

We are of the opinion that the appellees were the owners of the

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lots described in the writ in fee simple, and that the judgment obtained by John Moreland against Henry Dishon and Calvin B. Dishon should have been revived and an execution ordered for the sale of the premises described in the *scire facias.*

The judgment of the Circuit Court must therefore be reversed and remanded. *Reversed and remanded.*

EDWARD HARPSTRITE ET AL. *v.* H. G. VASEL.

CONSIDERATION—*Partial failure of.*—Where the record shows that the instrument sued on was executed by appellee and his deceased partner to A in part consideration of the sale of a house and lot, sold by her to appellees, that the title was in her, that she executed warrantee deed to appellee and that appellee took possession under deed and that he has peaceably enjoyed possession ever since, and the appellee set up a partial failure of consideration, it was *held* that under the evidence the appellee had not sustained his plea of partial failure of consideration either as to interest accrued on the mortgage or as to the real consideration for the sale of house and lot and personal property.

SET-OFF—*For goods furnished after the instrument sued on was made.*—Where appellee's set-off was for goods furnished after the instrument sued on was made by appellee, who admitted that for those items of goods furnished A he had sued her and her husband jointly, and had obtained a judgment against them, so that his debt was, before the commencement of this suit, merged in judgment, it was *held* that no action could be maintained on this account, nor could her account be set-off in a suit against him.

INSTRUCTION.—Where the court instructed the jury for appellee that if they believed from the evidence that appellee gave the agreement sued on, then that it was in effect a guarantee that the incumbrance upon the land did not amount to more than $600, it was *held* that the court erred in giving the instruction indicated.

VERDICT.—*Held* that the verdict, under the evidence, was wrong.

APPEAL FROM MADISON COUNTY. Opinion filed March 20, 1878.

J. H. YAGER, *Attorney for Appellants.*
CHAS. P. WISE, *Attorney for Appellee.*

ALLEN, J., delivered the opinion of the court:

This was a suit brought by appellants against appellee to the October term, 1877, upon the following instrument:

ALTON, Ill., May 14, 1877.

We, the undersigned, promise hereby to deliver to Mrs. Mary Schwendeman, or order, on demand, merchandise to the amount of three hundred and eighty-nine ($389.20), provided she gives us full procession of property described in deed filed in Hillsboro, and bill of sale in our hand, and further guaranteed the title and procession of the same clear, except the mortgage of ($600) six hundred dollars in favor of Mess. Harpstrite & Shlaudeman, Decatur, otherwise this agreement shall have no power and shall be void.

$389.20. H. G. VASEL & Co.

Which had been assigned by Mary Schwendeman to appellants before the commencement of the suit.

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The declaration contained one special count on the instrument and the common counts.

Appellee filed pleas "general issue," 2d, Set-off that Mary Schwendeman was indebted to plaintiff on open account in the sum of $238.75; 3d, Plea of payment; 4th, Total failure of consideration, except as to $1.

Issue on pleas and trial by jury and verdict for appellee.

Motion for new trial overruled, and judgment for appellee for costs.

Several errors are assigned by appellants, but we deem it important to notice but two. The first, that the court erred in admitting improper evidence to go to the jury; second, that the verdict of the jury was contrary to the law and evidence.

The record shows that the instrument sued on was executed by appellee and his deceased partner to Mary Schwendeman in part consideration of the sale of a house and lot in Hillsboro, sold by her to appellees, that the title was in her, that she executed warrantee deed to appellee and that appellee took possession under deed and that he has peaceably enjoyed possession ever since.

Appellee set up as a ground of partial failure of consideration that he had bought the property mentioned in deed and referred to and some chattels, amounting to $100 in value, of Mary Schwendeman; that the entire consideration was $1,300; that this instrument sued on was for a balance due on the purchase after deducting an account which she was owing him of $203.75, another note which he gave at same time for $100, taxes paid ($7.05), and $600 to be paid on mortgage on property described in deed, amounting in all to the sum of $1,300, and insists that that consideration has failed in this, that he was to have the house and lot free from all incumbrances by the terms of the contract, except $600, the amount of mortgage on the same, and that he, by the terms of the contract, was not liable to pay any interest that had accrued or might thereafter accrue on the mortgage; that $300 interest had accrued on mortgage and was an incumbrance on the land, and that herein the consideration had failed except as to the $1, and that the chattels were purchased at same time the house and lot was purchased.

On the other hand it is insisted that the purchase price of the house and lot was $1,300, and that the personal property bought at same time was $100, altogether $1,400, and that appellee was to lift the mortgage of $600 on the house and lot. A bill of sale of the personal property was taken by appellee from Mary Schwendeman and her husband for the personal chattels, dated May 7, 1877, for the consideration of $100. The consideration expressed in the deed, made on a different date, is $1,300.

Anton Schwendeman, husband of Mary, testified that he made the contract, and that the true consideration in the deed was $1,300, that the personal goods were $100, making total, $1,400; that at time deed was made there was about $100 interest due on mortgage, and that when trade was made appellee assumed to pay the mort-

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gage and the interest, and that the $600 and $100 interest was deducted from price of land and personal property.

Anton Schwendeman is corroborated in his statement both by the deed and bill of sale, so far as the consideration expressed in them is concerned, and we think appellee has not sustained his plea of partial failure of consideration either as to interest accrued on the mortgage or as to the real consideration for the sale of house and lot and personal property.

As to appellee's set-off for goods furnished Mary Schlaudeman after the instrument sued on was made by appellee, it is sufficient to say that appellee, in his testimony, admits that for those items of goods furnished Mrs. Schwendeman he had sued her and her husband jointly, and had obtained a judgment against them, so that his debt was, before the commencement of this suit, merged in judgment. If so, then no action could be maintained on this account, nor could her account be set-off in a suit against him. *Warren* v. *McNulty*, 2 Gilm. 35; *Wayman* v. *Cochran*, 35 Ill. 152; *Runamaker* v. *Corday*, 54 Ill. 103.

This suit was wrongly brought, but we have in furtherance of justice regarded it in the light in which it was tried by both parties in the Circuit Court.

The written contract says, "except the mortgage of ($600) six hundred dollars in favor of Mess. Harpstrite & Schlaudeman, Decatur," thus specifically pointing out and identifying the incumbrance that was excepted. The contract did not specify the interest of that mortgage or the principal of that mortgage, as being accepted, but it designated the mortgage, and the mortgage included the whole mortgage, both principal and interest.

The court instructed the jury for appellee that if they believed from the evidence that appellee gave the agreement sued on, agreeing by said agreement to pay said $389.20 in merchandise if the incumbrance upon the land did not amount to more than $600; then, if the jury also believed from the evidence that instead of being only $600 due on the mortgage on said land there was due in addition, as interest, the sum of $102.60, then that appellee was entitled to a credit of $102.60, the court thus informing the jury that this written agreement was in effect a guarantee that the incumbrance upon the land did not amount to more than $600. We do not so interpret it, and in our opinion the court erred in giving the instruction indicated.

We regard the verdict of the jury as manifestly wrong, that the court erred in giving the instruction indicated and in not granting a new trial and in rendering judgment for appellee.

This cause is reversed and remanded.

Reversed and remanded.

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THE CITY OF ANNA v. CORNELIUS O'CALLAHAN.

MUNICIPAL CORPORATION — *Contracting for, without authority.— Held* that where the city clerk contracted to furnish a pump and had an interest in its sale to the city, his contract, for want of authority, would not be binding upon the city.

EVIDENCE.—Also *held* that the evidence fails to show any authority to order the pump that could bind the city to pay for it.

APPEAL FROM UNION COUNTY. Opinion filed March 20, 1878.

ALEXANDER J. NISBET AND W. C. MORELAND, *Attorneys for Appellant*, cited: All acts of a municipal corporation beyond the scope of powers granted are *void*, much less can any power be exercised or any *act done forbidden* by *charter or statute*. Rev. Stat. 1874, 225, sec. 78; 1 Dillon, 173, sec. 55. Courts adopt a strict rather than a liberal construction of powers. *Minturn* v. *Larue*, 23 How. (U. S.) 435–436; *Thompson* v. *Lee Co.*, 3 Wall, 320; *Thompson* v. *Richardson*, 12 Wall, 349; *Clark* v. *Davenport*, 14 Iowa, 495; *Messiam* v. *Moody*, 25 Iowa, 163; *Nichol* v. *Mayor*, 9 Humph. 252, 1 Dillon, 175, note. The action of municipal corporations is to be held strictly within the limits, they are to be favored by the courts. 1 Dillon, 185, *Leonard* v. *Canton*, 35 Miss. 189; *Douglas* v. *Placeville*, 18 Col. 643, 647; *Argentine* v. *San Francisco*, 16 Cal. 282; *Wallace* v. *San Jose*, 29 Cal. 180; *Lafayette* v. *Cox*, 5 Ind. 38; *Bank* v. *Chillicothe*, 7 Ohio, part II, 31–35; *Collins* v. *Hatch*, 18 Ohio, 523. Their powers must be strictly pursued *within* the limits of their charter, *or they are void*. 1 Dillon, 175; *Smith* v. *Madison*, 7 Ind. 86; *Kyle* v. *Molin*, 8 Ind. 34–57; *Willard* v. *Killingworth*, 8 Conn. 247; approved 10 Conn. 442. An act without the scope of corporate authority is void. 1 Dillon, 481, note; *Brady* v. *Mayor*, 20 N. Y. 312; *Hodges* v. *Buffalo*, 2 Denio, 110; approving 17 N. Y. 584. *No obligation* is *created against the corporation* by a contract formed *without substantial* compliance with the *statute formalities*. *Butler* v. *Charleston*, 7 Gray, 12; *Appleby* v. *Mayor of N. Y.* 15 How. Pr. 428; *Baltimore* v. *Erchbach*, 18 Md. 276; *White* v. *New Orleans*, 15 La. An. 667; Abbott's Digest on Corporations, 442, sec. 421; *Lottman* v. *San Francisco*, 20 Cal. 96; *City of Leavenworth* v. *Rankin*, 2 Kan. 357; Abbott's Digest, Law of Corporations, 520, sec. 404; *Cowen* v. *Village*, 43 Barb. 48; *Johnson* v. *Common Council*, 16 Ind. 227. A contract entered into by the city officers in *violation* of the *provision* of a *statute*, is *illegal, void*, and *imposes no obligation upon the city*. And the *officers* of the *corporation cannot bind* the *corporation* by *accepting work done under it*. *Bradley* v. *Mayor of N. Y.* 312, 18 How. Pr. 343. An unauthorized contract does not bind the corporation. *Jeffersonville* v. *Ferry Boat*, 35 Ind. 19; *Seibrecht* v. *New Orleans*, 12 La. An. 496; *Wood* v. *Waterville*, 5 Mass. 294; *Jones* v. *Lancaster*, 4 Pick. 149. Assent must be shown. 1 Dillon, 479, sec. 386; Rev. Stat. 187, sec. 19, 227; *Weston* v. *Syracuse*, 17 N. Y. 110, 1 Dillon, 204, sec. 86.

MATTHEW J. INSCORE, *Attorney for Appellee*, cited: *The Ottawa Gas Light and Coke Co.* v. *Graham*, 35 Ill. 346; *Buckland* v. *Goddard*, 36 Ill. 206; *Ballance* v. *Leonard*, 37 Ill. 44; *Esty* v. *Grant*, 55 Ill. 341; *Goodrich* v. *City of Minonk*, 62 Ill. 121; *Wilson* v. *McDowell*, 65 Ill. 522; *Culliner* v. *Nash*, 76 Ill. 515; *Henry* v. *Holloway*, 78 Ill. 356.

ALLEN, J., delivered the opinion of the court:

Appellee brought suit for $31.20 against appellant before a justice of the peace and recovered a judgment for that sum and costs. An appeal was taken by appellant to the Circuit Court of Union county

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and the cause was tried by a jury in that court, which resulted in a verdict for appellee for that sum. A motion was entered by appellant for new trial, that motion was overruled by the Circuit Court and judgment rendered on verdict for $31.20, which appellee claims to have paid for a pump ordered by the city authorities through him for one of the public wells of the city, and its payment is resisted by appellant on two grounds. 1. That appellee had no authority to order the pump. 2. That as an officer of the city he could not make a contract for its purchase. The evidence shows that appellee was at the time the pump was procured the city clerk.

That at that time the city council had a committee of three of its members whose duty it was to look after the city wells. That Bohannon, Henderson and Trent were members of that committee.

The evidence of the appellee is that Bohannon told him to order the pump, that he, Bohannon, said he had the concurrence of Henderson, another member of the committee, in making the order. That in pursuance of the order he wrote to St. Louis and procured the pump, and paid the charges on same amounting to $31.20. That he had no authority to do so from any one but Bohannon, but that after the pump was put in the well Henderson said to appellee that it was a valuable improvement.

Bohannon testifies that he had a conversation with appellee about the well, and that he (Bohannon) recommended the pump, but that he had had at that time no conversation with Henderson about the pump.

Henderson testifies that he never had any conversation with Bohannon about the pump, that he knew nothing about it until after it was purchased and put in the well.

Trent, the chairman of the committee, testifies that he knew nothing about the pump till the appellee's bill was presented for payment, and that he was opposed to putting a pump in the well.

Sec. 78, Rev. Stat. 1874, 225, provides no officer of a city shall be "interested in any contract work or business of the city," etc., and appellant insists that appellee in this transaction comes within the provision of this section, and he is not entitled to recover. If appellee contracted to furnish a pump and had an interest in its sale to the city, then he would be within its purview. If he only ordered a pump by authority of the city and advanced the money to pay for it, then he would not. The construction of the section given by appellant would prevent the city from procuring any material which it might need, for this could only be done through some one or more of its officers. This very narrow construction would prohibit the clerk or any one else belonging to the city government from purchasing even the necessary stationery for the business of the city council. We think that this objection of appellant is not well taken.

There are some other points made by appellant, but they are, in the opinion of the court, not of sufficient importance to require comment.

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The only remaining question to be considered is, did the evidence in this case support the verdict of the jury? This court would not be inclined to reverse a cause when the evidence was conflicting, or even when the court might think the weight of evidence was against the finding.

In this case the appellee says the only "authority he had to order the pump was from Bohannon." Bohannon could not make the order without a concurrence of other members of the committee, or at least a majority of them. The other members of the committee on improvement repudiate the order, deny that Bohannon was authorized by them to give any such order, and deny that since the pump was procured they have in any way ratified the order for its purchase.

We think the evidence fails to show any authority to order the pump that could bind the city to pay for it, and that the court erred in overruling the motion for a new trial, and for this reason this cause is reversed and remanded. *Reversed and remanded.*

THE PEOPLE OF THE STATE OF ILLINOIS v. JOHN W. O'NEAL ET AL.

JURISDICTION — *Of appellate court.— Held* that this court has jurisdiction only in matters of appeal and writs of error from the *final* judgment, orders and decrees of circuit, county and other courts.

APPEAL—*Before final order.—Held* that where no final order or judgment was rendered by the county court; the case is still *in fieri* in that court, and until it is finally disposed of no appeal lies.

Opinion filed March 20, 1878.

JOHN C. EDWARDS, *Attorney for Appellants.*
WALKER & HALE, *Attorneys for Appellees.*

BAKER, J., delivered the opinion of the court:

This was a *scire facias* on a forfeited recognizance at the December term, 1877, of the county court. On motion of appellee, based on affidavit, the default on the recognizance was set aside. The state's attorney excepted to the ruling of the court and prayed an appeal to this court, which was allowed.

The appeal was inadvertently allowed and improperly taken. This court has jurisdiction only in matters of appeal and writs of error from the *final* judgment, orders and decrees of circuit, county and other courts. Laws of 1877, page 70, sec. 8, and page 77, sec. 123.

No final order or judgment was rendered by the county court; the case is still *in fieri* in that court, and until it is finally disposed of no appeal lies. *Gage* v. *Eich*, 56 Ill. 297; *Phelps* v. *Tickis*, 63 Ill. 201.

The appeal must be dismissed. *Appeal dismissed.*

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JAMES COLLINS v. FILMAN A. MONTEMY, ADMR. ETC.

PROMISSORY NOTE—*When it matures—Calendar month.*—Where the suit was predicated upon a promissory note, dated February 12, 1875, and due nine months after date, *held* that it matured on the 15th day of November, 1875, that in all computations of time a month shall be considered to mean a calendar month, and a day shall be considered a thirtieth part of a month, that promissory notes other than such as are payable at sight, or on demand, or on presentment, are entitled to days of grace, that the suing out of the summons was the commencement of the suit, and that an objection should not be raised before the justice and by plea in abatement.

SAME—*Held* that the cause of action must exist at the time of the institution of the suit, and where the demand has not matured at the time of the institution of the suit and the general issue is pleaded, the defendant may avail himself of the objection on the trial.

SAME—*Held* that the court below erred in overruling appellant's objections to the introduction of the note in evidence and in permitting it to be read to the jury.

PLEADING—*Plea in abatement.*—It is a good plea in abatement to the action of the writ that it was prematurely brought, *but as this is ground of demurrer or nonsuit, it is very unusual to plead it in abatement.*

APPEAL FROM JEFFERSON COUNTY. Opinion filed March 20, 1878.

POLLOCK & SON AND GREEN & CARPENTER, *Attorneys for Appellant*, cited: Rev. Stat., p. 720, sec. 16; 10 and 11, tenth clause of sec. 1; Chitty on Bills, 406; 68 Ill. 250. The law presumes that all pleadings before a justice are oral and that every defense was made there. *Wilson* v. *Berans*, 58 Ill. 233; *Town of Lewiston* v. *Proctor*, 27 Ill. 416; *Williams* v. *Corbet*, 28 Ill. 263–4; *Fry* v. *Tucker et al.*, 24 Ill. 181. The only requisite is jurisdiction. *City of Alton* v. *Kirch et al.*, 68 Ill. 263; *Minard* v. *Lawler*, 26 Ill. 301–304. Where a suit is prematurely brought, advantage may be taken of it upon the trial when the evidence is offered. Chit. Pl., vol. 1, top page 453–4. *Archibald* v. *Argall*, 53 Ill. 308; *Harlow* v. *Boswell*, 15 Ill. 57; *Nickerson* v. *Babcock*, 29 Ill. 497. If the justice of the peace had jurisdiction, then the only question for the Circuit Court is to inquire into and determine the rights of the parties. *Vaughn* v. *Thompson*, 15 Ill. 39, 40; *Swingley* v. *Haynes*, 22 Ill. 216; *Thompson* v. *Sutton*, 51 Ill. 213; *Allen* v. *Nichols*, 68 Ill. 250; *Zuel* v. *Bowen*, 78 Ill. 234–236. The trial in the Circuit Court was but a continuance of the case, and no demand, not then matured and owned by the plaintiff, could be given in evidence. Rev. Stat. 1874, p. 645, sec. 48; Rev. Stat. 1874, p. 643, sec. 35; Rev. Stat. 1874, p. 640, sec. 17. *Feazle* v. *Simpson*, 1 Scam. 30; *Daniels* v. *Osburn*, 71 Ill. 169. The plaintiff must show that the defendant was indebted to him at the time of the commencement of the suit, or he fails in his action. *Hamlin, Hale & Co.* v. *Race*, 78 Ill. 422; *McCoy* v. *Babcock*, Chi. L. J. 222.

T. S. CASEY AND C. H. PATTOR, *Attorneys for Appellee*, cited: That an action is prematurely brought is matter in abatement only. *Archibald* v. *Argall*, 53 Ill. 307; *Palmer* v. *Gardiner et al.*, 77 Ill. 146, 147; Chit. Pl. 453. So a suit in name of a dead person is matter of abatement only. *Miles* v. *Bland*, 76 Ill. 381. By pleading to the merits (in the J. P. Court), appellant waived his dilatory plea in abatement. *Thomas* v. *Lowy*, 60 Ill. 512; *Pearce & Sharp* v. *Swan*, 1 Scam. 266; *Gilmore et al.* v. *Newland*, 26 Ill. 200; *Mills* v. *Exrs. of Bland*, 76 Ill. 381; *Lindsay* v. *Stout*, 59 Ill. 491; *Conley* v. *Good*, Beecher's Breese, 135 and Notes; *Adams* v. *Miller*, 12 Ill. 27. As to all *dilatory* pleas, the transcript must affirmatively show

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that they were presented at the first opportunity, and no *presumptions* will be indulged that any but pleas to the merits were pleaded in justices' courts. *Adams* v. *Miller*, 14 Ill. 71, 277; *Wilson* v. *Nettleton*, 12 Ill. 61.

BAKER, J., delivered the opinion of the court:

This was a suit brought by appellee against appellant before a justice of the peace, and a judgment was rendered by the justice against the appellant, and appeal was taken to the Circuit Court of Jefferson county, where the case was submitted to a jury, with a like result. A motion for a new trial was overruled by the court, and appellant excepted and brings the record to this court. The points referred to by us in this opinion are fully covered by the rulings of the court below, the exceptions there taken, and the errors here assigned.

The summons was issued by the justice of the peace on the 11th day of November, 1875; was made returnable on the 16th day of that month, and was served on appellant by the constable on the 12th day of said month of November.

The suit was predicated upon a promissory note, dated February 12, 1875, and due nine months after date. This would make it mature on the 15th day of November, 1875. In all computations of time, a month shall be considered to mean a calendar month, and a day shall be considered a thirtieth part of a month. Rev. Stat., ch. 98, sec. 16; ch. 74, sec. 10; ch. 131, sec. 1, tenth clause. Promissory notes other than such as are payable at sight, or on demand, or on presentment, are entitled to days of grace. Rev. Stat., ch. 98, sec. 15.

But it is urged by appellee that it should be made to appear that the objection was raised before the justice and by plea in abatement; such is not our understanding of the law. The suing out of the summons was the commencement of the suit. Rev. Stat., ch. 79, sec. 17. *Feazle* v. *Simpson*, 1 Scam. 30.

The cause of action must exist at the time of the institution of the suit, and where the demand has not matured at the time of the institution of the suit and the general issue is pleaded, the defendant may avail himself of the objection on the trial. *Harlow* v. *Boswell*, 15 Ill. 56; *Nickerson* v. *Babcock*, 29 Ill. 497; *Daniels* v. *Osborn*, 71 Ill. 169; *Hamlin, Hale & Co.* v. *Race*, 78 Ill. 422; and authorities there cited. In this latter case the Supreme Court say: "We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit."

It is a good plea in abatement to the action of the writ that it was prematurely brought, *but as this is ground of demurrer or non-suit, it is very unusual to plead it in abatement.* 1 Chit. Pl., p. 422, 453.

We are referred, however, by appellee, to the cases of *Archibald* v. *Argall*, 53 Ill. 307, and *Palmer* v. *Gardner*, 77 Ill. 143. We do not regard either of these cases as militating at all seriously against the conclusions that we have arrived at in this case.

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In *Archibald* v. *Argall*, *supra*, the defense was not that the money was not due for the goods sold under and by the terms of the contract of purchase, but that by a subsequent agreement *dehors* the contract of sale, the plaintiff agreed to extend the time for the payment of the account. The court held that the matter stated in the special plea filed in that case was in abatement and not in bar of the action. The distinction between that case and the case at bar is obvious, and again in the plea filed in that case there was no consideration stated to sustain the promise to extend the time of payment, and the plea was bad on that account.

Palmer v. *Gardner*, *supra*, was a bill in chancery to enjoin the collection of two judgments theretofore recovered at law. One ground alleged in the bill was that the note upon which these judgments were predicated was only due one day by its terms when suit was brought, and days of grace were not allowed. In that case, the Supreme Court say: "As to the question of the days of grace, the bill is loose and defective. It merely states conclusions. It should have given the date on which the note was in terms payable, together with the date of the commencement of the suit, that it might be determined whether the suit was prematurely brought. The bill only states that it was." Now this fully disposed of this chancery case so far as this question was concerned, and that which is subsequently said *in arguendo*, and without any reference to authority in regard to the necessity of pleading in abatement, was wholly unnecessary for the decision of the case.

We are of the opinion that the court below erred in overruling appellant's objections to the introduction of the note in evidence and in permitting it to be read to the jury, and also in overruling the appellant's motion for a new trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

TANNER, P. J., took no part in the decision of this case.

JEREMIAH BENNETT *v.* JOHN T. PULLIAM.

EVIDENCE—*Set-off.*—*Held* that appellee, under his general rejoinder to appellant's plea of set-off, could introduce evidence tending to prove partnership in the wood.

SAME—*Non assumpsit—replication.*—*Held*, that if this were a suit by appellee for the value of the wood, the defendant could, under "*non assumpsit*," introduce evidence of partnership; that a plea of set-off is in the nature of a cross action, and a general replication to such plea performs the same office that a plea of general issue would in an action of *assumpsit*, that the defendant may plead '*non assumpsit*' when there is a partnership between defendant and plaintiff.

SAME.—*To prove partnership.*—Where the court refused to permit appellant to introduce evidence to show that this question of partnership in the wood had been adjudicated in a former trial between appellee and appellant, and that in that suit the jury found that no partnership existed, it was *held* error under the issues in this case.

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SAME—*On former trial.*—Where from the extracts of appellee's testimony on former trial, and appellant's testimony on this trial, it is manifest a partnership in this timber on the Pierce tract of land was set up by appellant against the claim of appellee in that suit, and that appellee was repelling the idea of a partnership between them, and while the real merits in that suit was not presented in this, yet the jury after hearing the testimony called out by appellee in his cross-examination of appellant, the jury are instructed that they have nothing to do with the finding or decision of the jury in the former case, it was *held* error, since such an instruction might be understood by them to mean that as they had nothing to do with the finding of the jury in the former trial, they must disregard the evidence on this trial of what was sworn to on the former trial.

APPEAL FROM ST. CLAIR COUNTY. Opinion filed March 20, 1878.

EDWARD L. THOMAS, *Attorney for Appellant.*
WILDERMAN & HAMILL, *Attorneys for Appellee.*

ALLEN, J., delivered the opinion of the court:

This was an action of *assumpsit*, brought by appellee against appellant and James Fincher in the St. Clair Circuit Court, to the April term, 1877, on a promissory note for $300, dated Nov. 5, 1875, payable to appellee and signed by appellant and Fincher.

Fincher filed his several pleas "*non assumpsit*" and "release," and afterward suit was dismissed as to him.

Appellant severally filed his plea "general issue" and "set-off"; afterward the plea of general issue was withdrawn, leaving only the plea of set-off. To this plea appellee filed a general replication, and upon this plea and replication the cause was tried by a jury at the September term, 1877.

The jury found for appellee, and assessed his damages at $387.30.

Appellant moved for new trial, which motion was overruled by the court, and judgment was rendered on verdict of jury for $387.30 and costs. An appeal was prayed by appellant and was allowed to this court.

Upon the trial, appellee introduced the note in evidence and rested.

Appellant then introduced in support of his plea of set-off, evidence to prove that appellee had received between 400 and 500 cords of wood from appellant, worth $1.50 per cord.

Appellee introduced evidence tending to prove that the cord-wood received from appellant was partnership wood, which he and appellant owned jointly. To this evidence of appellee, appellant objected, but the court overruled the objection.

Appellant then offered to introduce evidence tending to show that in a former suit between appellee and appellant, the question of partnership had been submitted in that trial, and that the jury found that no partnership had existed. To this evidence appellee objected, and the court sustained the objection. After the evidence was closed the court on behalf of appellee gave to the jury the following instructions:

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1. If plaintiff and defendant were partners in wood, etc., the jury should not allow set-off.

2. The court instructs the jury that in the former trial in this court between Pulliam and Bennett, the jury which tried said cause between Pulliam and Bennett had nothing whatever to do with the question of whether Bennett and Pulliam were partners in business in matters that were not submitted to said jury, and the jury in this case are instructed that they have nothing whatever to do with the finding or decision of the former jury in the case of *Pulliam* v. *Bennett.*

3. If Fincher was not released by agreement, then the jury must find for plaintiff.

4. If plaintiff and defendant were partners, then they must find for plaintiff.

Defendant objected to giving above instructions severally. Objection overruled and defendant excepted.

The first error assigned is that improper evidence was permitted to go to the jury by the court on behalf of appellee.

It is insisted that appellee, under his general rejoinder to appellant's plea of set-off, could not introduce evidence tending to prove partnership in the wood. We think this objection is not well taken.

If this were a suit by appellee for the value of the wood, the defendant could, under "*non assumpsit*," introduce evidence of partnership. A plea of set-off is in the nature of a cross action, and a general replication to such plea performs the same office that a plea of general issue would in an action of *assumpsit.*

"The defendant may plead '*non assumpsit*' when there is a partnership between defendant and plaintiff." Saunders on Pleading and Evidence, vol. 2, p. 648.

The second error assigned is the refusal of the court to permit appellant to introduce evidence to show that this question of partnership in the wood had been adjudicated in a former trial between appellee and appellant, and that in that suit the jury found that no partnership existed.

To determine the correctness or incorrectness of the ruling on this point, we must again revert to the pleading. Appellant in his plea claims compensation for wood. Appellee replies generally, you have no right to such compensation in this suit. Appellant makes his proof that appellee got the wood. Appellee replies, the wood I got was partnership wood. Appellant proposes to show that in a former suit this question of partnership was litigated and it was found no partnership existed; shall he not be permitted to do so? Appellee says he must plead former adjudication. Plead it how; rejoin it to appellee's general replication? This he could not do, for he could not know that appellee would attempt to set up partnership. If appellee had replied specially, as he could do, that the wood was partnership business, then appellant could have rejoined the former adjudication, and he must have done so before his proof would have been admissible; but to hold that appellant could not rebut proof

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of partnership offered by appellee under the issues as they were in this suit, and as appellee himself had made them, was in our judgment error in the Circuit Court.

Exception was taken to the second instruction given for appellee by the court, and the giving of that instruction is assigned for error.

That instruction assumes that in a former trial between these parties, the question of partnership in this wood was not inquired of by the jury, or if the jury did make such inquiry they had no right to do so. Now whether the jury did or did not inquire into and pass upon that question was a question of fact upon which the court could not instruct, and whether they had a right to inquire into that question would depend upon the pleadings in that suit. Under the pleadings in that case, whether they could consider the question of partnership would be a question of law, but what the pleadings were was a question of fact upon which the court could not pass in an instruction. We regard the instruction as erroneous in that regard, and when we consider the latter part of that instruction in connection with some of the testimony in this trial, it may have misled the jury.

It appears from the testimony of appellant on this trial that, in a former trial between him and appellee, this question of partnership in this wood was in some way involved in the trial of that cause. When asked by counsel for appellee if he had not testified on former trial that wood was partnership property, he answered that he did, but he (appellee) outswore me. My understanding was that he (appellee) went down there (meaning to Pierce land, where wood was) as my partner, but he (appellee) denied it and swore it all the same. He (appellee) swore he went down there to work for me. What appellee swore in that regard was also introduced; he says I had no settlement with Bennett (appellee) before I went on the Pierce land. "Bennett never settled with me by giving me mill and partnership timber on Pierce land." There never was any understanding about it (the partnership), for I never accepted his proposition.

In answer to question whether he had not taken mill and interest in timber for his debt against Bennett (appellant), his answer was *no sir*, I never did.

From these extracts of appellee's testimony on former trial, and appellant's testimony on this trial, it is manifest a partnership in this timber on the Pierce tract of land was set up by appellant against the claim of appellee in that suit, and that appellee was repelling the idea of a partnership between them, and while the real merits in that suit was not presented in this, yet the jury after hearing the testimony called out by appellee in his cross-examination of appellant, the jury are instructed that they have nothing to do with the finding or decision of the jury in the former case.

Such an instruction might be understood by them to mean that as they had nothing to do with the finding of the jury in the former

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trial, they must disregard the evidence on this trial of what was sworn to on the former trial.

For these reasons the cause is reversed and remanded.

Reversed and remanded.

BAKER, J: In the conclusion reached, that this judgment should be reversed and the cause remanded, I altogether concur. I think that the evidence in this record clearly shows that there was no partnership between Bennett and Pulliam. Therefore, appellant's set-off for the wood should have been allowed by the jury. To form a partnership, at least so far as the parties themselves are concerned, the assent of both of the contracting parties is required. While the evidence shows assent on the part of Bennett, it also shows clearly that there was no assent whatever on the part of Pulliam. Either both parties must be bound, or neither. The court erred in overruling the motion for a new trial.

I do not understand, however, that the offer of appellant in the Circuit Court went to the extent of proving that there had been an issue and former adjudication between the parties on the question of partnership. The question of a partnership seems to have been incidentally raised in some manner, in some former litigation. I cannot concur in all that is said in the opinion filed upon this subject.

TANNER, P. J: I concur in the reversal of the judgment, but place it upon the ground stated in the opinion of Judge Baker.

SUPREME COURT OF THE UNITED STATES.

NO. 249. OCTOBER TERM, 1877.

EDWIN WALKER, PLAINTIFF IN ERROR, *v.* WILLARD JOHNSON.

CONTRACT—*Parol.*—To make a parol contract void within the statute of frauds, it must appear affirmatively that it was not to be performed within a year. If performance by defendant could have been required by plaintiff within a year, the contract is valid. *McPherson* v. *Cox*, 96 U. S. R.

SAME—*Subsequent verbal agreement valid.*—When a contract for the delivery of stone exists only in parol, a subsequent verbal agreement varying the manner of delivery is binding.

SAME—*Comments of judge—effect of.*—The comments of the judge in his charge to the jury as to the circumstances under which the defendant might be entitled to damages against plaintiff, cannot be a ground of error when there was no such issue, and when the remarks could not have prejudiced the defendant.

SAME—*Court not bound to give as instructions philosophical remarks.*—The court is not bound at request of counsel to give as instructions philosophical remarks copied from text-books, however wise they may be in the abstract, or however high the source from which they come.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

WILLIAMS & THOMPSON, *Attorneys for Plaintiff.*
FULLER & SMITH, *Attorneys for Defendant.*

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MILLER, J., delivered the opinion of the court:

On the 21st day of July, 1869, Edwin I. Sherburne, Edwin Walker and Charles B. Farwell entered into a written contract with the canal commissioners of the State of Illinois for the construction of a lock and dam in the Illinois river near the city of Henry, in which they agreed to commence the work on or before the first day of August, 1869, and complete it by the first day of September, 1871.

Sherburne shortly after assigned his interest in this contract to James K. Lake, and Lake, Farwell and Walker assigned the same, with the approval of the commissioners, to Willard Johnson, plaintiff below. But while Farwell, Lake and Walker were the contractors, they made an agreement between themselves, in writing, by which, among other things, Walker was "to furnish all the stone necessary for the construction of the lock and dam, to be by him delivered on board of canal boats at Henry as the same might be required in the progress of the work, to be of the description required for said work," and the prices that he was to receive for the various kinds of stone so delivered were settled. It is alleged by Johnson that after the contract with the commissioners had been assigned to him, Walker agreed with him to furnish the stone for the work in the same manner and on the same terms as in this contract with his former partners. And that by reason of his failure to do so he, the plaintiff, was greatly damaged, and for that he brought this action. A verdict and judgment for $6,500 were rendered against defendant Walker, to which he prosecutes the present writ of error.

The errors assigned relate exclusively to exceptions taken to the charge of the judge, and to his refusal to charge as requested by defendant. We will consider these in their order.

1. The first error arises upon the proposition of defendant that the contract, being one not to be performed within a year from the time it was made, and resting only in parol, was void, and could not sustain the action. Evidence was given which tended to show that the agreement between plaintiff and defendant was made early in November, 1869, and renewed or modified in April, 1870. As by the terms of the original contract with the canal commissioners, the work was to be completed *on or before* September 1, 1871, defendant insisted that his contract for delivery of stone had the same time to run; and his counsel asked the court to instruct the jury that it was void, if it appeared from the Farwell, Lake and Walker contract that it was not the intention and understanding of the parties *that the same should be performed within the space of one year* from the making of the verbal agreement between plaintiff and defendant.

The court refused this instruction and told the jury that if it appeared from the contract itself that it was not to be performed or was not intended to be performed within a year, it was void; but that if it was a contract which might have been performed within a year, and which the plaintiff, at his option, might have required the defendant to perform within a year, it was not within the statute.

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We think the court ruled correctly both in what it charged and in what it refused.

In order to bring a parol contract within the statute, it must appear affirmatively that the contract was *not* to be performed within the year. We have had occasion to examine this question very recently, in the case of *McPherson* v. *Cox*, at the present term. We said, in that case, that the statute "applies only to contracts which, by their terms, are *not* to be performed within the year, and not to contracts which *may* not be performed within that time." The court said, in regard to that case, which was a contract by a lawyer to conduct a suit in court, that there was nothing to show that it could not have been fully performed within a year. So, in this case, the lock and dam was to be completed on or *before* September 1, 1871. Clearly the contractor had the right to push his work so as to finish it before November, 1870, which would have been within a year from the date of Walker's contract with plaintiff.

If plaintiff had a *right* to do his work within that time, he had a right to require of defendant to deliver the stone necessary to enable him to do it. There is no error in the action of the court on this branch of the subject.

2. It will be observed that by the agreement of Walker with his partners he was to deliver at Henry *in canal boats.* Evidence was given tending to show that, in the spring of 1870, it was agreed between him and plaintiff that he should deliver by railroad, and the court charged the jury that it was competent for the parties to change the contract in that regard, if they chose, and that if the jury found that defendant did so agree, he was bound by such agreement as he made, if any.

We think that as the original contract was in parol, there is no reason why, if the parties, for their mutual convenience, or for no good reason at all, chose, both of them consenting to a delivery by rail, that the change in the mode of delivery became a part of the contract.

3. There was evidence tending to show that while defendant was performing part of the contract, he received notice from plaintiff that he would take no more stone from him, and also evidence that shortly after this the parties had an interview in which this notice was waived, and Walker agreed to go on with the contract. On this part of the case the court said:

"If the testimony satisfies you that the defendant did, after the notice of the 12th of May, recognize the contract as still in force, and promise the plaintiff that he would go on and complete the same, the defendant cannot now claim as a defense to this action that said notice released him from the performance of the contract.

"If, on the contrary, you are satisfied that the defendant made no agreement after the notice to stop on the 12th of May, recognizing the contract as still in force, or promising to perform it or continue it in force, then the defense may be considered made out, although the notice to suspend might entitle the defendant to damages; but

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I do not think it necessary to discuss the question of the defendant's damages."

The court, however, did, in answer to a suggestion of counsel for defendant, that the latter would have a right to damages for the withdrawal of the contract by plaintiff, proceed to make some remarks on that subject to which defendant excepts and which he now assigns for error.

We do not see anything in these remarks to complain of, except that they were irrelevant to any issue in the case. There was no plea or cross-demand under which those damages could have been passed upon by the jury. As they in no wise prejudiced defendant in the present action, we are not called on to consider further their soundness as matter of law.

4. The court was asked to instruct the jury—

"That verbal admissions, while if deliberately made and precisely identified, they frequently furnish satisfactory evidence, are to be received with great caution, and the attention of the jury should be directed in passing upon alleged verbal admissions, to whether the witnesses testifying thereto distinctly understood the party charged in what he said, and whether they have or have not, intentionally or unintentionally, failed to express what was actually said."

But the court refused said instruction.

This is the ground of the last assignment of error.

There is nothing in the testimony, as we find it in the bill of exceptions, to which such a charge could apply. There are no *admissions*, properly so-called, of defendant relied on in the case. The testimony in regard to the renewal of the contract after plaintiff's letter to defendant, that he would receive no more stone from him, is not an admission. It is a conversation between plaintiff and defendant, in which the contract is renewed or the abandonment waived. It is explicitly stated by plaintiff that defendant agreed to recommence the delivery of stone and complete the contract. Whatever else this may be, it is no *admission*. This word, in the sense of the quotation from Greenleaf, asked by counsel as a charge, means an admission by a party of some existing fact or circumstance which tells against him in the trial, and does not relate to the terms in which a substantive verbal contract is made by the parties.

Besides, it is apparent that the attention of the jury was directed by the court to all the matters essential to their understanding the case, and we do not admit that a court is bound to give to the jury, at the instance of counsel, every philosophical remark found in text-books of the law, however wise or true they may be in the abstract, or however high the reputation of the author.

We find no error in the record, and the judgment of the Circuit Court is affirmed. *Affirmed.*

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APPELLATE COURT OF ILLINOIS.

WILLIAM C. BUCHANAN *v.* BARTOW IRON COMPANY.

CORPORATION—*Non-liability of the president of a stock corporation to an individual creditor.—Held*, that under sec. 16 of the general incorporation law of 1872, Rev. Stat. 288, the directors and officers of a stock corporation are liable solely and only in a court of chancery, and to the creditors as a whole, and not to any individual creditor for the amount of his individual debt.

BILL IN CHANCERY—*Where there is a general liability to creditors under the statute.*—Where the liability is to the creditors of the corporation as a body, then the only appropriate and available remedy is by bill in chancery, and an action at law cannot be maintained on the liability imposed by sec. 16 of the act of 1872.

ASSUMPSIT—*When the legal liability is to an individual creditor.*—Where the legal liability was a liability to appellee individually as a creditor, or was for the amount of his debt, then the general doctrine would apply, that where the statute creates a legal liability, an implied promise arises out of this liability, and that an action of *assumpsit* may be maintained.

STATUTE—*The general incorporation law, sec. 16, Rev. Stat. 288, construed.—Held*, that the import and object of this statutory provision was intended to furnish a remedy and a relief to the creditors generally, and a common fund to which they might, on terms of perfect equality, resort for the satisfaction of their debts.

APPEAL FROM ST. CLAIR COUNTY. Opinion filed March 20, 1878.

CHARLES W. THOMAS, *Attorney for Appellant.*

JAMES M. DILL AND W. C. KUEFFNER, *Attorneys for Appellee.*

BAKER, J., delivered the opinion of the court:

Appellant was president of the Belleville Nail Mill Company, a corporation organized under the general law of 1857, and judgment was recovered against him in the Circuit Court by appellee, in an action of *assumpsit* for a debt of $4,935.37 contracted by the said nail company with the assent of appellant.

The supposed liability of appellant is predicated upon sec. 16 of the general incorporation law of 1872, Rev. Stat., p. 288. That section reads as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation, assenting thereto, shall be personally and individually liable for such excess to the creditors of such corporation."

In this case the first count of the declaration avers an indebtedness of $100,000, and the second and third counts aver an indebtedness of $150,000 in excess of the capital stock of the company, and the proofs show an indebtedness of over $100,000 in excess of the capital stock of the company, thus indicating that there are creditors other than appellees.

We are of the opinion that the liability of the appellant under this section, if he be liable at all, is solely and only in a court of chancery, and is to the creditors as a whole, and is not to any individual creditor for the amount of his individual debt. We think

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that this is so, from a consideration of the several provisions of the statute itself, from the reason, justice and very nature of the case, and from the authorities.

Upon examination of the several sections of this act that impose liabilities upon parties other than the corporation itself, we find that each stockholder and assignee of stock shall in a certain contingency *be liable for the debts of the corporation*, to a certain specified extent; that it is provided in the eighteenth section that any pretended officers or agents of any real or pretended corporation shall in a certain contingency be jointly and severally *liable for* certain specified *debts and liabilities;* that it is provided in the nineteenth section that directors, officers or agents of corporations shall in a certain other specified event be jointly and severally *liable for* certain other specified *debts;* and that it is provided in the twenty-first section that certain officers of corporations shall, in a still other specified event, be jointly and severally *liable for all damages.* These three first mentioned sections fix a liability for the debts themselves, and *ex necessitate rei* a liability to the persons to whom the debts are owing. The last mentioned section imposes a liability for damages suffered, and of course to be recovered by the party damnified. Sec. 16 is otherwise. It provides that in a certain contingency the directors and officers of a corporation shall be *liable for an excess of indebtedness* over capital stock, personally and individually, to the *creditors of the corporation.* The liability is not for any debt or debts, as in the cases of the other sections, but is for an excess of indebtedness, and the liability is not to the persons who hold the contracts of indebtedness in excess, and is not, as in the other sections, to certain specified creditors, or to specified persons damnified, but to the creditors as a class. It appears to us that the use of a phraseology in this section so variant from the language of the other sections is evidence of a legislative intent as to cases falling under this sixteenth section, different from the legislative intention in regard to the cases of the other sections.

We do not claim, however, that under the declaration this case falls within the twenty-fifth section of the same act, where provision is expressly made for a suit in equity. But this latter section, in its full scope and import, is fully in accord with our interpretation of sec. 16, and provides in express terms for the cases of that section the same remedy that it impliedly provided for the case of the sixteenth section.

It is not readily seen why, in the event the company has ceased to do business, or has failed to pay an execution for ten days after demand, the legal title to the excess should be vested in the creditors as a whole, whereas otherwise the cause of action should be in an individual creditor. No legislative intention to make such difference is expressly indicated in reference to the liability imposed by this section.

The reason, justice and equity of the case lead us to the same conclusions. Granted that it is eminently proper that, in the event

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of an excess of indebtedness over capital stock, the directors or officers assenting thereto should be individually and personally liable for such excess. But why should this excess belong to one creditor more than another? The interests of the particular creditor whose indebtedness was last contracted are not more jeopardized than the rights and interests of those prior creditors whose debts were contracted before the limit was reached, and who have no lien or claim against the property representing the capital stock that the last creditor of them all has not. Why in reason should this last creditor have all the security that other creditors have, and at the same time exclusively have this personal liability in addition? His equities are no greater, if so great, as theirs, and the statute has given this right to the excess in express terms, not to him, but to the creditors of the corporation.

If this liability is to be considered simply as a penalty, and not as intended also to furnish an equitable fund for the payment of the debts of the corporation, then the right to recover this penalty either belongs to the creditors as a whole or to that creditor who first sues therefor. If it can be recovered by one creditor alone, then it belongs to one creditor as much as another, and without regard to priority of indebtedness. If a penalty only, then the penalty should be in gross for the total amount of the excess, and that creditor who first sues, be he a creditor within or without the limit, can recover it, and his recovery will be a bar to any subsequent suit by any other creditor for such penalty or excess.

We do not believe that this was the intention of the law. The import and object of this statutory provision goes far above and beyond this; it was intended to furnish a remedy and a relief to the creditors generally, and a common fund to which they might, on terms of perfect equality, resort for the satisfaction of their debts.

This view of the law seems to be supported by the authorities.

The act of congress of May 5, 1870, authorizes the formation of corporations within the District of Columbia, and provides, among other things, that "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company."

It will be noticed that this language is almost identical with the language used in sec. 16 of our statute.

The Supreme Court of the United States had this provision of the act of congress before them in the case of *Horner* v. *Henning*, 93 U. S. 228. The unanimous decision of the court was, that a suit at law could not be maintained under this provision; that this statutory liability constituted a common fund for the benefit of all the creditors; that they were entitled to share in it in proportion to the amounts of their debts, so far as it might be necessary to pay such debts; and that the appropriate and only remedy was in a court of chancery.

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Mr. Justice Miller, in delivering the opinion of the court, says: "The remedy for this violation of duty as trustee is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the trustees, and apportioned among the creditors, in a manner which the trial by jury and the rigid rules of common law proceedings render impossible. This course . . . adjusts the rights of all concerned on the equitable principles which lie at the foundation of the statute."

We would refer, also, to the cases of *Sturges* v. *Bouton*, 8 Ohio State, 215; *Merchants' Bank* v. *Stevenson*, 5 Allen, 398; and *Pollard* v. *Bailey*, 20 Wall. 520; and many other cases might be referred to that throw light upon the questions here involved.

We regard the conclusions that we have reached as being in entire harmony with the decisions of our own supreme court, and as not at all in conflict with the cases cited by appellees. We admit the general doctrine that where the statute creates a legal liability, an implied promise arises out of this liability, and that an action of *assumpsit* may be maintained. If the legal liability here was a liability to appellee individually as a creditor, or was for the amount of his debt, then the rule would apply. But the liability is to the creditors of the corporation as a body; and if so, then the only appropriate and available remedy is by bill in chancery.

In the case of *Culver* v. *Third National Bank of Chicago*, 64 Ill. 528, the action was based on the liability imposed by sec. 9 of the act of February 18, 1857, which is as follows: "All the stockholders of every such company shall be severally individually *liable to the creditors of the company* to an amount equal to the amount of stock held by them respectively, *for all debts and contracts* made by such company prior to the time when the whole amount of its capital stock shall have been paid in, and a certificate thereof made as hereinafter required." This section, in express terms, declares the liability to be *for all debts and contracts* made by such company prior, etc., and that the supreme court should have held that an action of *assumpsit* could be maintained against the stockholders for one of these debts, or on one of these contracts, is exactly in harmony with the distinction that we make.

It may be suggested that the words "*shall be liable to the creditors*" occur alike in sec. 9 of the act of February 18, 1857, and in sec. 16 of the act of 1872, now under consideration, and that, therefore, they should be interpreted alike. This does not follow. Expressions found more than once even in the same statute do not necessarily have the same signification. Potter's Dwarris on Statutes, 128. Nor does it state all of the case. In the latter act these general words alone are used; but in the former act, in connection

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therewith, are words of limitation, and the whole of the words therein, taken together, are, "*shall be liable to the creditors for all debts and contracts.*" Thus we see that these additional words so qualify and limit that which otherwise might be a liability to creditors generally as to make it a liability for the debts and contracts of the individual creditor. The fact that the legislature omitted from the statute of 1872 the qualifying words used in the act of 1857 is a circumstance tending to manifest the legislative intention. *Bedell* v. *Janny*, 5 Gil. 207. In the construction of a statute every part of it must be viewed in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning. Potter's Dwarris, 144; Kent Com. 462. If the section under consideration is to be construed as meaning just what the section quoted from the act of 1857 means, then the words "*for all debts and contracts*" in the latter act are wholly without meaning, and altogether superfluous.

Steele v. *Dunne*, 65 Ill. 298, is brought upon the same ninth section in the act of 1857, and is to the same effect.

Butler v. *Walker*, 80 Ill. 345, was predicated upon sec. 16 of the general act for incorporating and regulating insurance companies, adopted March 11, 1869. That section provides that "the trustees and corporations of any company organized under this act, shall be severally liable *for all debts or responsibilities* of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded as hereinbefore provided." Here the liability is for all *debts and responsibilities*, just as in the two preceding it is for all *debts and contracts*, and the case is identical in principle with those cases, and still further corroborates our view.

In our opinion, an action at law cannot be maintained on the liability imposed by sec. 16 of the act of 1872, and the Circuit Court erred in overruling the motion in arrest of judgment.

As there is no provision made by statute for changing an action at law into a bill in chancery, it would be a work of supererogation to remand this cause. The case will not be remanded; but the judgment of the Circuit Court will be reversed, and a judgment will be rendered in this court against the appellee for costs of suit. Moreover, we are informed that many other cases are depending upon the determination of this suit, and this course will facilitate a review of our decision in the supreme court, should such review be desired. *Reversed.*

TANNER, P. J., dissenting.

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WILLIAM C. BUCHANAN v. JOSIAH O. LOW.

Opinion filed March 20, 1878.

CHARLES W. THOMAS, *Attorney for Appellant.*
THOMAS G. ALLEN, *Attorney for Appellee.*

BAKER, J., delivered the opinion of the court:

In this case we are of the opinion that the Circuit Court erred in overruling the appellant's motion in arrest of judgment.

The judgment of the Circuit Court is reversed, and a judgment entered in this court in favor of appellant and against appellee for costs of suit.

Our reasons for reversing this judgment are the same as those set forth in an opinion filed at this term in the case of *William C. Buchanan* v. *Bartow Iron Company.* *Judgment reversed.*

TANNER, P. J., dissenting.

SAMUEL W. DUNAWAY v. GOODALL ET AL.

ABATEMENT—*Amended plea in, filed after sustaining a demurrer to the original plea.—Held*, that pleas in abatement are not amendable at common law, because they are dilatory and do not go to the merits of the action.

AMENDMENTS—*To pleas in abatement under the statute of.—Held*, that the statute confers no power upon the courts to allow amendments to be made to pleas in abatement, where the plea is in the ordinary form of pleas to abate actions prematurely brought, and does not go to the merits of the case, but only to the right of the appellees to sue at the time the suit was instituted.

SAME—*Plea to the jurisdiction.*—A plea in abatement to the jurisdiction of the court is a meritorious plea, and not to be regarded as a mere plea in abatement, but one necessary to the protection of a substantial right, granted by the statute, *and so the exception in the statute* of amendments forbidding the amending plea in abatement does not embrace pleas of this character.

STATUTE OF AMENDMENTS—*Rule of construction as to pleas in abatement.*—Where the first section of the statute can be construed as giving authority to allow amendments to pleas in abatement, and the last section of the act takes it away, the rule of construction is that when a general intention is expressed, and the act also expresses a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of the exception.

APPEAL from Williamson county. Opinion filed March 20, 1878.

WM. J. ALLEN, *Attorney for Appellant.*
WM. W. CLEMENS AND A. D. DUFF, *Attorneys for Appellees.*

TANNER, P. J., delivered the opinion of the court:

This was an action of *assumpsit* brought by the appellant against the appellees in the Circuit Court of Williamson county. The appellees interposed a plea in abatement to the action, setting out, in substance, that after the several causes of action occurred they had

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entered into a contract with the appellant by which he, for a consideration mentioned in the plea, was to forbear suing upon the indebtedness averred in the declaration, until the appellees could be relieved from the financial embarrassment under which they then suffered, and that although they should be so relieved within the period of one year, suit should not be instituted until the expiration of that time, a demurrer was interposed to this plea and sustained by the court. The appellees then asked and obtained leave over the objections of the appellant to file an amended plea in abatement.

The amended plea differed from the original by averring that for the consideration stated in the first plea the appellee was not to sue on said indebtedness for the space of five years, unless the appellees should sooner become relieved from their pecuniary embarrassments.

To this plea a demurrer was also interposed and overruled by the court, and an exception taken to the ruling of the court by the appellant and he stood by his demurrer, and the court rendered judgment as follows:

"It is therefore ordered by the court that the defendants recover of the said plaintiff their proper costs in this behalf expended."

The appellant brings the cause to this court and assigns for error the rulings of the Circuit Court in allowing an amended plea in abatement to be filed after sustaining a demurrer to the original plea.

It seems to be a rule that pleas in abatement are not amendable, because they are dilatory and do not go to the merits of the action. Tidd's Practice, 638; Chit. Pl. 465; *Trindon* v. *Durant*, 5 Wend. 72, and authorities there cited.

In *Brownell* v. *Garwood*, 41 Ill. 115, the court say: "After the defendant has filed a plea in abatement to the action which has been disposed of by the court, it is irregular to file another plea of the same character, and it may be stricken from the files." Pleas in abatement are not favored by the courts, and we are not aware of any well adjudicated cases in which they are held to be amendable at common law; this view, we think, is not shaken by the authorities citied by the appellees. If such pleas could be at any time amendable in our state, the right therefor must be statutory.

The twenty-third section of the Practice Act, in force July, 1872, provides that "at any time before final judgment in a civil suit amendments may be allowed in any matter either of form or substance in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense." If this section could be construed favorably for such pleas in regard to amendments, the statute of amendments in force July, 1874, clearly prohibits the amendment of such plea. The first section of the latter act provides "that the court in which any action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before

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judgment." This section is in all respects the same as the statute construed in 5 Wend. *supra*, in which was *held*, not to confer power upon the courts of New York to allow amendments to be made to pleas in abatement. However, our legislature left no difficulty for the courts in respect to the construction of this section. The last paragraph of the last section of the act provides that "no part of this act shall extend to any plea in abatement."

If the first section can be construed as giving authority to allow amendments to such pleas, the last section of the act takes it away. "When a general intention is expressed, and the act also expresses a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of the exception." *Churchill* v. *Crease*, 5 Bing. 180; *Terrington* v. *Hargraves*, ib. 492; Sedg. St. & C. L. 60.

The next question that presents itself for our consideration is, it the twenty-third section of the Practice Act of 1872 conferred upon the courts the power to allow amendments in this character of pleas, was it taken away by the prohibitory clause in the last section of the statute of amendments in force July, 1874? We think there is no difficulty in determining this question.

The twenty-third section of the statute of amendments are statutes *in pari materia*, and are to be taken as one statute and construed together, in order to arrive at the intention of the law-making body. *Smith Conn.*, *Bruce* v. *Schuyler*, 4 Gil. 273.

If the twenty-third section of the Practice Act and the first section of the statute of amendments are statutes *in pari materia*, and the power is conferred upon the courts to allow amendments to pleas in abatement by both, a repeal or limitation of one, in this regard, would be a repeal or limitation of the other. The last section of the statute of amendments is subsequent in point of legislative contemplation to both, and must be regarded as a repeal or limitation of both.

The cases referred to by appellants in support of the rulings of the Circuit Court do not militate against this view. In those cases the pleas raised the question of jurisdiction of the court over the person, under the provisions of the statute of our state, and are therefore not in conflict with the statute of amendments. In *Safford* v. *Sangamon Ins. Co.*, 83 Ill. 528, the views of the court are expressed by Judge Dickey in these words: "A plea in abatement to the jurisdiction of the court is a meritorious plea, and not to be regarded as a mere plea in abatement, but one necessary to the protection of a substantial right, granted by the statute, *and so the exception in the statute* of amendments forbidding the amending plea in abatement does not embrace pleas of this character."

The plea in the case at bar is in the ordinary form of pleas to abate actions prematurely brought, and does not go to the merits of the case but only to the right of the appellees to sue at the time the suit was instituted. After a careful consideration of authorities and the several provisions of statutes in reference to amendments, we must con-

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clude that the plea in this case is embraced in the prohibitory features of chap. 7, sec. 11, Rev. Stat. 1874.

The Circuit Court, on sustaining the demurrer to the plea, should have denied leave to amend the plea and required the appellees to plead to the declaration.

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

FIRST NATIONAL BANK OF OLNEY v. COPE BROTHERS ET AL.

JURISDICTION—*Appellate Court in matters of appeal.*—This court has jurisdiction only in matters of appeal or writs of error from final judgments, orders or decrees.

DECREE—*In vacation under sec. 47, ch. 37, Rev. Stat. 1874, p. 332.*—The forty-seventh section of the thirty-seventh chapter of the Revised Statutes of 1874, page 332, provides that when a cause or matter is decided in vacation, the judgment, decree or order therein may be entered of record in vacation, but such judgment, decree or order may, for good cause shown, be set aside or modified or excepted to at the next term of the court, upon motion filed on or before the second day of the term, of which motion the opposite party or his attorney shall have reasonable notice, and that if not so set aside or modified it shall thereupon become final.

SAME—*By stipulation under sec. 48 of the same statute.*—The forty-eighth section of the statute provides that if it is stipulated of record that a decree, judgment or order so entered of record in vacation shall be final, then such judgment, decree or order shall have the same force and effect as if it had been entered at the term preceding the time it is entered, subject to the right of appeal or writ of error.

SAME—*Without stipulation the decree is not final.*—In the case under consideration there was no such stipulation entered of record as is contemplated by this forty-eighth section of the statute, and it therefore follows that the decree filed in said cause in vacation is not a final decree, and that no appeal lies from it to this court.

Opinion filed March 20, 1878.

CANBY & EKEY, *Attorneys for Appellant.*
J. M. LONGENECKER, *Attorney for Appellees.*

BAKER, J., delivered the opinion of the court:

Cope Brothers filed a bill to the November term, 1877, of the Richland Circuit Court, for the purpose of enforcing a mechanic's lien on a certain lot and premises described therein, and made William Ratcliff and the First National Bank of Olney parties defendant to said bill. Edward S. Wilson *et al.* also filed a bill against the same parties for a similar lien, and the two cases were, by order of the court, consolidated. Afterward K. D. Horrall, Prunty and Jolly and G. Gaddis & Co. were severally allowed to interplead, and they filed intervening petitions praying for liens for the respective amounts claimed by them to be due for material and labor on the same building and premises described in the two bills above men-

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tioned. At the November term of court the First National Bank of Olney answered the said several bills and petitions, and filed a cross-bill for a vendor's lien on said lot, making said Ratcliff and all of the several complainants and petitioners above mentioned defendants to said cross-bill. This cross-bill was answered and replications were filed.

At the said term of court the following order was made and entered of record in the consolidated cause, to wit:

"On motion it is ordered that this cause be referred to A. V. Miller, a special master, to take testimony and report to this court, and this cause to be submitted at Jasper Circuit Court and decree entered as of this term."

Testimony was taken in vacation before said special master and his report thereof was filed in the clerk's office on the 6th day of December, 1877.

Afterward, and in vacation, the court rendered a decree in the case, which was filed December 10, 1877, in the clerk's office, and it does not appear from recitals in the decree or otherwise that the First National Bank was present when said cause was submitted, or when said decree was announced or filed.

On the 19th day of December, 1877, and also in vacation, a supplemental order was filed in the clerk's office reciting that the aforesaid decree had been rendered after term time and entered as of the said term, and that neither the said First National Bank nor its attorney was present at the time of the rendition of the decree, and thereupon granting an appeal to said Bank upon its filing bond in the sum of $3,000 within thirty days. The Bank filed the required bond and brings the record to this court.

In this state of the record it is only necessary to refer to one point in the case. This court has jurisdiction only in matters of appeal or writs of error from final judgments, orders or decrees. The decree filed in this case in vacation is not a final decree. The forty-seventh section of the thirty-seventh chapter of the Revised Statutes of 1874, page 332, provides that when a cause or matter is decided in vacation, the judgment, decree or order therein may be entered of record in vacation, but such judgment, decree or order may, for good cause shown, be set aside or modified or excepted to at the next term of the court, upon motion filed on or before the second day of the term, of which motion the opposite party or his attorney shall have reasonable notice, and that not so set aside or modified it shall thereupon become final; and the section of the statute immediately following provides that if it is stipulated of record that a decree, judgment or order so entered of record in vacation shall be final, then such judgment, decree or order shall have the same force and effect as if it had been entered at the term preceding the time it is entered, subject to the right of appeal or writ of error.

In the case under consideration there was no such stipulation entered of record as is contemplated by this latter section of the

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statute, and it therefore follows that the decree filed in said cause in vacation is not a final decree; upon notice being given and motion filed in the Richland Circuit Court on or before the second day of the next term, it may be set aside or modified.

As the decree in question is not final no appeal lies from it to this court, and consequently the appeal herein must be dismissed at the cost of the appellant. *Appeal dismissed.*

EDITOR'S NOTES.

MARRIAGE—*Procured by fraud.*—Marriage is considered by the law in no other light than as *a civil contract*. Tyler, Infancy and Coverture, sec. 618; Reeve's Domestic Relations, 195. A marriage procured by force or fraud is also void *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question; the basis of the marriage is *consent*, and the ingredient *fraud* or duress *is as fatal in this as in any other contract*, for the free assent of the mind is wanting. 2 Kent. Com. 42; Reeve's Domestic Relations, 206; Schooler's Domestic Relations, 25, 35; Tyler on Infancy and Coverture, 863; *Mather* v. *Ney*, 1 Maule & Selwyn, 265; *Frankland* v. *Nicholson*, 3 Maule & Selwyn, 260. All marriages procured by force or fraud, or involving palpable error, are void, for here the element of mutual consent is wanting, so essential to every contract. School. Dom. Rel. 35. The true point of light in which this ought to be viewed, I apprehend, is that the marriage was void *ab initio*. Reeve's Dom. Rel. 206; Bishop, Marriage and Div., sec. 115.

VOIDABLE MARRIAGE.—A marriage is said to be void when it is good for no legal purpose, and its validity may be relied upon in any proceeding, in any court, between any parties, either in the lifetime or after the death of the supposed husband and wife, whether the question arises directly or collaterally. Bishop on Marriage and Divorce, sec. 46. There are various principles applicable alike to fraud, error and duress. We may presume that the guilty party would not be permitted so far to take advantage of his own wrong as to maintain a suit for nullity solely on that ground. The party imposed upon may, if he choose, waive the tort, and thereby render the marriage good. Thus a voluntary cohabitation after knowledge of the fraud or error, or after the cause of fear is removed, will cure the defect. Bishop on Marriage and Divorce, sec. 122. They are good at the election of the party injured, who, on being disenthralled from the influence of the fraud, error or duress, may then give a voluntary consent, and the other party cannot set up his wrong to object that the consent was not mutual. Bishop on Marriage and Divorce, sec. 123.

VOID AND VOIDABLE MARRIAGE.—There is a great difference between a void and a voidable marriage which it is important to notice. A void marriage is at all times a nullity, and binds no one, and is not valid for any legal purpose whatever, it leaves the parties to it in just the same situation, to all intents and purposes, as though there had been no pretended marriage at all. In such cases, if the parties cohabit, they are adulterers and fornicators, and their offspring, if any, are bastards. But a voidable marriage is valid for all civil purposes, and binding upon the parties so long as it is acted upon and recognized by them, and until its nullity is declared by a competent tribunal; and if the marriage has not been dissolved by sentence or decree during the joint lives of the parties, it will be too late to apply for its avoidance, and consequently the survivor will be entitled to courtesy, dower, and the other rights of a surviving husband and wife. Tyler on Inf. & Cov. 863; Schooler's Dom. Rel. 24; *Bassett* v. *Bassett*, 9 Bush. 696. No other legal contract is void by fraud. The term void, in speaking of such contracts, is an inaccurate use of language. *Thornton* v. *McGrath*, 1 Duv. 349.

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HENRY FULLER *v.* MONROE HEATH, MAYOR OF THE CITY OF CHICAGO.

CITY CERTIFICATES—*1877.—Held*, that the issue of the certificates of 1877 were not in violation of the constitution, because they were drawn upon a particular fund, actually existing to defray the current expenses of the city for that year, and upon the fund created by the tax levied and appropriated for such purpose, that this proceeding does not operate to create any liability against the corporation as interpreted by the Supreme Court, and that the appropriation and levy having been made before their issue brings them within the rule thus laid down.

SAME—*1875.—Held*, that the certificates, which appear to be issued in 1875 for the purpose of defraying the current expenses of the city, and which do not in terms appear to be drawn upon any special fund, being drawn upon the general fund of the city and in excess of the constitutional limit, were issued as a means of meeting the current expenses of the city for the year 1875, and were drawn after the appropriation and levy of the tax out of which it is now proposed to pay them was actually made, and that it would not be inequitable, therefore, for the city authorities to retire them, giving in substitution therefor other certificates drawn against the special fund designed for their payment, and to anticipate which they were issued, which would stand on the same footing with the certificates of 1877, and that it would be equitable to pay these certificates out of the said tax levy of 1875 when collected, and should not therefore be enjoined.

APPEAL from Superior Court of Cook County. Opinion filed May 9, 1878.

EDWARD ROBEY, *Attorney for Plaintiff.*
CORPORATION COUNSEL BONFIELD, *Attorney for Defendant.*

MURPHY, P. J., delivered the opinion of the court:

On the 17th day of April, 1878, Henry Fuller, the appellant, a resident and tax-payer of the city of Chicago, exhibited his bill of complaint in the Superior Court of Cook county, representing that on the 8th day of August, 1870, the date of the adoption of the present constitution of this state, the bonded debt of the city was over $13,000,000, far in excess of the constitutional limit of 5 per cent upon the assessed value of the taxable property of the city, as ascertained by the assessment thereof for state and county purposes; that, notwithstanding the fact, the officers of said city have from time to time received large sums of money in trust for specific purposes, to-wit: upon special assessments, city hall fund and other funds, and perverted the same and paid them out for general city purposes, as they deemed best, to the amount of $4,000,000 and over, and that, in violation of the plain provisions of the constitution, they had borrowed in the name of the city a large sum, to-wit: the sum of $5,000,000, which the mayor and comptroller had paid out as they saw fit; that in the year 1875, the city officers, pretending to be authorized so to do by an ordinance passed April 30, 1875, and by certain statutes of the state, borrowed in addition to the existing debt a large sum, to-wit: $4,500,000, and issued certificates of indebtedness therefor in denominations to suit lenders, bearing such interest as was agreed upon, in the following form:

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This is to certify that the city of Chicago acknowledges to owe John Doe the sum of $1,000 lawful money of the United States of America, which sum the city promises to pay to said John Doe, or order, —— months after the date hereof (without grace), at the office of the treasurer of the city of Chicago, with interest thereon at the rate of —— per cent per annum from May 1, 1875.

This loan having been authorized by sec. 26 of amendments to the city charter, approved Feb. 15, 1865, and by sec. 7 of the act of the general assembly of the state of Illinois amending the city charter, approved April 19, 1869.

In testimony whereof the mayor and comptroller of the said city have signed, and the clerk countersigned, these presents, and caused the seal of said city to be hereunto affixed, this —— day of ——, A.D. 1875.

That $4,000,000 of said sum has since been paid by said officers out of moneys in the treasury of the city, with the interest thereon. That they threaten now and intend to cause the residue thereof to be paid in the like manner.

That in the year 1877, the officers of said city, pretending to be authorized so to do by an ordinance of the city council of the said city of Chicago, passed April 10, 1877, borrowed a large sum in addition to said existing debt, to-wit: over $3,000,000, and issued cirtificates therefor in the following form, to-wit:

This is to certify that Jodn Doe has advanced to the city of Chicago $1,000 lawful money of the United States, to meet that part of the current expenses of the year 1877, for which an appropriation has been made for said year, for the general appropriation fund, and that said sum will be paid to John Doe, or order, upon the 21st day of July, 1878 (without grace), at the office of the treasurer of the city of Chicago, with semi-annual interest thereon, at the rate of 6 per cent per annum, from date, out of the taxes levied for said fiscal year, said tax levy having been heretofore actually made.

The treasurer of the city is hereby ordered to make said payment, as aforesaid, and charge to general appropriation fund. This warrant is issued for an amount not exceeding the appropriation for the above account, and not exceeding the amount of uncollected taxes apportioned to its payment, and which will be held and applied thereto. All of which is sanctioned by the mayor and finance committee, and duly authorized by law and the ordinance of said city.

In testimony whereof, the mayor and comptroller of said city have signed, and the clerk countersigned, these presents, and caused the seal of said city to be hereunto affixed, the 21st day of July, A.D. 1877.

Said certificates bear diverse dates, and are made payable at diverse times in 1878.

That large amounts of taxes for the year 1877 and prior years are due and unpaid to the city, to-wit: $5,000,000; that a large sum of money—to-wit: the sum of $500,000—is in the treasury of the city; that several millions more is about to be collected and paid into the said treasury, and that the mayor and comptroller of said city threaten to cause the certificates of indebtedness and time warrants to be paid therefrom,—prays for an injunction restraining the city authorities from paying any of said pretended debts incurred since August 8, 1870, and that, pending the suit, the mayor and comptroller be restrained from issuing any warrants on the treasurer of the city for the payment of such debts, or interest thereon.

To this bill the defendants answer jointly and severally, admitting the issue of the certificates of indebtedness as alleged in the bill, and claiming that they were issued not for the purpose alleged in said bill, that is, to borrow money on the credit of the city for general

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purposes, but to meet the current expenses of the city government for the years in which they were issued respectively, and that they were issued from time to time in anticipation of the collection of taxes levied for the current expenses of the year in which they were drawn, and were based upon and within the appropriation made for the expenses of the respective years for which they were drawn, and denying that they have ever paid any of said certificates or threatened or had given out that they intended to pay them except as they paid them out of the taxes levied in pursuance of the appropriation of the city council for the respective years in which they were issued, and out of the fund or revenue for the anticipation of which they were issued; and disclaim generally and specifically any purpose to pay said certificates except in the manner above stated.

By the agreement of counsel, the case was heard by the court below upon bill and answer and stipulation that the defendants should have the same benefits as if they had demurred to the portions of the bill not answered; and the prayer of the bill being denied *pro forma* and the bill dismissed, the complainant in the court below brings the record to this court by appeal, and assigns for error the denial of the prayer of, and dismissing the bill, and rendering judgment for costs against complainant.

It will only be necessary to consider the first assignment of error under the view of the case taken by the court.

It is claimed by the appellant that these facts alleged constitute an infraction of the following provision of the constitution, sec. 12, art. IX of the constitution is as follows:

"No city shall be allowed to become indebted in any manner, or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding 5 per cent of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to incurring such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

It is admitted by the defendants that if these certificates operate to increase the indebtedness of the city, their issue would be in violation of the above section of the constitution, and therefore void; and, as a consequence, the officers of the city should be prevented from paying them. But it is insisted by the defendants that they are not obligations of the city within the constitutional prohibition, and therefore do not increase its indebtedness.

The grounds of their position as we understand them are, that these certificates were issued from time to time by the city authorities for the purpose of defraying the current expenses of the city government for the fiscal year in which they bear date respectively; that in no instance in 1875 or 1877 were such certificates issued un-

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til after there was an appropriation by ordinance and levy of the tax to pay the expenses of the city government for the current year, and that the certificates were drawn upon such fund so created by said appropriation and levy, and that in no case did the amount of said certificates so issued equal the amount of said levy. That as to the certificates issued in 1877, they were in terms drawn upon said special fund and payable out of it, and in no other way, and that parties receiving them did so, discharging the city from all liability on account of the claim for which they were given, taking alone their chances to collect the same from such special fund. This being the case, it is giving one thing for another, and in no legal sense can be said to be an increase of the city indebtedness.

The case of the city of *Springfield* v. *Edwards*, 84 Ill. 626, was a case very similar to this, being a bill filed in chancery by a tax-payer to enjoin the city authorities from increasing the indebtedness of the city and levying taxes for its payment in violation of the constitution. In discussing the lawful power of the city in that case, the court, by Scholfield, J., says:

"If a contract or undertaking contemplates in any contingency a liability to pay when the contingency occurs, the liability is absolute, the debt exists, and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred. And since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else. In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to with this qualification: 1. The tax appropriated must, at the time, be actually levied. 2. By the legal effect of the contract between the corporation and the individual, made at the time of the appropriation and issuing and accepting of a warrant or order on the treasury for its payment, when collected, must operate to prevent any liability to accrue on the contract against the corporation.

"The principal, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another."

From the doctrine of this case, it is apparent that the issue of the certificates of 1877 were not in violation of the constitution, because they were drawn upon a particular fund, actually existing to defray the current expenses of the city for that year, and upon the fund created by the tax levied and appropriated for such purpose. This proceeding does not operate to create any liability against the corporation as interpreted by the Supreme Court. The appropriation and levy having in this case been made before their issue brings them within the rule thus laid down. At the September term of that court for 1877, in the case of *Ida Irena Law* v. *The People ex rel. Louis C. Huck*, the Supreme Court, in discussing the question of what was an anticipation of revenue already levied, says:

"The manner of anticipating revenue already levied was before us, and fully considered in the case of *City of Springfield* v. *Ed-*

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wards, 84 Ill. 626, and on the able arguments in this case we see no reason to change the rule there announced."

Thus it will be seen that the court means to adhere to the rule laid down in the Springfield case as the approved method of anticipating revenue by municipalities.

In *The Commissioners of Highways* v. *Thomas Newell*, 80 Ill. 587, the court seems to recognize the right of the commissioners of highways to anticipate their revenue by the same method as was approved in the case first above cited. Certificates of 1875.

As to these certificates, which appear to be issued in 1875 for the purpose of defraying the current expenses of the city, and which do not in terms appear to be drawn upon any special fund, it is insisted by the complainant that, being drawn upon the general fund of the city and in excess of the constitutional limit, they are therefore void. Even though, as a foundation of an action at law against the city, they may be held void, still does it follow that their payment out of the fund mentioned would be inequitable? It appears from the answer that they were issued as a means of meeting the current expenses of the city for the year 1875, and were drawn after the appropriation and levy of the tax out of which it is now proposed to pay them was actually made. It would not be inequitable, therefore, for the city authorities to retire them, giving in substitution therefor other certificates drawn against the special fund designed for their payment, and to anticipate which they were issued, which would stand on the same footing with the certificates of 1877, which we have shown is a method of anticipating the revenue sanctioned by law. If this may be done, as we think it may, it seems a good test of the equitable claim of the holder of these certificates to be paid out of the tax levy of that year, for it will not be claimed that the mere change in the form of the certificates will in any degree strengthen their equities. If, then, it be equitable to pay these certificates out of the said tax levy of 1875 when collected, and that is all the defendants claim the right to do, it is not perceived why a court of equity should enjoin the city authorities from so doing.

Having shown that the holders of these certificates have the equitable right to be paid the amount due thereon from the tax levy of that year, if the city authorities choose so to pay them, there is no valid reason why they should be prevented.

The court below, therefore, decided correctly in denying the injunction and dismissing the bill.

Finding no error in the record, the decree of the court below is affirmed. *Affirmed.*

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PHILIP STEIN *v.* MARTHA H. KENDALL.

BILL OF EXCEPTIONS—*Striking from the record when not filed in time—presumption.*—Where the bill of exceptions purports to have been signed and sealed by the circuit judge on the 7th of November, which was within the thirty days, but was not actually filed with the clerk of the court below until November 26, which was seven days after the expiration of said thirty days, and there was no proof fixing the date at which the bill of exceptions was presented to the circuit judge, or tending to explain the delay in filing it after the day it purports to have been signed, it was *held* that the presumption is that it was presented to the circuit judge within the thirty days, and that for reasons for which the circuit judge alone was responsible, it was not actually filed until after the thirty days had expired.

SAME—*Filed nunc pro tunc.*—When a bill of exceptions was filed, and it was accompanied by a written order of the circuit judge directing the clerk to file it, *nunc pro tunc*, as of November 7, and it was so filed, it was *held* that it was not material whether, at the time the order to file the bill of exceptions *nunc pro tunc* was made, the court below was in session or not, nor whether such order was or was not valid as an order of court.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY. Opinion filed April 22, 1878.

BAILEY, J., delivered the opinion of the court:

In this case appellee moves to strike from the record the bill of exceptions on the ground that it was not *filed* within the time prescribed by the court below for that purpose. It appears that the judgment was rendered in the Circuit Court on the 20th day of October, 1877, and that appellant was allowed thirty days from that day to file his bill of exceptions. The bill of exceptions purports to have been signed and sealed by the circuit judge on the 7th of November, which was within the thirty days, but was not actually filed with the clerk of the court below until November 26, which was seven days after the expiration of said thirty days.

When filed, it appears to have been accompanied by a written order of the circuit judge directing the clerk to file it, *nunc pro tunc*, as of November 7, and it was so filed. We are furnished with a certificate of the circuit clerk that, from October 20 down to a date considerably later than November 26, the circuit judge, who rendered the judgment and signed the bill of exceptions, held no session of his branch of the Circuit Court.

It should be observed that there is no proof before us fixing the date at which the bill of exceptions was presented to the circuit judge, or tending to explain the delay in filing it, after the day it purports to have been signed. The circuit judge having, under his official responsibility, signed the bill of exceptions under date of November 7, and ordered it to be filed as of that day, in the absence of proof explaining the delay, every presumption and intendment will be indulged in to support it.

We must presume that the judge would not have signed it unless it was presented to him in proper time, and whatever delay may

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have intervened after it was signed, and before it was filed, will be presumed to have been occasioned by the pressure of other engagements on the part of the judge, or by his failure to deliver it to appellant for filing, and not by any neglect on the part of appellant. The burden of establishing such neglect, if any exists, is on appellee.

As we view the rules of practice, then, we do not consider it material whether, at the time the order to file the bill of exceptions *nunc pro tunc* was made, the court below was in session or not, nor whether such order was or was not valid as an order of court. Nor do we consider it material, as the proof before us now stands, whether the 7th or 26th of November is to be regarded as the true date of filing the bill of exceptions. The presumption is that it was presented to the circuit judge within the thirty days, and that for reasons for which the circuit judge alone was responsible, it was not actually filed until after the thirty days had expired.

The motion to strike the bill of exceptions from the record will be overruled. *Motion overruled.*

PHILIP STEIN *v.* MARTHA H. KENDALL.

CONTRACT—*Special.*—Where the appellee claimed that there was a special contract, made through an agent, as to the price appellant should receive for professional services in collecting certain bills, and appellant denied the authority of the agent to make such contract, it was *held* that there was no evidence in the case that appellant indorsed or knew of the representations of the agent, or anything tending to establish a special contract.

SAME—*Instruction.*—*Held*, that an instruction by the court, which assumed that the jury might find a special contract to have been proven was erroneous, and was calculated to mislead the jury.

SAME.—Also *held*, that an instruction by the court that the jury disregard and pay no attention whatever to that part of the evidence which relates to the terms on which it is claimed that the plaintiff would take the claims for collection, should have been given.

APPEAL FROM COOK COUNTY CIRCUIT COURT. Opinion filed April 26, 1878.

PHILIP STEIN *pro se.*

A. C. STORY, *Attorney for Appellee.*

MURPHY, P. J., delivered the opinion of the court:

This was an action commenced originally before a justice of the peace by appellant, to recover for professional services claimed by him to have been rendered for the appellee. In the justice's court he recovered a judgment for $35.25. The defendant appealed to the Circuit Court of Cook county, where a trial *de novo* was had, resulting in a judgment in favor of the defendant. The plaintiff brings the case to this court, and asks the reversal of the judgment on the grounds that the court permitted improper testimony to be given to the jury by the appellee at the trial below, and the giving

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of an instruction by the court, and also refusing certain instructions asked by the plaintiff below.

It appears that in the winter of 1874–75, the appellee placed in the hands of the appellant, who was then a practicing attorney in this city of Chicago, several small bills for collection, which appear to have accrued to the appellee in the course of her business as a dressmaker, which business she, during that time, carried on. It appears that the appellant commenced and pressed the collection of these bills with varied success; succeeding in some instances and failing in others. That when finally he presented his bill for his services, the appellee set up and claimed a special agreement in respect to the price she was to pay for such services. It is claimed by the appellee that one Mrs. Stephani, at and immediately preceding the time when she placed these bills in the hands of the appellant for collection, induced her to do so by representing to her that she had talked with the appellant, and that he had agreed to take the bills for collection, and charge only ten per cent upon such sum as he collected.

That at this time appellant was a boarder in the house of Mrs. Stephani, and that she and Mrs. Kendall, appellee, were intimate friends, and that relying upon such representations she, the appellee, placed said bills in the hands of the appellant for collection.

Upon the trial in the court below, appellee, being on the stand as a witness, was asked by counsel to state the conversation which took place between her and Mrs. Stephani at her house in the winter of 1875, in respect to placing these bills in the hands of appellant, he not being present.

This was objected to by appellant, and over his objection it was allowed to go to the jury.

In this conversation Mrs. Stephani informed her, the appellee, that Mr. Stein would collect the bills for ten per cent upon such sum as he collected, that being all he charged Mrs. Stephani. She, Mrs. Stephani, offered to see and ask him if he would take these bills on these terms, to which she responded, "I asked her to do so." On the next day she came to the appellee, and told her she had seen Mr. Stein about the matter, and he would do the business on the terms indicated, that is, ten per cent on the sum actually collected.

A few days after this the appellee had these bills made out, and gave them to Mrs. Stephani for Mr. Stein to collect on these terms. She says: "I told her I did not consider my bills good enough to pay regular lawyers' prices." Admitting this testimony to go to the jury over the objection of the appellant is assigned for error by him. This appears to be the only evidence in the record tending to establish any special contract as to the price to be paid by the appellee for such services.

Upon this question the appellant testifies that he did not hear this conversation between Mrs. Stephani and the appellee, nor did he know or hear of its occurrence until after the entire performance of his services in the premises. That he never authorized Mrs.

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Stephani to procure any business for him, or make any representations in his behalf as to the price he would charge.

It appears to have been entirely without any authority from appellant that Mrs. Stephani went to, and talked with, appellee. But it is insisted by the appellee that the appellant must be held to have ratified the act of Mrs. Stephani, as his agent, because he took and kept the business. This proposition appears to be fully answered by the uncontradicted testimony of the appellant, that he did not know or hear anything about any such representations until after he had presented his bill for payment.

Before he could be held to have ratified any action of Mrs. Stephani, it must first be shown that he acted advisedly in the premises; that is, that he had a full knowledge of all the material facts and circumstances of the case. The proof utterly fails to show that he knew of any of the false representations made to the appellee in respect to his charges, and of course could not be said to be acting with a view to them.

We think the evidence of the above conversation, in the absence of the appellant, upon a familiar principle of law, is incompetent, and the objection to which should have been sustained, and that the overruling of which was error.

This being the only evidence in the record tending to establish a special contract, there is no evidence on which to predicate the following instruction:

"7. If the jury find from the evidence that Mrs. Stephani volunteered to act on plaintiff's behalf to obtain from defendant the bills in question, to be put into plaintiff's hands for collection, and in doing so, Mrs. Stephani told a falsehood to defendant with the intent of so obtaining said business for plaintiff, but agreed with defendant, on behalf of plaintiff, that the terms should be ten per cent on the amount collected; if, then, the plaintiff got said bills under such circumstances as that, he knew it was solely through the agency of Mrs. Stephani, and thereupon accepted such employment, then the court instructs you that the plaintiff, if he so accepted the bills of account for collection through such agency, is bound by the means used by Mrs. Stephani in obtaining such business for him, and by the special contract, if any, which she made with defendant," by the court, which assumes that the jury might find such contract to have been proven. We think the instruction was calculated to mislead the jury. In the light of these views, we think the following instruction, asked by appellant, should have been given:

"On behalf of plaintiff, the court further instructs the jury to disregard and pay no attention whatever to that part of the evidence which relates to the terms on which it is claimed Mrs. Stephani stated to the defendant, Mrs. Kendall, that the plaintiff would take the claims for collection."

For these errors the judgment of the court below is reversed, and the cause remanded. *Reversed and remanded.*

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ANNIE BREATON *v.* SWEN JOHNSON.

SCIRE FACIAS.—A plaintiff in error has no right to the writ of *scire facias* until the transcript of the record is filed in the Appellate Court.

COMMENCEMENT OF SUIT—*In the Appellate Court—two ways of.*—By a practice established by the rules of the Supreme Court and of the Appellate Court, a party, without having first actually sued out a writ of error, may, in the first instance, file in the Appellate Court a transcript of the record below, and such transcript becomes, in effect, a return to a writ of error. The filing in the Appellate Court of the transcript of the record is the commencement of the suit in that court.

WRIT OF ERROR.—Where a party seeks to bring a record into this court by writ of error, the practice is to sue out of the office of the clerk of this court a writ, directed to the clerk of the court below, commanding him to certify to this court such record, and the filing in this court of a transcript of the record below constitutes a return to such writ.

ERROR TO SUPERIOR COURT OF COOK COUNTY. Opinion filed April 18, 1878.

E. ANTHONY, *Attorney for Appellant.*
JOSEPH SCHLERMITZAUER, *Attorney for Appellee.*

BAILEY, J., delivered the opinion of the court:

In this case a motion is submitted by the defendant in error to quash the *scire facias* and dismiss the suit. No writ of error has been issued, and at the time the motion was interposed, no transcript of the record sought to be reviewed had been filed in this court. It appears, however, that on the sixth day of April instant, plaintiff in error filed with the clerk a *præcipe*, directing the issuance of a summons, and that the clerk thereupon, in pursuance of such *præcipe*, as it may be presumed, issued a writ of *scire facias*, which, on the same day, was served on the defendant in error.

Ordinarily, where a party seeks to bring a record into this court by writ of error, the practice is to sue out of the office of the clerk of this court, a writ, directed to the clerk of the court below, commanding him to certify to this court such record, and the filing in this court of a transcript of the record below, constitutes a return to such writ. By a practice established by the rules of the Supreme Court, and of this court, a party, without having first actually sued out a writ of error, may, in the first instance, file in this court a transcript of the record below, and such transcript becomes, in effect, a return to a writ of error. In one case the issuing of the writ of error, and in the other the filing in this court of the transcript of the record, is the commencement of the suit in this court. In neither case, however, has the plaintiff a right to the writ of *scire facias* until the transcript of the record is filed here.

It follows that in this case the *scire facias* was improvidently issued, and must be quashed; also, that at the time the motion was interposed no suit had been properly commenced in this court to review the record below, and, consequently, this court had no jurisdiction of the subject-matter of such record, and so the motion to dismiss must be sustained.

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Since the motion was submitted, a transcript of the record below has been filed by the plaintiff in error. Such transcript might possibly give this court jurisdiction from the time of such filing, but it is no answer to the motion to dismiss, which must be decided upon the state of the record as it stood at the time the motion was interposed.

Motion to quash writ of *scire facias* and to dismiss suit sustained.

Motion sustained.

SWAINE NELSON ET AL. *v.* PEHT AKESON.

PRACTICE—*Under the five-day rule—Affidavit of merits.—Held*, that it was error under the five-day rule of the Superior Court of Cook county for the court to take up and try a case out of its order, on the trial calendar, after appellants had filed the affidavit of merits required by the statute.

SAME—*Refusing leave to file additional pleas.—Held*, that where the appellee was allowed to amend his declaration by entering a *nolle prosequi*, as to the account sued on, dismissing out of court all his cause of action founded upon open account, thus making a material change in the issues theretofore formed, it was error to refuse appellants the leave to file additional pleas to the appellee's declaration, after discontinuing his case as to the account sued on.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY. Opinion filed May 22, 1878.

MURPHY, P. J., delivered the opinion of the court:

This was an action of *assumpsit*, commenced in the Superior Court of Cook county by the appellee against the appellants. The declaration counts specially on two promissory notes, for the sum of $300 each, and contained the common counts, and for work, labor, and goods sold, etc. The trial of said cause in the court below resulted in a judgment against appellants, from which they prayed an appeal to this court, and ask the reversal of said judgment, and assign several errors, the first and third of which will be all that will be necessary for us to consider. The first assignment of error is, the Superior Court erred in ordering said cause to a trial under said rule, known as the five-day rule, because said rule is contrary to the Practice Act, and null and void, and because said motion for speedy trial out of the order of said cause on the docket, and before it had been placed on the trial calendar of said court, had already been made and overruled at the September term of said court, and the court had no power to allow said subsequent motion made at the October term.

The court erred in refusing defendant leave to file additional pleas.

It appears that one of the rules of practice of that court is as follows:

"Ordered, That in any case *ex contractu*, pending on an issue or issues of fact only, or only requiring the *similiter* to be added, if the plaintiff, or an attorney or agent of the plaintiff, shall make an affidavit that he or she believes that the defense is made only for delay, the plaintiff, by giving the defendant's attorney, or the defendant, if he or she do not appear by attorney, five days' previous notice, with a copy of such affidavit, that the plaintiff will bring on said case for

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trial at the opening of court on a day to be specified in such notice, or as soon thereafter as the court will try the same, may proceed to a trial at the time specified in said notice, unless it shall be made to appear to the court, by affidavit of facts in detail, that the defense is made in good faith, when the case will remain to be tried in its regular order on the trial calendar."

The first assignment of error involves the validity of this rule, judged of by the constitution and laws of this state, regulating the practice in courts of record.

In pursuance of sec. 29, art. 6, of the present constitution, the legislature enacted a general law to regulate the practice in courts of record, in force July 1, 1872, Rev. Stat. 1874, p. 774.

By the fifteenth section of that act, the clerks are required to keep a docket of all causes pending in their respective courts, and in docketing civil cases shall set them down in the order of the date of their commencement, and by the seventeenth section, "all causes shall be tried or otherwise disposed of in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct." The thirty-seventh section is: "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the *nature* of his demand and the amount due him from the defendant, after allowing the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, his agent, or his attorney, if the defendant is a resident of the county in which suit is brought, shall file with his plea an affidavit, stating that he verily believes he has a good defense to said suit upon the merits to the whole, or a portion of the plaintiff's demand, and if a portion specifying the amount, according to the best of his judgment and belief, upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order. No affidavit of merits need be filed with a demurrer, plea in abatement, or motion, provided that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits; that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court, but expects to produce by the next term; the court shall continue such cause until the next term."

These sections of the statute provide a uniform practice in courts of record, in respect to the taking up and disposing of actions *ex contractu* out of their order on the docket, when there is no substantial defense. It will be seen that the rule of practice in the Superior Court, known as the five-day rule above given, establishing a different practice from that provided by the statute for courts of record in this state.

In the case of *Fisher* v. *National Bank of Commerce*, 73 Ill. 37, the Supreme Court say that "if the plaintiff believes there is no valid defense to his cause, and desires a speedy judgment under the statute, he must file an affidavit with his declaration, showing the

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nature of his demand and the amount due him from the defendant, after allowing all his just credits, deductions and set-offs, if any, but under the rule of the Superior Court, he is simply required to make an affidavit that he believes the defense is made only for delay, and the defendant in such case, to entitle himself to a trial under the statute, is only required to file an affidavit with his pleas, stating that he verily believes that he has a good defense to the suit upon the merits, while under the rule of the Superior Court, he is compelled to make it appear to the court by affidavit of facts in detail, that the defense is in good faith. The practice being regulated by law, must, under the constitution, be uniform, and from whatever source the Superior Court may have assumed to derive its authority to adopt the rule, inasmuch as it is inconsistent with the general law, it is void and of no effect.

It appears, also, that the appellee was allowed to amend his declaration by entering a *nolle prosequi*, as to the account sued on, dismissing out of court all his cause of action founded upon open account, thus making a material change in the issues theretofore formed, and thereupon appellants asked leave to file additional pleas, which the court denied. The pleas proposed to be filed were for the purpose of setting up fraud as to $200 of the consideration of some promissory notes. After the appellee was allowed to materially change his declaration, we think appellants had the right to plead to the declaration as thus changed.

Under the statutes as thus interpreted by the Supreme Court, we think it clear that for the court to take up and try this case out of its order, on the trial calendar, after appellants had filed the affidavit of merits required by the statute, was error. We also think, to refuse appellants the leave to file additional pleas to the appellee's declaration, after discontinuing his case as to the account sued on, was error. For these errors the judgment is reversed and the cause remanded. *Reversed.*

MICHAEL GORMLEY ET AL. *v.* GERTRUDE UTHE.

FIVE-DAY RULE.—*Held*, that the matters to which that rule relates are regulated by the Practice Act of July 1, 1872, and that the rule, as a consequence, is void and of no effect.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY. Opinion filed May 22, 1878.

MURPHY, P. J., delivered the opinion of the court:

This was an action of *assumpsit*, commenced in the Superior Court of Cook county by appellee against appellants, and in her declaration counted specially on five promissory notes made by appellants, and contained the common counts. To this declaration the appellants filed the plea of *non assumpsit*, accompanied by an affidavit of merits, notwithstanding the objection of the appellants. The court,

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on motion of the appellee, advanced and tried said cause out of its order on the docket, under and by virtue of a certain rule of practice existing in that court, known as the "five-day rule." This is assigned for error by the appellants. This case turns upon the validity of that rule. In *Nelson and Benson* v. *Akerson*, at this term, we have passed upon the validity of that rule, and held that the matters to which that rule relates are regulated by the Practice Act of July 1, 1872, and that the rule, as a consequence, is "void and of no effect." The court below took up and disposed of the present case out of its order on the docket, and the judgment must, therefore, be reversed and the cause remanded. *Reversed.*

CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

HENRY FULLER *v.* MONROE HEATH, MAYOR OF THE CITY OF CHICAGO.

TAXES—*General rule in the appropriation of taxes in anticipation of their actual receipt.*—The general doctrine is that current taxes may be appropriated in anticipation of their actual receipt to the payment of proper and ordinary current expenses as effectually as if they were at the time of such appropriation in the city treasury, and such appropriation is not the creation of a debt.

SAME—*Doctrine in Illinois.*—The general rule for Illinois is that current taxes may be appropriated for current municipal expenses, in anticipation of the receipt of such taxes, in all cases where the tax is at the time of such appropriation actually levied, and where the warrant delivered to the payer for such current expenses imposes upon the municipal corporation no indebtedness by reason of its execution and delivery.

WARRANTS.—Warrants issued by a municipal corporation are valid.

SAME—*By the city of Chicago.*—The power of the city of Chicago to draw warrants is clearly recognized in its charter, and the power to draw them in anticipation of current revenues to be thereafter collected is necessarily implied.

SAME—*Effect of such warrant.*—Each warrant is *pro tanto* an equitable assignment of so much of the fund named therein to the payee, and gives to him an equitable and specific lien upon such fund. The payee, in consideration of such assignment, gives up his claim against the city. By the execution and delivery of such warrants, the city of Chicago assumes no indebtedness or liability. It does not create a debt or liability within the meaning of the constitution.

APPEAL from Cook County. Opinion filed May 2, 1878.

CORPORATION COUNSEL BONFIELD, *Solicitor for Defendant.*
JOHN M. ROUNTREE AND GEN. GEO. M. SMITH, *Attorneys for Certificate Holders.*
EDWARD ROBY, *Solicitor for Plaintiff.*

WILLIAMS, J., delivered the opinion of the court:

The bill filed in this cause sets up the issue upon the part of the city of Chicago of warrants signed by the mayor and countersigned by the comptroller, drawn upon the treasurer of the city, and pay-

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able out of the taxes of the year 1878. The warrants are substantially in the following form, being drawn upon different funds, according to the nature of the service for which they are issued:

$100. CITY TREASURY WARRANTS. 1878. No. 6957.

Treasurer of the City of Chicago: CHICAGO, ILL., April 15, 1878.

$5,574 from the taxes of the year 1878, appropriated and levied for the Public Works Department, when received by you, Pay E. J. Harkness, or Bearer, the sum of One Hundred Dollars; being for services rendered and payable out of the appropriation for said Department, and charge said amount to DEPARTMENT OF PUBLIC WORKS APPROPRIATION FUND.

The Taxes to be collected for account of this Fund are specially appropriated, set apart and pledged to the payment of this and all Warrants drawn thereon, and which Warrants do not exceed 85 per cent of the appropriation made therefor.

This Warrant is also receivable in payment of City Taxes for the year 1878.

[SEAL] M. HEATH, Mayor.

Countersigned, J. A. FARWELL, Comptroller.

NOTE: Present in payment of said City Taxes after January 1, 1879.

The bill alleges that the city of Chicago, prior to the issue of these warrants, had incurred the maximum of indebtedness which it could incur under the constitution; that by the constitution, art. 9, first clause of sec. 12, it is provided as follows: "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per cent on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness"; that these warrants are an indebtedness within the meaning of that clause, that their issue is illegal; and the prayer of the bill is that their issuance be enjoined.

To this bill a demurrer has been filed, and thus the question of the validity of these warrants is raised. Are these warrants indebtedness within the meaning of the present state constitution?

The opinions of the Supreme Court of Illinois in the recently decided cases of the *City of Springfield* v. *Edwards*, and of *Law* v. *The People*, have rendered an extended discussion of many points raised and argued in this case unnecessary.

Both these cases affirm the doctrine of the decisions in Iowa, California, Ohio and Louisiana, in regard to the anticipation by a municipal corporation of its revenues, with certain qualifications, which I shall hereinafter set forth.

That doctrine is that current taxes may be appropriated in anticipation of their actual receipt to the payment of proper and ordinary current expenses as effectually as if they were at the time of such appropriation in the city treasury, and such appropriation is not the creation of a debt. The position is sustained by the cases of *Grant* v. *City of Davenport*, 36 Iowa, 396; *People* v. *Pacheco*, 7 Cal. 173; *Koppekus* v. *State*, Cap. Coms., 16 Cal. 253; *The State* v. *McAuley*, 15 Cal. 455; *The State* v. *Medbury*, 7 Ohio State, 522; *State* v. *Mayor*, 23 La. An. 358.

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Alluding to the above decisions, the Supreme Court of Illinois, in the case of the *City of Springfield* v. *Edwards*, says:

"In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to with this qualification: First, the tax appropriated must at the time be actually levied; second, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the issuing and accepting of a warrant or order on the treasury for its payment, must operate to prevent any liability to accrue on the contract against the corporation. The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant or order on the treasury is issued and accepted, for its payment when collected, the transaction is closed upon the part of the corporation — leaving no future obligation, either absolute or contingent upon it, whereby its debt may be increased. But until a tax is levied, there is nothing in existence which can be exchanged; and an obligation to levy a tax in the future for the benefit of a particular individual, necessarily implies the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy."

And in the case of *Law* v. *The People*, the court said:

"The manner of anticipating revenue already levied was before us, and considered in the case of the *City of Springfield* v. *Edwards*, 84 Ill. 626; and, on the able arguments filed in this case, we see no reason to change the rule then announced. The questions are essentially the same in the two cases, and that must govern this as well as the other constitutional questions."

These two cases affirm and establish the rule for this state, that current taxes may be appropriated for current municipal expenses, in anticipation of the receipt of such taxes, in all cases where the tax is at the time of such appropriation actually levied, and where the warrant delivered, to the payer for such current expenses imposes upon the municipal corporation no indebtedness by reason of its execution and delivery.

Complainant, through his counsel, urges that if this is the law in this state, in reference to municipal corporations having the power to issue warrants, it is not the law in reference to the city of Chicago, because it has no power to draw warrants such as are described in the bill.

There are two answers to this position. First, a municipal corporation may do any act fairly within the scope of its granted powers, and which may be necessary to carry out the object of its charter. No municipal organization could successfully carry out the object of its creation unless it could create and discharge debts. Second, the power of the city of Chicago to draw warrants is clearly recognized in its charter, Rev. Stat. 228, sec. 95, and the power to draw warrants being admitted, the power to draw them in anticipation of current revenues to be thereafter collected is necessarily

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implied. *Commissioners of Highways* v. *Newell*, 80 Ill. 594; Dillon on Mun. Corp., p. 9. Such warrants "are necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes out of which they must be paid." Dillon, Mun. Corp., p. 9. *Grant* v. *City of Davenport*, 36 Iowa, 401; 19 Wallace, 468.

The provision in these warrants, that they may be received in payment of city taxes, is expressly authorized by the act of May 25, 1877 (Laws of 1877, p. 172), and there is no constitutional objection to such a law.

These warrants are clearly within the scope of the decisions in Iowa, California, Ohio and Louisiana, and would be deemed valid in the light of those decisions. Are they invalid by reason of the qualifications of those decisions which have been made in the cases of the *City of Springfield* v. *Edwards*, and of *Law* v. *The People*? These qualifications are, first, a tax must be actually levied before the warrant is drawn, and out of which, when collected, the warrant must be paid. That was done in this case. The city had levied the tax and had made provisions for the collection of the fund out of which the warrant was to be paid before the issue of the warrants. The term "levy" is not synonymous with "collect" in our statute. It means the imposition of the tax, not its collection. Second, the city must not by the issue of the warrant assume any indebtedness. The warrants now under consideration are orders by the mayor and comptroller upon the city treasurer to pay, out of a certain revenue fund thereafter to come into his hands, to a certain payee named in such order, a certain sum, for certain labor or materials furnished for the city toward its current expenses, and this order pledges the taxes to be collected for account of such fund to the particular warrant and all others which may be drawn upon the fund. Each warrant is *pro tanto* an equitable assignment of so much of the fund named therein to the payee, and gives to him an equitable and specific lien upon such fund. *Phelps* v. *Northrup*, 56 Ill. 159. The payee, in consideration of such assignment, gives up his claim against the city. By the execution and delivery of such warrants, the city of Chicago assumes no indebtedness or liability.

If it is said that the city is liable to use due diligence in the collection of the tax, that is an obligation imposed by the law, and not by the warrant. The legal obligation is in no way altered or affected by the execution of the warrant. And, quoting again from the language of the Supreme Court in the case of the *City of Springfield* v. *Edwards*, which is applicable to the case at bar, it can be said, "There is no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant on the treasury is issued and accepted for its payment when collected, the transaction is closed upon the part of the corporation, leaving no future obligation, either absolute or contingent, upon it whereby its debts may be increased." These warrants come up fully to the decisions of the Supreme Court, and

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their issue is warranted thereby. They do not create a debt or liability within the meaning of the constitution, as interpreted by the Supreme Court, and are drawn in accordance with the law as settled by that court, and are, therefore, valid instruments to the extent that they, upon their face, purport to be.

The demurrer to complainant's bill will be sustained, and the injunction prayed for by the bill will be denied. This opinion is concurred in by all my brother judges who heard the case. Judge Farwell has been sick, and did not hear the argument.

CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

ANNA WESCOTT *v.* JOHN MENHARD ET AL.

JURISDICTION—*Of a justice of the peace.—Held*, that to establish jurisdiction the entries on a justice's docket should show the names of the parties, the amount, and *the nature of the debt sued for.*

TRESPASS.—*Held*, that in an action of trespass the court will not, in the absence of any entry on the justice's docket showing the nature of the cause of action sued on, presume that it was one within the jurisdiction of the court. Because being a court of inferior and limited jurisdiction, its jurisdiction must affirmatively appear. The generic word "trespass" does not give the nature of the cause of action any more than the word tort or wrong would. It should have said trespass to property, or something equivalent.

Opinion delivered May 20, 1878.

MCALLISTER, J., delivered the opinion of the court:

Anna Wescott recovered a judgment before George L. Ford, Esq., a justice of the peace, January 25, 1878, against John Menhard and Agnes Menhard, his wife, for $150 damages. The defendants filed a petition in this court for a common law *certiorari*, which was allowed by my brother Rogers, and to which return has been made. The question for decision is whether it appears from the transcript of the justice, which alone can be considered, that the subject-matter of the suit was within the jurisdiction of the justice.

The entries on the justice's docket are that the "action is brought to recover damages for trespass by above named defendants."

"The court decided that the plaintiff, according to the evidence offered, was entitled to the possession of the premises until January 21, 1878. Judgment was entered against the defendants for the sum of $150 damages in trespass, and costs of suit, and in favor of plaintiff."

A justice's court is one of limited and inferior jurisdiction; the statute is the charter of its authority. Its acts are null and void when it assumes jurisdiction not given by the statute. *Robinson* v. *Harlan*, 1 Scam. 237. The law is well settled that in order to justify courts not of record, in taking cognizance of a cause, their jurisdic-

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tion must affirmatively appear. *Trader* v. *McKee*, 1 Scam. 558. Authorities might be multiplied to any extent in further support of the above propositions. Sec. 122 of the Justice's Act, Rev. Stat. 655, declares that, "It shall be the duty of every justice, whenever a suit shall be commenced before him, to record in a well-bound book kept for that purpose, the names of the parties, the amount, *and nature of the debt sued for*," etc.

Sec. 13, Rev. Stat. 639, defines the jurisdiction of justices of the peace, and gives jurisdiction "in actions for damages for injury to real property, or for taking, detaining, or injuring personal property."

But such courts have no jurisdiction of actions for injury to the person or to the relative rights of persons.

Trespass is an action brought for injury to the person as well as to property. If the entry of the justice had been: Trespass for injury to real property or to personal property, or even trespass to property, then it would have shown a case within the justice's jurisdiction, and the law would indulge the presumption that the evidence proved or sustained the cause of action specified. As was held in *Railroad Company* v. *Fell*, 22 Ill. 336, which was a common law *certiorari* to justice's court: "It was only necessary that the courts should see that the law conferred jurisdiction upon the justice to take cognizance of the offense specified; and when it appears that the courts could have had jurisdiction, the presumption is that the evidence made out a proper case for its exercise." In that case, "the offense specified" on the justice's docket was "trespass on personal property." In the case in hand it is simply trespass, with nothing to affirmatively show that it was trespass to property and not to the person, over which the justice has no jurisdiction. The finding of the justice as to plaintiff being entitled to the possession of premises, standing by itself as it does, would be just as material to a case of trespass to the person for forcibly putting her out of, as to an action for damages for injury to real property. I have endeavored to spell out jurisdiction and uphold the judgment; but under the rules of law applicable to courts of inferior and limited jurisdiction requiring that their jurisdiction shall in all cases affirmatively appear, I have, after repeated efforts to dispose of the case the other way, been, at last, forced to decide that it does not affirmatively appear upon the face of the transcript that the justice had jurisdiction of the cause. This court will not, in the absence of any entry on the justice's docket showing the nature of the cause of action sued on, presume that it was one within the jurisdiction of the court. Because being a court of inferior and limited jurisdiction, its jurisdiction must affirmatively appear. The generic word "trespass" does not give the nature of the cause of action any more than the word tort or wrong would. It should have said trespass to property, or something equivalent. For these reasons the judgment of the justice must be quashed.

Judgment quashed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

IDA WINTER BRINE, BY GEORGE J. BRINE, HER GUARDIAN AD LITEM, *v.* THE HARTFORD FIRE INSURANCE COMPANY.

STATE LAW—*Controls descent of land.*—The laws of the state in which land is situated control exclusively its descent, alienation and transfer from one person to another, and the effect and construction of instruments intended to convey it.

SAME—*A part of the contract.*—All such laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract.

SAME—*Governs redemption.*—A state statute, therefore, which allows to the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to a judgment creditor of his three months after that, governs to that extent the mode of transferring the title and confers a substantial right, and thereby becomes a rule of property.

SAME—*Binding on federal court.*—This right of redemption after sale is, therefore, obligatory on the federal courts, sitting in equity, as on the state courts, and the rules of practice of such courts must be made to conform to the law of the state, so far as may be necessary to give substantial effect to the right.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

MILLER, J., delivered the opinion of the court:

This suit began by a bill in chancery filed in the Circuit Court of the United States for the Northern District of Illinois, by the Hartford Fire Insurance Company, to foreclose a mortgage on a lot in Chicago. The mortgage, which was in the form of a deed of trust to secure the sum of $7,000 loaned by the insurance company to Bartalott and Barbier, was signed by them and their wives, and conveyed the lot to Benjamin E. Gallop in trust to secure payment of the money loaned and the interest thereon as it fell due. The title to the lot, which was in the grantors when the deed of trust was made, they afterward sold and conveyed to Samuel J. Walker, and Walker sold, but did not convey, to Ida R. Brine, who, dying, left as her sole heir the appellant, Ida Winter Brine.

It further appears that Walker, after he had sold to Ida R. Brine, which sale was evidenced by a written instrument, conveyed the lot to J. Irving Pearce, in order that the sum of $6,000, which Mrs. Brine owed him on the contract of purchase, might be held by Pearce as security for a debt of Walker to the Third National Bank of Chicago. All the parties interested in the lot were made defendants except the bank, whose interest was represented by Pearce.

A final decree was made, which ascertained the sum due on the mortgage, and allowed defendants one hundred days to pay it. If not paid within that time, the special master was ordered to sell the

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land for cash, *making such sale in accordance with the course and practice of the court;* and after retaining his commissions, and paying the costs of the proceedings, he was to deposit the remainder with the clerk, together with his report of sale, to abide the further order of the court.

From this decree Ida Winter Brine, the minor heir of Ida R. Brine, appeals, and her counsel assign errors which we will notice in their order:

1. The money borrowed of the insurance company was evidenced by a bond for the principal sum of $7,000, and the semi-annual interest by coupons attached to said bond, and the court allowed interest on such of these coupons as were due and unpaid, and this is asserted to be error. We have decided more than once in this court that such instruments are so far distinct contracts for the payment of money, that when they become due they bear interest and may be sued on separately from the bond. (See *Cromwell* v. *Sac County*, at this term.

2. It is objected that complainant was allowed in the decree premiums paid for insurance of the house covered by the mortgage. The deed of trust required the grantors to keep the property insured for the benefit of complainant, and when they failed to do this, we think the sum paid by the trustee for such insurance is a proper charge and a lien under the trust deed.

3. By reason of the conveyance of the lot to Pearce after Walker had sold to Mrs. Brine and received $5,000 of the purchase money, the appellant, her heir, insisted that before final decree in favor of complainant, the right to the equity of redemption under the trust deed should be ascertained and settled by the court as between her and Pearce, in order that she might know if she paid the insurance company's debt what she was getting for it. For this purpose she made application to be permitted to file a cross-bill, but she did not pay, or offer to bring into court for the use of the company, the money which was due on the mortgage. The court refused to delay the decree in favor of plaintiff for this purpose, but by the decree allowed any of the defendants to pay the money found due within a hundred days, and thus prevent the sale; and it also ordered that if the lot sold for more than the debt, interest and costs, the excess should be paid into court. The rights of these parties to the surplus could then be litigated.

In this we are of the opinion the court did precisely what equity and equity practice required. The complainant's debt was due and was undisputed as a lien on the lot paramount to all others, and the complainant had no interest in the controversy between appellant and Pearce, and should not have been delayed until the end of a long suit for specific performance, which could not affect the right of complainant to have its money out of the lot.

While these errors are pointed out by counsel for appellant in his brief, but little is said about them, and in the full and able arguments, oral and printed, by counsel on both sides, these questions are

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ignored or passed over in favor of one which they deem of very great importance; and in this they have the concurrence of the court.

4. It is said by counsel for appellant that the statutes of Illinois allow one year after sale, in such cases as the present, for redemption by the debtor, and three months after that by any judgment creditor of the debtor, making fifteen months before the purchaser has a right to his deed and to possession. And it is assigned for error that this decree not only makes no provision for such redemption, but by its terms cuts off and defeats that right.

If the point had been raised or insisted on by the appellee, it would admit of doubt whether this question is fairly raised by the decree; for while it orders the sale of the lot, and a report to the court, it says nothing about barring the equity of redemption, nor of the making of a deed, and but for a single phrase in the decree it would seem that the appropriate time to raise this question would be on the confirmation of the report of sale and the order for a deed to the purchaser, which has not yet been done. But it is conceded by counsel here on both sides that it is according to the course and practice of the court that the master makes to the purchaser at the sale a deed for the land, which deed, by the uniform practice of the court, gives him the right to immediate possession, and cuts off all right of redemption, whether statutory or otherwise.

If this be true, which we have no reason to doubt, then the decree which ordered the sale to be made in accordance with the course and practice of the court, does deny and defeat the right, which the appellant asserts, to redeem by paying the amount of the bid, with interest, twelve months after the sale. As it is important to the holder of the equity of redemption to know whether it is essential to the exercise of her right to redeem, that it be exercised before the sale, or can be with equal safety exercised a year later, and as the question is one of importance and frequent recurrence on the circuits, it is eminently proper that it be decided now.

The statutes of Illinois in force on this subject when this mortgage was made, and for a great many years before, are found in the Rev. Stat. of 1845, pp. 302–305, as follows:

"It shall be lawful for any defendant, his heirs, executors or grantees, whose land shall have been sold by virtue of any execution, within twelve months from such sale, to redeem such land by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same for the benefit of such purchaser, the sum of money paid on the purchase thereof, together with interest thereon at the rate of ten per centum per annum from the time of such sale, and on such sum being paid, as aforesaid, the sale and certificate shall be null and void."

"In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgage lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same in the manner provided in this chapter for the redemption of lands sold by vir-

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tue of executions issued upon judgments at common law, and judgment creditors may redeem lands sold under any such decree in the same manner as is prescribed for the redemptionof lands sold on execution issued upon judgments at common law."

It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the declaration of independence, and by such rules of practice as have been established by the Supreme Court of the United States or adopted by the Circuit Courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor, and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract. And that all the laws of a state existing at the time a mortgage or any other contract is made, which effect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

We are of opinion that the propositions last mentioned are sound, and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, comes in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form.

Let us see if the statutes of Illinois on this subject do confer positive and substantial rights in this matter.

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It is not denied that in suits for foreclosure in the courts of that state the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts.

Nor is it pretended that this court, or any other federal court, can, in such case, review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right. *Olcott* v. *Bynam*, 17 Wal. 58; *Ex-parte McNeill*, 13 Wal. 243.

Of the soundness of the first proposition of appellant it would seem there can, under the decisions of this court, be little doubt.

The earliest utterance of the court on the subject is found in the case of the *United States* v. *Crosby*, 7 Cranch, 115, in which this explicit language is used: "The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and *lost* only in the manner prescribed by the law of the place where such land is situated." And in *Clark* v. *Graham*, 6 Wheaton, 577, it is said: "It is perfectly clear that no title to lands can be acquired or passed unless according to the laws of the state in which they are situate."

In the case of *McCormick* v. *Sullevant*, 10 Wheaton, 192, the court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the devisor resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that state, as the law of Ohio required. "It is an acknowledged principle of law," said the court, "that the title and disposition of real property is *exclusively* subject to the laws of the country where it is situated, which can alone prescribe the mode by which the title to it can pass from one person to another."

In the case of *Watts et al.* v. *Waddell et al.*, 6 Peters, 389, a question very much like the one before us arose. Watts was seeking to compel Waddell to accept a deed and pay for land which he had sold him many years before, the relief sought being in the nature of specific performance. It was objected that Watts could not convey a good title to a part of the land which he claimed to receive from the heirs of Powell by a decree rendered in the Circuit Court for the District of Kentucky. And although the proper parties were before that court, and a conveyance had been made to Watts by a commissioner appointed by the court, it was held that as no statute of Ohio recognized such a mode of transferring title, the deed of the commissioner was wholly ineffectual. It will be seen that here was a court of equity, proceeding according to its usual forms, transferring title from one party to another, both of whom were before the court, yet

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its decree held wholly ineffectual under the principle we are considering.

We will close these citations by using the language which had the unanimous assent of the court in the recent case of *McGoon* v. *Scales*, 9 Wal. 27: "It is a principle too well established to admit of dispute at this day, that to the law of the state in which the land is situated must we look for the rules which govern its descent, alienation and transfer, and for the effect and construction of its conveyances."

The decree in this case, the sale made under it, and the deed made on that sale, will constitute a transfer of the title within the meaning of the principle thus laid down. Neither the purchaser at that sale, nor any one holding under him, can show title in any other way than through the judicial proceeding in this suit. These proceedings are a necessary part of the transfer of title. The legislature of Illinois has prescribed, as an essential element of the transfer by the courts in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and to judgment creditors a similar right for fifteen months after the sale, before the right of the purchaser to the title becomes vested. This right, as a condition on which the title passes, is as obligatory on the federal courts as on the state courts, because in both cases it is made a rule of property by the legislature, which had the power to prescribe such a rule. *United States* v. *Fox*, 94 U. S. R. 320.

But there is another view of the question which is equally forcible and which leads to the same result. All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their construction, validity and effect are governed by the place where they are made and are to be performed, if that be the same as it is in this case. It is, therefore, said that these laws enter into and become a part of the contract.

There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties, and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of *Tennessee* v. *Sneed* we held that, so long as there remained a sufficient remedy on the contract, an act of the legislature, changing the form of the remedy, did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was complete and which secured all the substantial rights of the party.

At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no change in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States. *Edwards* v. *Kearzey*, this term. That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law

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giving the right exists when the contract is made, is very clearly stated by Chief Justice Taney, in the case of *Bronson* v. *Kenzie*, 1 How. 311. That case was one which turned on the identical statute of Illinois which is invoked by the appellant in this case. The mortgage, however, on which that suit was founded was made before the statute was passed, and the court held that because the statute conferred a new and additional right on one of the parties to the contract, which impaired its obligation, it was for that reason forbidden by the constitution of the United States and void as to that contract. But the chief justice, in delivering the opinion, further declared that, as to all contracts made after its enactment, the statute entered into and became a part of the contract, and was therefore valid and binding in the federal courts as well as those of the state. As it is impossible to state the case and the doctrine applicable to the case before us any better, we give the language of the court on that occasion:

"When this contract was made," said the court, "no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind, and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time, and, therefore, entered into the contract and formed a part of it without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem by paying the purchase money after the day limited in the deed, and before foreclosed by a decree of the court, yet no one doubts his right or his remedy; for, by the laws of the state then in force, this right and this remedy were a part of the laws of the contract without any express agreement of the parties." Speaking of the law now under consideration, he said: "This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Mortgages made since the passage of those laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt, and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions, and they would be obligatory on the parties in the courts of the United States, as well as in those of the state."

In *Clark* v. *Reyburn*, 8 Wal. 318, the court in recognition of the doctrine that the statute becomes a part of the contract, uses this language:

"In this country the proceeding in most of the states, and perhaps in all of them, is regulated by statute. *The remedy thus provided, where the mortgage is executed, enters into the convention of the par-*

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ties, in so far as that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law impairing the obligation of the contract within the meaning of the provision of the constitution on that subject."

We are not insensible to the fact that the industry of counsel has been rewarded by finding cases, even in this court, in which the proposition that the rules of practice of the federal courts in suits in equity cannot be controlled by the laws of the states, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a state, or to add to or take from a contract that which is made a part of it by the law of the state, except where the law impairs the obligation of a contract previously made. And we are of opinion that Chief Justice Taney expressed truly the sentiment of the court as it was organized in the case of *Bronson* v. *Kenzie*, as it is organized now, and as the law of the case is, when he said that "all future contracts would be subject to such provisions, *and they would be obligatory upon the parties in the courts of the United States as well as those of the states.*"

It is not necessary, as has been repeatedly said in this court, that the form or mode of securing a right like this should follow precisely that prescribed by the statute. If the right is substantially preserved or secured it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court. *Ex parte McNeill*, 13 Wal. 343. In the case before us no better mode occurs to us than that prescribed by the statute, namely, that the master making the sale shall give to the purchaser a certificate of the sale, with the sum at which the land was sold, and a statement that unless redeemed within fifteen months by some one authorized by the law to make such redemption, he will be entitled to a deed. The matter being thus reported to the court, it can, at the end of the time limited, make such final decree of confirmation and foreclosure of all equities as are necessary and proper. Or if the land be redeemed, then such other decree as the rights of the parties consequent on such redemption may require.

The decree of the Circuit Court is reversed, so far as it requires the sale to be made in accordance with the course and practice of the court, and the case is remanded, with directions to modify the decree by making provision for the sale and redemption in conformity to this opinion.

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UNITED STATES DISTRICT COURT.

NORTHERN DISTRICT OF ILLINOIS.

IN THE MATTER OF HENRY GREENEBAUM, ELIAS GREENEBAUM AND DAVID S. GREENEBAUM, BANKRUPTS.

BANKRUPTCY—*Rule of confirmation of a composition.—Held*, that in accepting a composition of creditors all the court requires is to be satisfied that the creditors have been fully and honestly advised of the true condition of the debtor's affairs, so that the creditors have acted intelligently and understandingly in full view of the facts, and with a knowledge of their own rights in the premises.

The whole question of whether the composition should be accepted is relegated under the law to the necessary quorum of the creditors, and if it appears that they acted intelligently and without undue influence, the court should confirm their action, unless subsequent disclosures are made which it may be fairly presumed would, if known, have caused the creditors to act differently.

Under this rule no sufficient reason has been assigned why this composition should not be confirmed.

Opinion delivered May 25, 1878.

ADOLPH MOSES AND ROSENTHAL & PENCE, *Attorneys for Bankrupts.*
FULLER & SMITH AND E. A. STORRS, *Attorneys for Objecting Creditors.*

BLODGETT, J., delivered the opinion of the court:

I announced that I would dispose of the objections to the confirmation of the composition *in re* Greenebaum Brothers this morning. I regret that I have not had more time to investigate this case, although so far as I have gone I am satisfied that investigation would only strengthen the conviction and the conclusion to which I have arrived. The case has been made quite voluminous, and to some extent complicated, by the acts of the parties opposing the composition. Very voluminous depositions have been taken, and I have been obliged to read those, as far as possible, in fragments, here and there, getting at the substance of what had been eliminated by the depositions, and think that I pretty fully understand all the questions of fact that have been made in the case.

In the month of December last the firm of Henry Greenebaum & Co., consisting of Henry Greenebaum, Elias Greenebaum and David S. Greenebaum, filed their voluntary petition in bankruptcy in this court, and subsequently were duly adjudged bankrupts. In the month of February last, the bankrupts filed their petition, asking that a meeting of their creditors be called to consider propositions for compositions. The meeting was duly called to be held before H. N. Hibbard, Esq., one of the registers of this court, on the 8th day of March, 1878. This meeting was quite largely attended, the bankrupts being present. As, however, the affairs of the bankrupts were complicated, and the creditors numerous, many residing

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in Europe, the meeting appointed a committee of creditors to examine the books and affairs of the bankrupts, and adjourned to the 28th day of March last, at which time it was expected the committee would report. In the interval between the first and the adjourned meetings the bankrupts Henry and Elias were examined at great length, under oath, by attorneys representing creditors, and a very careful examination of their books and papers, made by an expert accountant, employed in behalf of creditors. At the adjourned meeting the committee reported the result of their examination, so far as the same had gone, and asked for a further adjournment, but the meeting, by a large vote, refused to adjourn for further examination, and proceeded to act on the propositions for composition. The bankrupts, however, offered themselves for examination, and in accordance with such offer, Mr. H. G. was examined in reference to his conveyances just prior to the failure.

It appeared that the bankrupts had been, for quite a number of years past, engaged in business in the city of Chicago, as bankers and brokers and dealers in foreign and domestic exchange, under the firm name of Henry Greenebaum & Co., and had also conducted a similar business in New York city, under the firm name of Greenebaum Brothers & Co. They had also been largely interested in the German National Bank of this city, and the German Savings Bank, as managers and stockholders of said corporations.

The whole number of their creditors, so far as at present disclosed, by their schedules and otherwise, is seven hundred and fifty-four, of whom three hundred and eighty-six are creditors for over $50 each; and the total amount of debts and liabilities scheduled amounted as shown to $442,137.53. The number of creditors present or represented at the meeting was one hundred and twenty-eight, representing debts to the amount of $218,000.

The creditors assembled and represented at the adjourned meeting then proceeded to consider the proposition for composition, made by the bankrupts, which was an offer to pay 25 per cent on the dollar of the amount due from them to their respective creditors: 5 cents to be paid in cash within sixty days after the ratification of the composition, 10 cents in one year, and 10 cents in two years from the date of the ratification of the composition. The deferred payment to be evidenced by the joint and several notes of the bankrupts, and secured by a bond, to be approved by a committee of creditors, in the penal sum of $100,000 and adopted a resolution to accept said composition, one hundred and fourteen of the creditors at the meeting voting in favor of accepting the composition, and only fourteen voting against it, the fourteen so voting in the negative representing about $34,000 of indebtedness.

On the 2d of May inst. the proceedings of the creditors' meeting, duly certified by the register, were filed with the court, together with a confirmation of the composition, signed by two hundred and seventy creditors, representing about $322,000 indebtedness. A rule was entered requiring all persons interested to show cause on the 9th

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instant why the composition should not be ratified and confirmed by the court, and on the return day of the rule, Moses Bloom, Leopold Bloom, Simon Zacaries, Christoph Remelsburger and Peter Mars filed objections to the ratification of the composition.

These objections are substantially:

1. That the resolution was not legally adopted by the creditors' meeting.

2. That Elias Greenebaum has failed to schedule a large amount of his property, the proceeds of an undivided half of the assets of the late firm of Greenebaum & Foreman.

3. Because Elias Greenebaum, in fraud of his creditors, has heretofore attempted to transfer and assign to his wife all his interest in the assets of Greenebaum & Foreman.

4. Because both Elias and Henry had made preferences which were fraudulent under the bankrupt law.

5. That the bankrupts have failed to show by their schedules the names of all their creditors.

I have not attempted to recite in detail the objections and specifications filed, but the substance of those urged upon the court or referred to in the proofs are grouped under the foregoing heads.

The main controversy in the case centers about two transactions.

1. It was disclosed that in 1874 Elias Greenebaum became a partner in the firms of Henry Greenebaum & Co. and Greenebaum Brothers & Co., contributing at that time a cash capital of about $250,000, besides $50,000 which those firms owed him previously; that Elias at, or just before he became a member of the firms, pretended to transfer to his wife, Rosina Greenebaum, the balance of his estate, amounting to about $250,000 to $300,000 more, and that said Rosina now claims to hold and control the assets so transferred to her, as against the present creditors of the bankrupts.

The undisputed facts in regard to this seem to be these: Elias and one Gerhard Foreman had been partners, doing business as loan brokers for several years prior to the spring of 1874 under the firm name of Greenebaum & Foreman. This firm had recently dissolved, for the purpose, it would seem, of enabling Elias to unite in business with his brothers. On the 16th of May he gave to his wife an agreement in writing, in the following language:

WHEREAS, The copartnership heretofore existing under the firm name and style of Greenebaum & Foreman has been dissolved, and I, the undersigned, having been a member of said firm, and am about to enter into the firms of Greenebaum & Co., of Chicago, and Greenebaum Brothers & Co., of New York; and whereas I have promised my wife, Rosina Greenebaum, that prior to my entering into the aforesaid business relations I shall assign, transfer and set over unto her all my personal property and estate save and except the sum of $50,000, which sum I have agreed to contribute into the business firms which I am about to enter, and save and except the sum of $50,000 due me from Henry and David S. Greenebaum, which indebtedness is represented by two demand certificates, signed Greenebaum Brothers & Co., and bearing date April 7, 1873, and payable respectively January 1, 1876 and 1877, with annual interest at 7 per cent per annum;

Now, therefore, in consideration of $1 to me in hand paid, I, Elias Greenebaum, of the city of Chicago, do hereby make, assign, and set over to my wife, Rosina Greenebaum, all my right, title and interest in and to the undivided assets of the

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late firm of Greenebaum & Foreman, which will be kept by said Foreman, at his office, in a separate safe, for collection and conversion, with my assistance and concurrence.

P. S.—It is understood and agreed that should at any time any of the assets, by exchange, foreclosure, or settlement, be converted into real estate, and thereby the title of the interest of said Rosina Greenebaum be vested into Elias Greenebaum, then said Elias Greenebaum is either to transfer and convey the same to said Rosina Greenebaum, or pay therefor the amount of the original indebtedness.

After making this paper, Elias has continued to collect and reinvest the funds referred to, and has received about $193,000 of his share of the assets of Greenebaum & Foreman, which he has kept in a separate account with Elias Greenebaum as trustee; but most of the time the securities have been under the control of his wife, and she, as between themselves, has been recognized as the owner, although Mr. Foreman knew nothing of it, and for some time it was not known to Henry Greenebaum. This gift, or transfer, it is claimed, was and is fraudulent and void as against the creditors of the bankrupt firms, and upon the facts surrounding this transaction is based the charge of fraud and concealment of assets by Elias.

So far as Henry Greenebaum is concerned, the main allegations are as to the unlawful preferences made by him just before filing the petition in bankruptcy. These charges are in substance that Henry conveyed a large amount of real estate, owned by him individually, to various firm creditors, and for the benefit of the German National Bank, in which he was interested, thereby defrauding his individual creditors, and also the creditors of the firm who would have shared in any surplus of his individual estate.

The admitted facts in regard to these transactions are, briefly, that in the early part of November the New York house became embarrassed, and after a visit to New York, Henry Greenebaum attempted, with the aid of his personal friends here, to raise funds to relieve the New York house. In order to do so, he obtained from eight prominent merchants of this city their notes for $10,000 each, and upon these he raised the money, about $50,000 of which went to the relief of the New York firm, and the balance was used about the affairs of the firm here and for the payment of his individual debts. A few days after, Henry executed to Hermann Shaffner five trust deeds upon real estate, the title to which stood in his name; three to secure $10,000 each, payable in one year; two to secure $50,000, payable in two and three years; one to secure $25,000, payable in one year.

It does not appear that it was expressly agreed that these conveyances were agreed upon or promised at the time these friends lent their credit to protect the bankrupt firms, but Henry Greenebaum testified that a portion of these securities were made to so secure those who had generously, as he says, come forward to help sustain the credit of his firm. Of these securities $80,000 were so appropriated, $25,000 was pledged at the Corn Exchange bank to raise funds for the firm, and the other $50,000 note and security is turned over to the assignee.

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A day or two before the petition in bankruptcy was filed, Henry Greenebaum also executed an instrument declaring that he held title to certain real estate in trust for the German National Bank, and a similar instrument in favor of the German Savings Bank. An assignment was also made for nominal consideration of the interest of Henry Greenebaum in the leasehold interest and building on the corner of Lake and La Salle streets, subject to payment of ground rent and taxes, and a deed made to Nelson Morris of certain real estate in exchange for stock in the German National Bank.

It is claimed that the transfer by Elias Greenebaum to his wife of one-half of the assets of Greenebaum & Foreman was fraudulent and void as against creditors, either existing at the time or subsequent, and that creditors should be allowed to test the validity of this transfer by proceedings in the name of an assignee in bankruptcy; that the conveyances by Henry Greenebaum to Shaffner were void as fraudulent preferences under the Bankrupt Act, and creditors should be allowed to set them aside in the name of the assignee.

With regard to the transactions between Elias and wife, it can hardly be claimed that these are void under any provision of the bankrupt law. At most, it can only be attacked by creditors as a partly executed or inchoate gift, the proof tending to show that since the alleged gift or assignment, Elias has exercised the general control over his interest in the old assets of Greenebaum & Foreman. But Mrs. Greenebaum has control and possession now of these assets, at least all that seem to have any present value, and they could only be reached at the end of a probably tedious and expensive litigation.

The conveyances made by Henry Greenebaum upon the eve of the developed insolvency of his firms are perhaps of more questionable validity under the bankrupt law, and it is possible that some of them might be set aside as preferential. But it is obvious such a result could only be reached at the end of a series of lawsuits with the parties now interested in those conveyances.

All these facts were before the meeting of creditors. Most of them were to some extent developed at the first meeting, and they were thoroughly investigated by the committee between the first and the adjourned meetings. The committee consisted of able lawyers and astute, sagacious business men. They laid the results of their investigation before the adjourned meeting in an elaborate report, and the proofs now before me show that the report of the committee was elaborately and fully discussed. There is no charge that there has been any concealment or withholding of any fact necessary to be known by the creditors in order to enable them to act intelligently upon the proposition.

An expert accountant was employed, who made a thorough examination of the books of both firms and laid the results of those investigations before the creditors at their last meeting, in tabulated form, easy to be understood by any business man. The amount of the assets and liabilities of the bankrupts, and the reasons for their losses were all explained as fully as any such transactions can probably

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ever be explained under such circumstances. All the facts in regard to the alleged preferences and the main and essential facts in regard to the gift assignment from Elias to his wife were fully discussed and understood by the creditors at the meeting, and the evidence taken by the committee has been accessible to all creditors ever since that meeting.

The single question is, ought the court, for the reasons assigned, to refuse to ratify this composition?

The creditors who have confirmed the composition by their signatures would seem to be largely of a class who are intelligent and capable on questions touching their own interests, a large proportion being bankers or business firms engaged in business in various parts of the country.

There is no pretext or evidence that any undue or improper influence has been brought to bear on creditors to secure their votes at the creditors' meeting, or signatures in confirmation.

Since the amendments of 1874 to the bankrupt law, the right of a certain majority of the creditors of a bankrupt or insolvent debtor to control the bankruptcy proceedings has been one of the leading features of the law, and the constitutionality of such action has been amply sustained by the courts. It is hardly necessary to refer to the only authority on that subject, and that is the decision of Judge Hunt, reported in the Thirteenth Bankruptcy Register, p. 128.

For illustration: No matter how flagrant or fraudulent acts of bankruptcy a debtor may have committed, it requires the concurrence of one-fourth in number of his creditors, representing at least one-third in amount of his debts, to commence and prosecute bankrupt proceedings against him. If more than three-fourths of a debtor's creditors representing the least fraction more than two-thirds of his debts, see fit to overlook the acts in bankruptcy, the minority is powerless; they cannot invoke the aid of the law in any respect. So, too, when a bankrupt asks for a creditors' meeting to submit proposals for a composition under the amendment of 1874, the creditors can undoubtedly condone acts of bankruptcy or even frauds of which their debtor has been guilty. This question was decided by Judge Wallace, of the Northern district of New York, in the matter of Allen et al., and it was reported in *The Monthly Jurist* of May, 1878.

While I confess I should be loath to confirm a composition originating in fraud, as the learned judge stated to have been the fact in that case, I think there can be no doubt of the rule deducible from all the adjudications in the composition cases, that all the court requires is to be satisfied that the creditors have been fully and honestly advised of the true condition of the debtor's affairs, so that the creditors have acted intelligently and understandingly in full view of the facts, and with a knowledge of their own rights in the premises.

The whole question of whether the composition should be accepted is relegated under the law to the necessary quorum of the creditors, and if it appears that they acted intelligently and without undue

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influence, it seems to me the court should confirm their action, unless subsequent disclosures are made which it may be fairly presumed would, if known, have caused the creditors to act differently.

The creditors of these bankrupts meet. They become aware that Elias Greenebaum, who was reputed the wealthiest of this firm of brothers in 1874, made a gift of half his substance to his wife, and that this fact has been kept concealed, at least not communicated, from the body of the creditors of these firms up to the eve of their bankruptcy. They also learn that the donee of the large amount of assets has them now, or the valuable portion of them, in her possession, and that she can only be made to disgorge them at the end of a lawsuit, and are not even sure of that result. They learn that Henry Greenebaum, on the eve of his bankruptcy, gave certain securities which they are advised were preferential and void under the bankrupt law; but they also learn that those alleged preferences may be deemed the struggles of an over-sanguine business man, made in good faith under the belief that he could thereby tide his business affairs over a crisis, and thus save his credit and pay all his debts in full. Knowing, therefore, that if these alleged preferences are set aside, it will be after tedious and expensive proceedings in the courts, where the assets at present available may be consumed, or at least much diminished, without absolute assurance of success, they, the creditors, in view of all the surrounding facts, vote to accept the offer made by the bankrupts, condone the alleged frauds as a proper majority undoubtedly have the right to do, say they will take what is offered without further delay or expense, and forego the balance of the debt. This is what the creditors of the bankrupts have done by a very large majority under the circumstances.

As I have already said, the total amount of debts is $442,137, in the hands of seven hundred and fifty-four creditors, of whom three hundred and eighty-six are creditors for $50 and over. Of these three hundred and eighty-six creditors two hundred and seventy had confirmed the composition, representing $322,000 of the debts. The law requires that the composition shall be confirmed by the signatures of two-thirds in number and one-half in value. Here is a majority of eleven over the required number, and over $100,000 in amount more than what is required. The majority at the creditors' meeting was very large. The number present at the meeting and voting was one hundred and twenty-eight; those voting for the composition, one hundred and fourteen; those voting against it, fourteen, and since the composition meeting four of the creditors who voted in the minority at that meeting have signed the confirmation of the composition. Those who have signed represent over $17,000, over half of the amount of the indebtedness which was represented in the composition at the time of the meeting. But it is also claimed that the individual composition of Henry Greenebaum was not properly carried and confirmed, because at the meeting seven creditors voted, six of whom voted aye and one voted no. The whole amount in value of his individual debts represented was $63,199, but the debt-

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or voting no, represented $11,000, leaving $52,000 voting in the affirmative. But it is claimed that this amount should be reduced by deducting the amount represented by the German National Bank, and that that vote should have therefore been excluded. I do not see the force of this objection. There is no question raised but what Henry Greenebaum owed the German National Bank the amount of the indebtedness that was represented and voted for. Nor is there any charge made that any undue influence was brought to bear by Henry Greenebaum as the representative of the corporation to secure this vote. On the contrary, the proof shows that at the time this meeting was held, and at the time the vote was cast, the German National Bank was in process of liquidation, winding up its affairs under the control of other parties than Henry Greenebaum, and that he had no special influence with the management of the bank at that time.

It is also objected that some of these creditors who have confirmed this composition by their signatures have acted as administrators or assignees in bankruptcy, and that therefore enough creditors have not confirmed it.

A sufficient answer to this objection is that a careful inspection of the confirmation shows that only five, I think, of the creditors who have confirmed the composition have signed in any representative capacity, so that those claims may be all thrown out, and yet the requisite number of creditors, both in number and amount, will be shown.

But it may be further questioned whether the court would not presume, in the absence of evidence, these parties to be personally liable. The receipt of an assignee is sufficient, and the receipt of an administrator is sufficient, and if they sign for indebtedness due the estates which they represent without sufficient authority, they simply make themselves personally liable. So that upon two grounds this objection would be overruled.

It is further objected that the bankrupts have failed to schedule all their creditors. This is based upon the fact that the evidence shows that they were stockholders in the German Savings Bank and in the German National Bank, and that a contingent liability exists from them as such stockholders to the creditors of these corporate institutions. A sufficient answer to that criticism is that it is not definitely ascertained or known, certainly not judicially determined, that any such liability will ever be attempted to be enforced, or will arise; it does not appear but what both these institutions may pay in full, nor does it appear from any evidence that there is any personal liability on the part of the stockholders in the German Savings institution. But even if it were so, the debtors in a composition proceeding are only discharged from those debts which they schedule, and if they fail to schedule this indebtedness or this contingent liability which rests upon them as stockholders in these corporations, they will not be released from personal liability. They will only be released from their liability to creditors who are named in their schedule.

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For these reasons which I have thus carefully gone over, I am satisfied that no sufficient reason has been assigned why this composition should not be confirmed. The unanimity of the creditors' meeting, the large number of creditors considering the scattered condition of the creditors of this firm throughout this country and Europe, the large number of creditors who have confirmed the composition by their signatures, all tend to convince me that the business men who looked at the affairs of this concern, who have investigated its assets and liabilities, are satisfied that as a business proposition it is better for them to accept the offer that is made. The offer is a peculiar one, but at the same time is such an one as is for the creditors themselves to say whether it is satisfactory or not. And the minority, while they may be satisfied that fraud has been perpetrated, that preferences have been given, that Elias Greenebaum has in this transaction, as between himself and his wife, saved a large proportion of his estate, which he will hereafter enjoy with his wife, yet those facts were all before the creditors; they knew what they were, knew what the objections were, and considered them. The court must believe that with the aid of the able lawyers who have contested this composition from the outset, who have met and argued questions of law and submitted proofs to the creditors—that this question must have been fully considered in all its aspects by the creditors, and that they acted intelligently and understandingly.

The objections to the composition will therefore be dismissed and the composition confirmed. *Composition confirmed.*

EDITOR'S NOTES.

JURISDICTION OF JUSTICE OF THE PEACE.—"In the appellate court no exception shall be taken to the form or service of the summons issued by the justice of the peace, nor to 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." Sec. 72 Rev. Stat. 1874, p. 648.

"By adverting to the organization and powers of a justice's court, it will be perceived that it is one of limited jurisdiction. The statute is the charter of its authority; and whenever it assumes jurisdiction in a case not conferred by statute, its acts are null and void, and the officer obeying its process in such case makes himself liable." *Robinson* v. *Harlan*, 1 Scam. 237.

"The statute clearly gives the Circuit Court power to retry the right of property in the same manner as it may be done before the justice and constable. Taking the appeal, executing the bond, and delivering the papers to the clerk of the Circuit Court, are the means provided by law by which the cause is transferred from the justice and constable to the Circuit Court. These means are in the nature of process to remove the cause from the inferior to the superior court. When the process by which a court obtains jurisdiction of a cause is irregular, if no objection is made, the irregularity is waived." *Pearce* v. *Swan*, 1 Scam. 266.

"The law is well settled that in courts *not of record*, in order to justify their taking cognizance of a cause, their jurisdiction must affirmatively appear." *Trader* v. *McKee*, 1 Scam. 558. It must be shown that the justice of the peace had jurisdiction over the subject-matter upon which he attempted to adjudicate. Ib.

"The jurisdiction depends not on the form of the summons, but *on the subject-*

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matter of the suit as established by the testimony. If the proceedings before the justice leave the question of jurisdiction doubtful, it is, nevertheless, the duty of the court to hear the evidence, and if it shows that the justice had jurisdiction, the suit is to be retained and decided on the merits." *Rogers* v. *Blanchard*, 2 Gil. 335.

"It is the duty of the court to hear the case on the merits, without regard to the proceedings before the justice, unless it appeared from the evidence that he had jurisdiction of the subject-matter of the action. . . . The court should not have dismissed the action until it appeared from the evidence that the subject-matter of the litigation was without the jurisdiction of the justice." *Ballard* v. *McCarthey*, 11 Ill. 501.

"It is error for the Circuit Court to dismiss a suit commenced, for want of jurisdiction appearing on the face of the papers, but it is the duty of the court, upon appeal, to hear the evidence, and if from that it appears that the subject-matter of the controversy is within a justice's jurisdiction, then it is the duty of the court to dispose of the cause upon its merits." *Hough* v. *Leonard*, 12 Ill. 456.

"The question of jurisdiction did not depend upon the amount of the claim filed with the justice. The real amount due the plaintiff was the true test of jurisdiction; and that was to be ascertained from the evidence, and not by reference to the papers or proceedings before the justice. The statute requires an *appeal case to be heard and decided on the merits*, unless it affirmatively appears from the evidence that the justice had no jurisdiction of the subject-matter." *Clark* v. *Whitbeck*, 14 Ill. 393.

"It is again urged that the court erred in rendering a judgment of affirmance without hearing evidence in support of the plaintiff's demand. . . . The trial in the Circuit Court shall be *de novo* upon the evidence the parties may adduce. This is the uniform and settled construction. The trial cannot be had upon the transcript of the justice's record, but the court must hear the evidence on the trial. Or if the appellant shall fail to appear to prosecute his appeal, the appellee may have the appeal dismissed, and the judgment of the justice of the peace affirmed. But the case, when properly in the Circuit Court by appeal, and the necessary service has been had, must be disposed of in one of these modes." *Shook* v. *Thomas*, 21 Ill. 87.

"On the trial of an appeal from a judgment of a justice of the peace in the Circuit Court, *it was the duty of the court to have the cause tried on its merits*, without regard to the complaint. It was a matter of no moment whether the complaint was technically correct or not; the real question before the jury was, whether there had been a sale by appellant in violation of law, without regard to whether the evidence corresponded with the complaint or not." *Harburgh* v. *City of Monmouth*, 74 Ill. 367.

"The refusal of the justice of the peace to grant a change of venue did not authorize the dismissal of the suit in the Circuit Court. The justice had jurisdiction of the subject, and on appeal to the Circuit Court, where there must be a trial *de novo*, that court had jurisdiction of the parties as well as the subject-matter." *Adkins* v. *Mitchell*, 67 Ill. 511.

"In a justice's court there are no pleadings, and it has been *held* by this court that the plaintiff is not required even to file an account in a suit before a justice of the peace, and on bringing an action in that court, if the plaintiff proves *any* grounds of a recovery he is entitled to a judgment, if the justice of the peace has jurisdiction of the subject-matter. The fact that the justice of the peace *names the action one thing when it is another cannot prejudice the rights of the plaintiff.*" *Allen* v. *Nichols*, 68 Ill. 250; *Vaughn* v. *Thompson*, 15 Ill. 39; *Stephens* v. *Cross*, 27 Ill. 36.

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EDITOR'S NOTES.

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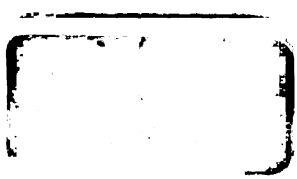

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